

THE
ENGLISH AND EMPIRE DIGEST
WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS.

VOLUME VII.

THE ENGLISH AND EMPIRE DIGEST

WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS

BEING
A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING
COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME VII.

*BILLS OF SALE.
BONDS.*

*BOUNDARIES, FENCES AND
PARTY-WALLS.*

*BUILDING CONTRACTS, ENGI-
NEERS AND ARCHITECTS.*

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In this Volume English Cases reported up to 1st January, 1921, are included, and other cases are included so far as the Reports of the same were available in London on that date.

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CARRIAGE BY SEA.

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A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (<i>e.g.</i> ,	Eng.
A. Jur. Rep. ...	Australian Jurist Reports	Aus.
A. L. T. ...	Australian Law Times	Aus.
A. R. ...	Ontario Appeals	Can.
Act. ...	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El. ...	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam ...	Adam's Justiciary Reports (Scotland), 1893—(current) ...	Scot.
Add. ...	Addams' Ecclesiastical Reports, 3 vols., 1822—1826 ...	Eng.
Agra ...	Agra High Court	Ind.
Agra F. B. ...	Agra High Court, Full Bench	Ind.
lc. & N. ...	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
Alc. Reg. Cas. ...	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn ...	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649 ...	Eng.
Alta. L. R. ...	New Brunswick Reports (Allen)	Can.
Amb. ...	Alberta Law Reports	Can.
And. ...	Ambler's Reports, Chancery, 2 vols., 1725—1783	Eng.
Andr. ...	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Anst. ...	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740 ...	Eng.
App. Cas. ...	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Ct. Rep. ...	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. D. ...	Appeal Court Reports	N.Z.
Argus L. R. ...	South African Law Reports, Appellate Division	S. Af.
Arkley ...	Argus Law Reports	Aus.
Arm. M. & O. ...	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848 ...	Scot.
Arn. ...	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn. & H. ...	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Ashb. ...	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Asp. M. L. O. ...	Ashburner's Principles of Equity, 1902	Eng.
Atk. ...	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Ayl. Pan. ...	Atkyns' Reports, Chancery, 3 vols., 1736—1754 ...	Eng.
Ayl. Par. ...	Ayliffe's New Pandect on Roman Civil Law ...	Eng.
	Ayliffe's Parergon Juris Canonici Anglicani ...	Eng.
B. ...	Barber's Gold Law	S. Af.
B. & Ad. ...	Barnewall and Adolphus Reports, King's Bench, 5 vols., 1830—	Eng.
B. & Ald. ...	Barnewall and Alderson Reports, King's Bench, 5 vols., 1817—	Eng.
B. & C. ...	1822	Eng.
B. & C. R. (preceded by date)	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
B. & S. ...	Reports of Bankrupts and Companies Winding up Cases, 1918—(current) (<i>e.g.</i> , [1918] B. & C. R.)	Eng.
B. C. R. ...	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
	British Columbia Reports	Can.
	Bose's Digest	Ind.
L. ...	Bengal Law Reports	Ind.
B. L. R. A. O. ...	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. O. ...	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol. ...	Bengal Law Reports, Supp. Vol.	Ind.
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Bail Ct. Cas. ...	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854 ...	Eng.
Baild. ...	Baildon's Select Cases in Chancery (Selden Society, Vol. X.) ...	Eng.
Ball & B. ...	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814 ...	Ir.
Bankr. & Ins. R.	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855 ...	Eng.
Bar. & Arn. ...	Barron and Arnold's Election Cases, 1 vol., 1843—1846 ...	Eng.
Bar. & Aust. ...	Barron and Austin's Election Cases, 1 vol., 1842 ...	Eng.
Barn. Ch. ...	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741 ...	Eng.
Barn. K. B. ...	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734 ...	Eng.
Barnes ...	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760 ...	Eng.
Batt. ...	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826 ...	Ir.
Beav. ...	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830 ...	Ir.
Beav. & Wal. ...	Beavan's Reports, Rolls Court, 36 vols., 1838—1866 ...	Eng.
Beaw. ...	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846 ...	Eng.
Bell, C. C. ...	Beawes's Lex Mercatoria ...	Eng.
Bell, Ct. of Sess.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860 ...	Eng.
Bell, Ct. of Sess. fol.	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792 ...	Scot.
Bell, Dict. Dec.	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794 ...	Scot.
Bell, Sc. App. ...	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833 ...	Scot.
Bellewe ...	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850 ...	Scot.
Belt's Sup. ...	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol. ...	Eng.
Ben. & D. ...	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756 ...	Eng.
Benl. ...	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579 ...	Eng.
Bing. ...	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627 ...	Eng.
Bing. N. C. ...	New Brunswick Reports (Berton) ...	Can.
Biss. & Sm. ...	Bingham's Reports, Common Pleas, 10 vols., 1822—1834 ...	Eng.
Bitt. Prac. Cas.	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840 ...	Eng.
Bitt. Rep. in Ch.	Bisset and Smith's Digest ...	S. Af.
Bl. Com. ...	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876 ...	Eng.
Bl. D. & Osb. ...	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884 ...	Eng.
Bli. ...	Blackstone's Commentaries ...	Eng.
Bli. N. S. ...	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848 ...	Ir.
Bluett ...	Bligh's Reports, House of Lords, 4 vols., 1819—1821 ...	Eng.
Bom. ...	Bligh's Reports, House of Lords, New Series 11 vols., 1827—	Eng.
Bom. A. C. ...	Bluett's Isle of Man Cases ...	I. of M.
Bom. O. C. ...	Bombay High Court Reports ...	Ind.
Bos. & P. ...	Bombay Reports, Appellate Jurisdiction ...	Ind.
Bos. & P. N. R.	Bombay Reports, Original Civil Jurisdiction ...	Ind.
Bourke ...	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804 ...	Eng.
Br. & Col. Pr. Cas.	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807 ...	Eng.
Bract. ...	Bourke's Reports ...	Ind.
Bro. Abr. ...	British and Colonial Prize Cases, 3 vols., 1914—1919 ...	Eng.
Bro. C. C. ...	Bracton De Legibus et Consuetudinibus Angliæ ...	Eng.
Bro. Ecc. Rep.	Sir J. Brooke's Abridgement ...	Eng.
Bro. N. C. ...	W. Brown's Chancery Reports, 4 vols., 1778—1794 ...	Eng.
Bro. Parl. Cas. ...	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872 ...	Eng.
Bro. Supp. to Mor.	Sir R. Brooke's New Cases, 1 vol., 1515—1558 ...	Eng.
Bro. Synop ...	J. Brown's Cases in Parliament, 8 vols., 1702—1800 ...	Eng.
Brod. & Bing. ...	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols. ...	Scot.
Brod. & F. ...	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827 ...	Scot.
Broun ...	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822 ...	Eng.
Brown. & Lush.	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864 ...	Eng.
Brownl. ...	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845 ...	Scot.
Bruce ...	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866 ...	Eng.
	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624 ...	Eng.
	Bruce's Decisions, Court of Session (Scotland), 1714—1715 ...	Scot.

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Buch. ...	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	S. Af.
Buch. A. C. ...	Buchanan's Reports of Appeal Court (Cape)	S. Af.
Buchan. ...	Buchanan's Reports, Court of Session and Justiciary (Scotland),	Scot.
Buck ...	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	Eng.
Bull. N. P. ...	Buller's Nisi Prius (published, London, 1772)	Eng.
Bulst. ...	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—	Eng.
Bunb. ...	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741	Eng.
Burr. ...	Burrow's Reports, King's Bench, 5 vols., 1756—1772	Eng.
Burr. S. C. ...	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	Eng.
Burrell ...	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	Eng.
C. A. ...	Court of Appeal Reports, 3 vols., 1867—1877	N.Z.
C. & P. ...	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	Eng.
C. B. ...	Common Bench Reports, 18 vols., 1845—1856	Eng.
C. B. N. S. ...	Common Bench Reports, New Series, 20 vols., 1856—1865	Eng.
C. C. Ct. Cas. ...	Central Criminal Court Cases (Sessions Papers), 1834—(current)	Eng.
C. L. Ch. ...	Common Law Chambers	Can.
C. L. J. ...	Cape Law Journal	S. Af.
C. L. J. N. S. ...	Canada Law Journal, New Series, 1865—(current)	Can.
C. L. J. O. S. ...	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
C. L. R. ...	Common Law Reports, 3 vols., 1853—1855	Eng.
C. L. R. ...	Commonwealth Law Reports	Ind.
C. L. R. ...	Calcutta Law Reporter	S. Af.
C. L. R. ...	Cape Law Reports	Can.
C. L. T. ...	Canadian Law Times	Can.
C. L. T. Occ. N. ...	Canadian Law Times, Occasional Notes	Can.
C. P. ...	Upper Canada Common Pleas	Can.
C. P. D. ...	Law Reports, Common Pleas Division, 5 vols., 1875—1880	Eng.
C. P. D. ...	Cape Provincial Division Reports	S. Af.
C R. [date] A. C. ...	Canadian Reports, Appeal Cases	Can.
C T. R. ...	Cape Times Reports of the Supreme Court of the Cape of Good Hope	S. Af.
C. W. N. ...	Calcutta Weekly Notes	Ind.
Cab. & El. ...	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol.,	Eng.
Cald. Mag. Cas. ...	Caldecott's Magistrates' Cases, 1 vol., 1776—1785	Eng.
Calth. ...	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618	Eng.
Cam. Cas. ...	Cameron's Supreme Court Cases	Can.
Cam. Prac. ...	Cameron's Supreme Court Practice	Can.
Camp. ...	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	Eng.
Can. Com. Cas. ...	Commercial Law Reports of Canada	Can.
Can. Crim. Cas. ...	Canadian Criminal Cases, Annotated	Can.
Can. Ry. Cas. ...	Canadian Railway Cases	Can.
Car. & Kir. ...	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	Eng.
Car. & M. ...	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842	Eng.
Car. C. L. ...	Carrington's Treatise on Criminal Law	Eng.
Carp. Pat. Cas. ...	Carpmael's Patent Cases, 2 vols., 1602—1842	Eng.
Cart. ...	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673	Eng.
Carth. ...	Cases on British North America Act (Cartwright)	Can.
Cary ...	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700	Eng.
Cas. in Ch. ...	Cary's Reports, Chancery, 1 vol.	Eng.
Cas. Pract. K. B. ...	Cases in Chancery, fol., 3 parts, 1660—1697	Eng.
Cas. Sett. ...	Cases of Practice, King's Bench, 1 vol., 1655—1775	Eng.
Cas. temp. Finch ...	Cases of Settlements and Removals, 1 vol., 1685—1727	Eng.
Cas. temp. King ...	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680	Eng.
Cas. temp. Talb. ...	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733	Eng.
Cass. Dig. ...	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737	Eng.
Ch. (preceded by date) ...	Cassells' Digest	Can.
Ch. App. ...	Law Reports, Chancery Division, since 1890 (e.g., [1891] 1 Ch.)	Eng.
Ch. Cas. in Ch. ...	Law Reports, Chancery Appeals, 10 vols., 1865—1875	Eng.
Ch. Ch. ...	Choyce Cases in Chancery, 1557—1606	Eng.
Ch. D. ...	Upper Canada Chancery Chambers Reports	Can.
Ch. Rob. ...	Law Reports, Chancery Division, 45 vols., 1875—1890	Eng.
Char. Cham. Cas. ...	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	Eng.
Char. Pr. Cas. ...	Charley's Chamber Cases, 1 vol., 1875—1876	Eng.
Chip. ...	Charley's New Practice Reports, 3 vols., 1875—1876	Eng.
Cl. & Fin. ...	New Brunswick Reports (Chipman)	Can.
Cl. & Sc. Dr. Cas. ...	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822	Eng.
Clay ...	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—	Eng.
	Clark and Scully's Drainage Cases	Can.
	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	Eng.

Clif. & Rick. ...	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	Eng.
Clif. & Steph. ...	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	Eng.
Co. A. ...	Cook's Lower Canada Admiralty Court Cases ...	Can.
Co. Ent. ...	Coke's Entries ...	Eng.
Co. Inst. ...	Coke's Institutes ...	Eng.
Co. L. J. ...	Colonial Law Journal ...	N.Z.
Co. Litt. ...	Coke on Littleton (1 Inst.) ...	Eng.
Co. Rep. ...	Coke's Reports, 13 parts, 1572—1616 ...	Eng.
Cochran ...	Nova Scotia Law Reports ...	Can.
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833 ...	Eng.
Coll. ...	Collyer's Reports, Chancery, 2 vols., 1844—1846 ...	Eng.
Coll. Jurid. ...	Collectanea Juridica, 2 vols. ...	Eng.
Colles ...	Colles' Cases in Parliament, 1 vol., 1697—1713 ...	Eng.
Colt. ...	Coltman's Registration Cases, 1 vol., 1879—1885 ...	Eng.
Com. ...	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740 ...	Eng.
Com. Cas. ...	Commercial Cases, 1895—(current) ...	Eng.
Com. Dig. ...	Comyns' Digest ...	Eng.
Comb. ...	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698 ...	Eng.
Con. & Law. ...	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843 ...	Ir.
Cong. Dig. ...	Congdon's Digest ...	Can.
Cooke & Al. ...	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., ...	Ir.
Cooke, Pr. Cas.	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747 ...	Eng.
Cooke, Pr. Reg.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742 ...	Eng.
Coop. G. ...	G. Cooper's Reports, Chancery, 1 vol., 1792—1815 ...	Eng.
Coop. Pr. Cas. ...	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838 ...	Eng.
Coop. temp. Brough.	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834 ...	Eng.
Coop. temp. Cott.	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases) ...	Eng.
Corb. & D. ...	Coryton's Reports ...	Ind.
Correspondances Jud.	Corbett and Daniell's Election Cases, 1 vol., 1819 ...	Eng.
Couper ...	Correspondances Judiciaires ...	Can.
Cout. ...	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885 ...	Scot.
Cout. Dig. ...	Coutlees' Unreported Cases ...	Can.
Cowp. ...	Coutlees' Digest ...	Can.
Cox & Atk. ...	Cowper's Reports, King's Bench, 2 vols., 1774—1778 ...	Eng.
Cox, C. C. ...	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846 ...	Eng.
Cox, Eq. Cas. ...	E. W. Cox's Criminal Law Cases, 1843—(current) ...	Eng.
Cox, M. & H. ...	S. C. Cox's Equity Cases, 2 vols., 1745—1797 ...	Eng.
Cr. & J. ...	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852 ...	Eng.
Cr. & M. ...	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832 ...	Eng.
Cr. & Ph. ...	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—	Eng.
Cr. App. Rep. ...	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841 ...	Eng.
Cr. M. & R. ...	Cohen's Criminal Appeal Reports, 1908—(current) ...	Eng.
Craw. & D. ...	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835 ...	Eng.
Craw. & D. Abr. C.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846 ...	Ir.
Cress. Insolv. Cas.	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838 ...	Ir.
Cripps' Church Cas.	Cresswell's Insolvency Cases, 1 vol., 1827—1829 ...	Eng.
Cro. Car. ...	Cripps' Church and Clergy Cases, 2 parts, 1847—1850 ...	Eng.
Cro. Eliz. ...	Croke's Reports temp. Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641 ...	Eng.
Cro. Jac. ...	Croke's Reports temp. Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603 ...	Eng.
Cru. Dig. ...	Croke's Reports temp. James I., King's Bench and Common Pleas, 1 vol., 1603—1625 ...	Eng.
Cunn. ...	Cruise's Digest of the Law of Real Property, 7 vols. ...	Eng.
Curt. ...	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735 ...	Eng.
	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844 ...	Eng.
	Duxbury's Reports of the High Court of the South African Republic ...	S. Af.
D. C. A.	Dorion's Queen's Bench Reports ...	Can.
D. L. R.	Dominion Law Reports ...	Can.
Dalr.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., —1720 ...	Scot.
	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823 ...	Eng.
Dan. & Ll.	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829 ...	Eng.

Dav. & Mer.	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1844 ...	Eng.
Dav. Ir	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1804—1811 ...	Ir.
Dav. Pat. Cas.	Davies' Patent Cases, 1 vol., 1785—1816 ...	Eng.
Day	Day's Election Cases, 1 vol., 1892—1893 ...	Eng.
Dea. & Sw.	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857 ...	Eng.
Deac.	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840 ...	Eng.
Deac. & Ch.	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835 ...	Eng.
Dears. & B.	Dearsley and Bell's Crown Cases Reserved, 1 vol., 1856—1858 ...	Eng.
Dears. C. C.	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856 ...	Eng.
Deas & And.	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—	Scot.
De G.	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848 ...	Eng.
De G. & J.	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859 ...	Eng.
De G. & Sm.	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852 ...	Eng.
De G. F. & J.	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—	Eng.
De G. J. & Sm.	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865 ...	Eng.
De G. M. & G.	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857 ...	Eng.
Delane	Delane's Decisions, Revision Courts, 1 vol., 1832—1835 ...	Eng.
Den.	Denison's Crown Cases Reserved, 2 vols., 1844—1852 ...	Eng.
Dick.	Dickens' Reports, Chancery, 2 vols., 1559—1798 ...	Eng.
Dig.	Justinian's Digest or Pandects ...	Eng.
Dirl.	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol.,	Scot.
Dods.	Dodson's Reports, Admiralty, 2 vols., 1811—1822 ...	Eng.
Donnelly	Donnelly's Reports, Chancery, 1 vol., 1836—1837 ...	Eng.
Doug. El. Cas.	Douglas' Election Cases, 4 vols., 1774—1776 ...	Eng.
Doug. K. B.	Douglas' Reports, King's Bench, 4 vols., 1778—1785 ...	Eng.
Dow	Dow's Reports, House of Lords, 6 vols., 1812—1818 ...	Eng.
Dow & Cl.	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832 ...	Eng.
Dow. & L.	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849 ...	Eng.
Dow. & Ry. K. B.	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—	Eng.
Dow. & Ry. M. C.	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—	Eng.
Dow. & Ry. N. P.	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823 ...	Eng.
Dowl.	Dowling's Practice Reports, 9 vols., 1830—1841 ...	Eng.
Dowl. N. S.	Dowling's Practice Reports, New Series, 2 vols., 1841—1843 ...	Eng.
Dr. & Wal.	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—	Ir.
Dr. & War.	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843 ...	Ir.
Dra.	Draper's King's Bench Reports ...	Can.
Drew.	Drewry's Reports, Chancery, 4 vols., 1852—1859 ...	Eng.
Drew. & Sm.	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865 ...	Eng.
Drinkwater	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841 ...	Eng.
Drury temp. Nap.	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—1859 ...	Ir.
Drury temp. Sug.	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841—	Ir.
Dugd. Orig.	Dugdale's Origines Juridicales ...	Eng.
Dunl. (Ct. of Sess.)	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862 ...	Scot.
Dunning	Dunning's Reports, King's Bench, 1 vol., 1753—1754 ...	Eng.
Durie	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—	Scot.
Dyer	Dyer's Reports, King's Bench, 3 vols., 1513—1581 ...	Eng.
E. & B.	Upper Canada Error and Appeal ...	Can.
E.	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858 ...	Eng.
	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861 ...	Eng.
	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol.,	Eng.
E. D. C.	Reports of the Eastern Districts Court (Cape) from 1880	S. Af.
E. D. L.	South African Law Reports, Eastern Districts Local Division	S. Af.
E. L. R.	Eastern Law Reporter ...	Can.
E. R. (or Eng. Rep.)	English Reports ...	Eng.
E. R.	Ontario Election Reports ...	Can.
Eag. & Y.	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825 ...	Eng.
	East's Reports, King's Bench, 16 vols., 1800—1812 ...	Eng.

East, P. C. ...	East's Pleas of the Crown ...	Eng.
Ecc. & Ad. ...	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	Eng.
Eden ...	Eden's Reports, Chancery, 2 vols., 1757—1766 ...	Eng.
Edgar ...	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725 ...	Scot.
Edw. ...	Edwards' Reports, Admiralty, 1 vol., 1808—1812 ...	Eng.
Elchies ...	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—	Scot.
Emden's B. C. ...	Emden's Building Contracts, Building Leases and Building Statutes ...	Eng.
Eng. Pr. Cas. ...	Roscoe's English Prize Cases, 2 vols., 1745—1858 ...	Eng.
Eq. Cas. Abr. ...	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744 ...	Eng.
Eq. Rep. ...	Equity Reports, 3 vols., 1853—1855 ...	Eng.
Esp. ...	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810 ...	Eng.
Exch. ...	Law Reports, Exchequer Division, 5 vols., 1875—1880 ...	Eng.
Exch. C. R. ...	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856 ...	Eng.
F. (Ct. of Sess.)	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	Scot.
F. ...	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880 ...	S. Af.
F. & F. ...	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	Eng.
F. N. D. ...	Finnemore's Notes and Digest of Natal Cases, 1863—1867 ...	S. Af.
Fac. Coll. ...	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841 ...	Scot.
Falc. ...	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751 ...	Scot.
Falc. & Fitz. ...	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838 ...	Eng.
Fenton ...	Fenton, Important Judgments ...	N.Z.
Ferg. ...	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	Scot.
Fitz. Nat. Brev.	Fitzherbert's Natura Brevium ...	Eng.
Fitz-G. ...	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	Eng.
Fl. & K. ...	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842 ...	Ir.
Fonbl. ...	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852 ...	Eng.
For. ...	Forrest's Reports, Exchequer, 1 vol., 1800—1801 ...	Eng.
Forb. ...	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713 ...	Scot.
Fort. De Laud.	Fortesque, De Laudibus Legum Angliæ ...	Eng.
Fortes. Rep. ...	Fortescue's Reports, fol., 1 vol., 1692—1736 ...	Eng.
Fost. ...	Foster's Crown Cases, 1 vol., 1708—1760 ...	Eng.
Fount. ...	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712 ...	Scot.
Fox & S. Ir. ...	M. C. Fox and T. B. O. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825 ...	Ir.
Fox & S. Reg. ...	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895 ...	Eng.
Fras. ...	Fraser (Simon), Election Cases, 2 vols., 1793 ...	Eng.
Freem. Ch. ...	Freeman's Reports, Chancery, 1 vol., 1660—1706 ...	Eng.
Freem. K. B. ...	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704 ...	Eng.
G. ...	Gregorowski's Reports of the High Court of the Orange Free State from 1883 ...	S. Af.
G. I. Dig.	General Index Digest ...	Can.
Gal. & Dav.	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843 ...	Eng.
Gale ...	Gale's Reports, Exchequer, 2 vols., 1835—1836 ...	Eng.
Gaz. L. R.	New Zealand Gazette Law Reports ...	N.Z.
Geld. Dig.	Geldert's Digest ...	Can.
Gib. Cod.	Gibson's Codex Juris Ecclesiastici Anglicani ...	Eng.
Giff. ...	Giffard's Reports, Chancery, 5 vols., 1857—1865 ...	Eng.
Gilb. ...	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714 ...	Eng.
Gilb. C. P.	Gilbert's History and Practice of the Court of Common Pleas	Eng.
Gilb. Ch.	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—	Eng.
Gilm. & F.	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686 ...	Scot.
Gl. & J.	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	Eng.
Glanv. ...	Glanville, De Legibus et Consuetudinibus Regni Angliæ ...	Eng.
Glanv. El. Cas.	Glanville's Election Cases, 1 vol., 1623—1624 ...	Eng.
Glascok	Glascok's Reports (Ireland), 1 vol., 1831—1832 ...	Ir.
Godb. ...	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637 ...	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

XXIII

Gouldsb.	...	Gouldsborough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	
Gow	...	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.
Gr.	...	Upper Canada Chancery (Grant)	Can.
Griffin's Patent Cases	...	Griffin's Patent Cases, 1884—1886	Eng.
Gwill.	...	Gwillim's Tithe Cases, 4 vols., 1224—1824	Eng.
		Hertzog's Reports of the High Court of the South African Republic, 1893	
H. & C.	...	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—	Af.
H. & N	...	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	
H. & Tw.	...	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	Eng.
H. & W.	...	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841	Eng.
H. B. R. (preceded by date)		Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 (<i>e.g.</i> , [1915] H. B. R.)	Eng.
H. C.	...	Reports of the High Court of Griqualand West	S. Af.
H. E. C.	...	Hodgin's Election Reports	Can.
H. L. Cas.	...	Clark's Reports, House of Lords, 11 vols., 1847—1866	
Hag. Adm.	...	Haggard's Reports, Admiralty, 3 vols., 1822—1838	Eng.
Hag. Con.	...	Haggard's Consistorial Reports, 2 vols., 1789—1821	Eng.
Hag. Ecc.	...	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	Eng.
Hailes	...	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	Scot.
Hale, C. L.	...	Hale's Common Law	Eng.
Hale, P. C.	...	Hale's Pleas of the Crown, 2 vols.	Eng.
Han.	...	New Brunswick Reports (Hannay)	Can.
Har. & Ruth.	...	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866	
Har. & W.	...	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	Eng.
Harc.	...	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
		Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	Eng.
Hare	...	Hare's Reports, Chancery, 11 vols., 1841—1853	Eng.
Hawk. P. C.	...	Hawkins's Pleas of the Crown, 2 vols.	
		Hay's Reports	Ind.
Hayes	...	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	Ir.
Hayes & Jo.	...	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	Ir.
Hem. & M.	...	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	
Het.	...	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
Hob.	...	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	Eng.
Hodg.	...	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	Eng.
Hog.	...	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	Ir.
Holt, Adm.	...	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	Eng.
Holt, Eq.	...	W. Holt's Equity Reports, 2 vols., 1845	Eng.
Holt, K. B.	...	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	Eng.
Holt, N. P.	...	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	Eng.
Home, Ct. of Sess.	...	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	Scot.
Hong Kong L. R.	...	Hong Kong Reports	Hong Kong.
Hop. & Colt.	...	Hopwood and Coltman's Registration Cases, 2 vols., 1868—	
Hop. & Ph.	...	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	
Horn & H.	...	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	Eng.
Hov. Supp.	...	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	Eng.
How. C.	...	Howard's Chancery Practice	
How. C. S.	...	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	
How. E. E.	...	Howard's Equity Exchequer	
How. P. L.	...	Howard on the Popery Laws	
Hud. & B.	...	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	Ir.
Hudson's B. C.	...	Hudson on Building Contracts, 2 vols.	Eng.
Hume	...	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—	
Hut.	...	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	Scot.
Hy. Bl.	...	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	Eng.
Hyde	...	Hyde's Reports	Ind.

I. C. L. R.	...	Irish Common Law Reports, 17 vols., 1849—1866	...	Ir.
I. Ch. R.	...	Irish Chancery Reports, 17 vols., 1850—1867	...	Ir.
I. Eq. R.	...	Irish Equity Reports, 13 vols., 1838—1851	...	Ir.
I. L. R.	...	Irish Law Reports, 13 vols., 1838—1851	...	Ir.
I. L. R. (Vol.) All.	...	Indian Law Reports, Allahabad	...	Ind.
I. L. R. (Vol.) Bom.	...	Indian Law Reports, Bombay	...	Ind.
I. L. R. (Vol.) Calc.	...	Indian Law Reports, Calcutta	...	Ind.
I. L. R. (Vol.) Lah.	...	Indian Law Reports, Lahore	...	Ind.
I. L. R. (Vol.) Mad.	...	Indian Law Reports, Madras	...	Ind.
I. L. T.	...	Irish Law Times, 1867—(current)	...	Ir.
I. L. T. Jo.	...	Irish Law Times Journal, 1867—(current)	...	Ir.
I. R. (preceded by date)	...	Irish Reports, since 1893 (<i>e.g.</i> [1894] 1 I. R.)	...	Ir.
I. R. (Vol.) C. L.	...	Irish Reports, Common Law, 11 vols., 1866—1877	...	Ir.
I. R. Eq.	...	Irish Reports, Equity, 11 vols., 1866—1877	...	Ir.
Ind. Awards	...	Industrial Awards Recommendations	...	N.Z.
Ind. Jur. N. S.	...	Indian Jurist, New Series	...	Ind.
Ind. Jur. O. S.	...	Indian Jurist, Old Series	...	Ind.
Ir. Cir. Rep.	...	Reports of Irish Circuit Cases, 1 vol., 1841—1843	...	Ir.
Ir. Jur.	...	Irish Jurist, 18 vols., 1849—1866	...	Ir.
Ir. L. Rec. 1st ser.	...	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	...	Ir.
Ir. L. Rec. N. S.	...	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	...	Ir.
Ir. Term Rep.	...	Irish Term Reports	...	Ir.
	...	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	...	Scot.
J. Bridg.	...	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	...	Eng.
J. D. R.	...	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	...	S. Af.
J. P.	...	Justice of the Peace, 1837—(current)	...	Eng.
J. P. Jo.	...	Justice of the Peace (Weekly Notes of Cases)	...	Eng.
J. R.	...	Jurist Reports	...	N.Z.
J. R. N. S.	...	Jurist Reports, New Series	...	N.Z.
J. Shaw, Just.	...	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	...	Scot.
Jac.	...	Jacob's Reports, Chancery, 1 vol., 1821—1823	...	Eng.
Jac. & W.	...	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	...	Eng.
James	...	Nova Scotia Law Reports (James)	...	Can.
Jebb & B.	...	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol.,	...	Ir.
Jebb & S.	...	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols.,	...	Ir.
Jebb, C. C.	...	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	...	Ir.
Jebb, Cr. & Pr. Cas.	...	Jebb's Crown and Presentment Cases	...	Ir.
	...	Jenkins' Reports, 1 vol., 1220—1623	...	Eng.
Jo. & Car.	...	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	...	Ir.
Jo. & Lat.	...	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	...	Ir.
Jo. Ex. Ir.	...	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	...	Ir.
John.	...	Johnson's Reports, Chancery, 1 vol., 1858—1860	...	Eng.
John. & H.	...	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	...	Eng.
Jur.	...	Jurist Reports, 18 vols., 1837—1854	...	Eng.
Jur. N. S.	...	Jurist Reports, New Series, 12 vols., 1855—1867	...	Eng.
Just. Inst.	...	Justinian's Institutes	...	Eng.
K.	...	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	...	S. Af.
K. & G.	...	Keane and Grant's Registration Cases, 1 vol., 1854—1862	...	Eng.
K. & J.	...	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	...	...
K. B. (preceded by date)	...	Law Reports, King's Bench Division, since 1900 (<i>e.g.</i> , [1901] 2 K. B.)	...	Eng.
Kames, Dict. Dec.	...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	...	Scot.
Kames, Rem. Dec.	...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	...	Scot.
Kames, Sel. Dec.	...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	...	Scot.
Kay	...	Kay's Reports, Chancery, 1 vol., 1853—1854	...	Eng.
Keb.	...	Keble's Reports, fol., 3 vols., 1661—1677	...	Eng.
Keen	...	Keen's Reports, Rolls Court, 2 vols., 1836—1838	...	Eng.
	...	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	...	Eng.
	...	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	...	Eng.
. W.	...	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	...	Eng.
Keny.	...	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	...	Eng.
Keny. Ch.	...	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—	...	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Kerr ..	New Brunswick Reports (Kerr)	Can.
Kilkerran	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	Scot.
Kn. & Omb.	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	Eng.
Knapp	Knapp's Reports, Privy Council, 3 vols., 1829—1836	Eng.
Konst. & W. Rat. App.	Knox's Reports	Aus.
Konst. Rat. App. ...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	Eng.
	Konstam's Reports of Rating Appeals, 2 vols., 1894—1904	Eng.
L. & G. temp. Plunk. ...	Lloyd and Goold's Reports temp. Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Ir.
L. & G. temp. Sugd. ...	Lloyd and Goold's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1835	Ir.
L. & Welsb. ...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol.,	Eng.
L. C. & M. Gaz. ...	Local Courts and Municipal Gazette	Can.
L. C. J. ...	Lower Canada Jurist	Can.
L. C. L. J. ...	Lower Canada Law Journal	Can.
L. C. R. ...	Lower Canada Reports	Can.
L. G. R. ...	Local Government Reports, 1902—(current)	Eng.
L. J. Adm. ...	Law Journal, Admiralty, 1865—1875	Eng.
L. J. Bcy. ...	Law Journal, Bankruptcy, 1832—1880	Eng.
L. J. C. C. ...	Law Journal (County Courts Reporter), 1912—(current)	Eng.
L. J. C. P. ...	Law Journal, Common Pleas, 1831—1875	Eng.
L. J. Ch. ...	Law Journal, Chancery, 1831—(current)	Eng.
L. J. Eccl. ...	Law Journal, Ecclesiastical Cases, 1866—1875	Eng.
	Law Journal, Exchequer, 1831—1875	Eng.
L. J. Ex. Eq. ...	Law Journal, Exchequer in Equity, 1835—1841	Eng.
L. J. K. B. or Q. B.	Law Journal, King's Bench or Queen's Bench, 1831—(current)	Eng.
L. J. M. C. ...	Law Journal, Magistrates' Cases, 1831—1896	Eng.
L. J. N. C. ...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	Eng.
L. J. O. S. ...	Law Journal, Old Series, 10 vols., 1822—1831	Eng.
L. J. P. ...	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	Eng.
L. J. P. & M. ...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	Eng.
L. J. P. C. ...	Law Journal, Privy Council, 1865—(current)	Eng.
L. J. P. M. & A.	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
L. Jo. ...	Law Journal Newspaper, 1866—(current)	Eng.
L. L. R. ...	Leader Law Reports	S. Af.
L. M. & P. ...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	Eng.
L. N. ...	Legal News	Can.
L. R. A. & E. ...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	Eng.
L. R. C. C. R. ...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	Eng.
L. R. C. P. ...	Law Reports, Common Pleas, 10 vols., 1865—1875	Eng.
L. R. Eq. ...	Law Reports, Equity Cases, 20 vols., 1865—1875	Eng.
L. R. Exch. ...	Law Reports, Exchequer, 10 vols., 1865—1875	Eng.
L. R. H. L. ...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	Eng.
L. R. Ind. App.	Law Reports, Indian Appeals, Privy Council, 1873—(current)	Eng.
L. R. Ind. App. Supp. Vol.	Law Reports, India Appeals, Privy Council, Supplementary Volume, 1872—1873	Eng.
L. R. Ir. ...	Law Reports (Ireland), Chancery and Common Law, 32 vols.,	Ir.
L. R. P. & D. ...	Law Reports, Probate and Divorce, 3 vols., 1865—1875	Eng.
L. R. P. C. ...	Law Reports, Privy Council, 6 vols., 1865—1875	Eng.
L. R. Q. B. ...	Law Reports, Queen's Bench, 10 vols., 1865—1875	Eng.
L. R. Q. B. ...	Quebec Reports, Queen's Bench	Can.
L. R. Sc. & Div.	Law Reports, Scotch and Divorce Appeals, House of Lords, 2 vols., 1866—1875	Eng.
L. T. ...	Law Times Reports, 1859—(current)	Eng.
L. T. Jo. ...	Law Times Newspaper, 1843—(current)	Eng.
L. T. O. S. ...	Law Times Reports, Old Series, 34 vols., 1843—1860	Eng.
L. Th. ...	La Themis	Can.
Lane ...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
Lat. ...	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	Eng.
Laws. Reg. Cas.	Lawson's Registration Cases, 1895—(current)	Eng.
Ld. Raym. ...	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	Eng.
Le. & Ca. .	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	Eng.
Leach ...	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
Lee ...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	Eng.
Lee temp. Hard.	T. Lee's Cases temp. Hardwicke, King's Bench, 1 vol., 1733—1738	

Leg. Rep.	Legal Reporter	...	...	...	...	...	...	Ir.
Legge ..	Legge's Reports	...	...	...	...	...	...	Aus.
	Leonard's Reports, King's Bench, Common Pleas and Exchequer,	...	...	...	...	...	...	Eng.
	fol., 4 parts, 1552—1615	...	...	...	...	...	...
Lev. ...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols.,	...	...	...	...	...	...	Eng.
		...	...	...	...	...	...	Eng.
Lew. C. C.	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	...	...	...	...	...	...	Eng.
Ley ...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	...	...	...	...	...	...	Eng.
Lib. Ass.	Liber Assisarum, Year Books, 1—51 Edw. III.	...	...	...	...	...	...	Eng.
Lilly ...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	...	...	...	...	...	...	Eng.
	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	...	...	...	...	...	Eng.
Lloyd, L. R.	Lloyd's List Law Reports, 1919—(current)	...	...	...	...	...	...	Eng.
Lloyd, Pr. Cas.	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	...	...	...	...	...	...	Eng.
	Lofit's Reports, King's Bench, foll., 1 vol., 1772—1774	...	...	...	...	...	...	Eng.
Long. & T. ...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol.,	...	...	...	...	...	...	Ir.
	1841—1842	...	...	...	...	...	...	Eng.
Lords Journals ...	Journals of the House of Lords	...	...	...	...	...	...	Eng.
Lud. E. C. ...	Luder's Election Cases, 3 vols., 1784—1787	...	...	...	...	...	...	Eng.
Lumley, P. L. C.	Lumley's Poor Law Cases, 2 vols., 1834—1842	...	...	...	...	...	...	Eng.
Lush. ...	Lushington's Reports, Admiralty, 1 vol., 1859—1862	...	...	...	...	...	...	Eng.
	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols.,	...	...	...	...	...	...	Eng.
	—1704	...	...	...	...	...	...	Eng.
Lut. Reg. Cas. ...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	...	...	...	...	...	...	Eng.
Lynd. ...	Lyndwood, Provinciale, fol., 1 vol.	...	...	...	...	...	...	Eng.
M. ...	Menzie's Reports of the Supreme Court of the Cape of Good Hope,	...	...	...	...	...	...	S. Af.
	1828—1850	...	...	...	...	...	...	Eng.
M. & S. ...	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	...	...	...	...	...	...
M. & W. ...	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	...	...	...	...	...	...	Can.
M. C. R. ...	Montreal Condensed Reports	...	...	...	...	...	...	Ind.
M. H. C. R. ...	Madras High Court Reports	...	...	...	...	...	...
M. L. R. (Vol.) K. B. or		...	...	...	...	...	...	Can.
Q. B. ...	Montreal Law Reports, King's Bench or Queen's Bench	...	...	...	...	...	...	Can.
M. L. R. (Vol.) S. C.	Montreal Law Reports, Superior Court	...	...	...	...	...	...	Can.
M. M. Cas. ...	Martin's Reports of Mining Cases	...	...	...	...	...	...	Can.
Mac. ...	Macassey's New Zealand Reports	...	...	...	...	...	...	N.Z.
Mac. & G. ...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	...	...	...	...	...	...	Eng.
Mac. & H. ...	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	...	...	...	...	...	...	Eng.
M'Cle ...	M'Clelland's Reports, Exchequer, 1 vol., 1824	...	...	...	...	...	...	Eng.
M'Cle. & Yo. ...	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—	...	...	...	...	...	...	Eng.
Macfarlane ...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts,	...	...	...	...	...	...
	—1839	...	...	...	...	...	...
Macl. & Rob. ...	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol.,	...	...	...	...	...	...	Scot.
Macph. (Ct. of Sess.) ...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols.,	...	...	...	...	...	...	Scot.
	1862—1873	...	...	...	...	...	...
Macq. ...	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—	...	...	...	...	...	...	Scot.
	1865	...	...	...	...	...	...	Eng.
Macr. ...	Macrory's Patent Cases, 2 parts, 1847—1856	...	...	...	...	...	...	Ind.
Mad. ...	Madras High Court Reports	...	...	...	...	...	...	Eng.
Madd. ...	Maddock's Reports, Chancery, 6 vols., 1815—1821	...	...	...	...	...	...
Madd. & G. ...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822	...	...	...	...	...	...	Eng.
	(Vol. VI. of Madd.)	...	...	...	...	...	...	Eng.
Madox ...	Madox's Formulæ Anglicanum	...	...	...	...	...	...	Eng.
Madox, Exch. ...	Madox's History and Antiquities of the Exchequer, 2 vols.	...	...	...	...	...	...	Eng.
Mag. ...	Magistrate and Municipal and Parochial Lawyer, London,	...	...	...	...	...	...	Eng.
	5 vols., 1848—1852	...	...	...	...	...	...
Man. & G. ...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—	...	...	...	...	...	...	Eng.
	1845	...	...	...	...	...	...
Man. & Ry. K. B.	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—	...	...	...	...	...	...	Eng.
		...	...	...	...	...	...	Eng.
Man. & Ry. M. C.	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	...	...	...	...	...	...	Can.
Man. L. J. ...	Manitoba Law Journal	...	...	...	...	...	...	Can.
Man. L. R. ...	Manitoba Law Reports	...	...	...	...	...	...	Can.
Man. R. temp. Wood	Manitoba Reports temp. Wood	...	...	...	...	...	...	Can.
Mans. ...	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	...	...	...	...	...	...	Eng.
Mar. L. C. ...	Maritime Law Reports (Crockford), 3 vols., 1860—1871	...	...	...	...	...	...	Eng.
March ...	March's Reports, King's Bench and Common Pleas, 1 vol.,	...	...	...	...	...	...	Eng.
	1639—1642	...	...	...	...	...	...	Eng.
Marr. ...	Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	...	...	...	...	...	Eng.
Marsh. ...	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	...	...	...	...	...	...	Eng.
Marsh. ...	Marshall's Reports	...	...	...	...	...	...	Ind.
Mayn. ...	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year	...	...	...	...	...	...	Eng.
	Books of Edw. II., Year Books, Part I., 1273—1326	...	...	...	...	...	...	Eng.
Meg. ...	Megone's Companies Acts Cases, 2 vols., 1889—1891	...	...	...	...	...	...	Eng.

Men. ...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
Mer. ...	Merivale's Reports, Chancery, 3 vols., 1815—1817	Eng.
Milw. ...	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	Ir.
Mod. Rep. ...	Modern Reports, 12 vols., 1669—1755	Eng.
Mol. ...	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831	Ir.
Mont. ...	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	Eng.
Mont. & A. ...	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—	Eng.
Mont. & B. ...	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	Eng.
Mont. & Ch. ...	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	Eng.
Mont. & M. ...	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—	Eng.
Mont. D. & De G. ...	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	Eng.
Moo. & P. ...	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
Moo. & S. ...	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	Eng.
Moo. Ind. App. ...	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	Eng.
Moo. P. C. C. ...	Moore's Privy Council Cases, 15 vols., 1836—1863	Eng.
Moo. P. C. C. N. S. ...	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	Eng.
Mood. & M. ...	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	Eng.
Mood. & R. ...	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	Eng.
Mood. C. C. ...	Moody's Crown Cases Reserved, 2 vols., 1824—1844	Eng.
Moore, C. P. ...	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	Eng.
Moore, K. B. ...	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	Eng.
Mor. Dict. ...	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr. ...	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	Eng.
Mos. ...	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep. ...	Municipal Reports	Can.
Murd. Epit. ...	Murdoch's Epitome	Can.
Murp. & H. ...	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	Eng.
Murr. ...	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr. ...	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841	Eng.
My. & K. ...	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835	Eng.
N. A. C. ...	Native Appeal Cases	S. Af.
N. & S. ...	Nichols and Stop's Reports (Tasmania)	Tasmania.
N. B. Dig. ...	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep. ...	New Brunswick Equity Reports	Can.
N. B. R. ...	New Brunswick Reports	Can.
N. B. R. (All.) ...	New Brunswick Law Reports (Allen)	Can.
N. B. R. (Ber.) ...	New Brunswick Law Reports (Berton)	Can.
N. B. R. (Chip.) ...	New Brunswick Reports (Chipman)	Can.
N. B. R. (Han.) ...	New Brunswick Reports (Hannay)	Can.
N. B. R. (Kerr) ...	New Brunswick Law Reports (Kerr)	Can.
N. B. R. (P. & B.) ...	New Brunswick Reports (Pugsley and Burbidge)	Can.
N. B. R. (P. & T.) ...	New Brunswick Law Reports (Pugsley and Trueman)	Can.
N. B. R. (Pug.) ...	New Brunswick Reports (Pugsley)	Can.
N. L. R. ...	Natal Law Reports	S. Af.
N. S. R. ...	Nova Scotia Reports	Can.
N. S. R. (James) ...	Nova Scotia Reports (James)	Can.
N. S. R. (Old.) ...	Nova Scotia Reports (Oldrights)	Can.
N. S. R. (R. & C.) ...	Nova Scotia Reports (Russell and Chesley)	Can.
N. S. R. (R. & G.) ...	Nova Scotia Reports (Russell and Geldert)	Can.
N. S. R. (Thom.) ...	Nova Scotia Reports (Thomson)	Can.
N. S. W. Adm. or Ad. ...	New South Wales Reports, Admiralty	Aus.
N. S. W. B. ...	New South Wales Reports, Bankruptcy	Aus.
N. S. W. Bkpty. Cas. ...	New South Wales Bankruptcy Cases	Aus.
N. S. W. Eq. ...	New South Wales Reports, Equity	Aus.
N. S. W. Ind. Arbtrn. Cas. ...	New South Wales Industrial Arbitration Cases	Aus.
N. S. W. L. R. ...	New South Wales Law Reports	Aus.
N. S. W. Land App. Cts. ...	New South Wales Land Appeal Courts	Aus.
N. S. W. S. C. R. ...	New South Wales Supreme Court Reports	Aus.
N. S. W. S. C. R. N. S. ...	New South Wales Supreme Court Reports, New Series	Aus.
N. S. W. W. N. ...	New South Wales Weekly Notes	Aus.
N. W. ...	North-Western Provinces High Court Reports	Ind.
N. W. T. R. ...	North-West Territories Reports	Can.
N. Z. Jur. ...	New Zealand Jurist	N.Z.
N. Z. Jur. Mining Law ...	New Zealand Jurist Mining Law	N.Z.
N. Z. Jur. N. S. ...	New Zealand Jurist, New Series	N.Z.
N. Z. L. R. ...	New Zealand Law Reports, 1883—(current)	N.Z.
N. Z. L. R. C. A. ...	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	N.Z.
	Nelson's Reports, Chancery, 1 vol., 1625—1693	Eng.

xxviii **REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.**

Nev. & M. K. B.	Nevile and Manning's Reports, King's Bench, 6 vols., 1832—1833	Eng.
Nev. & M. M. O.	Nevile and Manning's Magistrates' Cases, 3 vols., 1832—1836	Eng.
Nev. & P. K. B.	Nevile and Perry's Reports, King's Bench, 3 vols., 1836—1838	Eng.
Nev. & P. M. O.	Nevile and Perry's Magistrates' Cases, 1 vol., 1836—1837	Eng.
New Mag. Cas.	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols. 1844—1850	Eng.
New Pract. Cas.	New Practice Cases (Bittleston and others), 3 vols., 1844—	Eng.
New Rep. ...	New Reports, 6 vols., 1862—1865	Eng.
New Sess. Cas. ...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851	Eng.
Nfld. L. R.	Newfoundland Reports	Nfld.
Nolan ...	Nolan's Magistrates' Cases, 1 vol., 1791—1793	Eng.
Notes of Cases ...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850	Eng.
Noy ...	Nov's Reports, King's Bench, fol., 1 vol., 1558—1649	Eng.
O B. & F. ...	Ollivier Bell and Fitzgerald's Reports	N.Z.
O. B. S. P. ...	Old Bailey Session Papers	Eng.
O. Bridg. ...	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1666	Eng.
O. F. S. ...	Reports of the High Court of the Orange Free State, 1879—1883	S. Af.
O. L. R. ...	Ontario Law Reports	Can.
O'M. & H. ...	O'Malley and Hardcastle's Election Cases, 1869—(current)	Eng.
O. P. D. ...	South African Law Reports, Orange Free State Provincial Division	S. Af.
O. R. ...	Ontario Reports	Can.
O. R. ...	Official Reports of the South African Republic, 1894—1899	S. Af.
O. R. C. ...	Reports of the High Court of the Orange River Colony	S. Af.
O. S. ...	Upper Canada Queen's Bench, Old Series	Can.
O. W. N. ...	Ontario Weekly Notes	Can.
O. W. R. ...	Ontario Weekly Reporter	Can.
Old. ...	Nova Scotia Reports (Oldrights)	Can.
Ont. Dig. ...	Digest of Ontario Case Law, 4 vols., 1823—1900	Can.
Owen ...	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614	Eng.
P. (preceded by date) ...	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 (<i>e.g.</i> , [1891] P.)	Eng.
P. & B. ...	New Brunswick Reports (Pugsley and Burbidge)	Can.
P. & T. ...	New Brunswick Law Reports (Pugsley and Trueman)	Can.
P. D. ...	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890	Eng.
P. E. I. ...	Prince Edward Island Reports	Can.
P. R. ...	Ontario Practice	Can.
P. Wms. ...	Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735	Eng.
Palm. ...	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629	Eng.
Pat. App. ...	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767	Eng.
Pater. App. ...	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	Scot.
Peake ...	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
Peake, Add. Cas.	Peake's Reports, Nisi Prius, 1 vol., 1790—1794	Eng.
	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812	Eng.
	Peckwell's Election Cases, 2 vols., 1803—1806	Eng.
Pelham ...	Pelham (S. A.) Reports	Aus.
Per. & Dav. ...	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Per. & Kn. ...	Perry and Knapp's Election Cases, 1 vol., 1833	Eng.
Per. C. S. ...	Perrault's Conseil Supérieur	Can.
Per. P. ...	Perrault's Prévosté de Quebec, 1726—1756	Can.
Ph. ...	Phillips' Reports, Chancery, 2 vols., 1841—1849	Eng.
Phil. El. Cas. ...	Philipps' Election Cases, 1 vol., 1780	Eng.
Phillim. ...	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821	Eng.
Phillim. Eccl. Jud.	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Phip. ...	Phipson's Digest of Natal Reports, 1858—1859	S. Af.
Pig. & R. ...	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845	Eng.
Pitc. ...	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624	Scot.
Plowd. ...	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I.	Eng.
Poll. ...	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682	Eng.
Poph. ...	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627	Eng.
Pow. R. & D. ...	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.
Prec. Ch. ...	Precedents in Chancery, fol., 1 vol., 1689—1722	Eng.
Price ...	Price's Reports, Exchequer, 13 vols., 1814—1824	Eng.
Price ...	Price's Mining Commissioners' Cases	Can.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Pug.	New Brunswick Reports (Pugsley)	Can.
Py. R.	Pykes' Lower Canada Reports	Can.
			Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	...	...	...	...	Eng.
Q. B. (preceded by date)			Law Reports, Queen's Bench Division, 1891—1901 (<i>e.g.</i> , [1891] 1 Q. B.)	...	...	...	...	Eng.
Q. B. D....	...	...	Law Reports, Queen's Bench Division, 25 vols., 1875—1890	...	...	...	...	Eng.
. J. P. ...	...	...	Queensland Justice of Peace Reports	...	...	...	...	Aus.
. L. J. ...	...	...	Queensland Law Journal	...	...	...	...	Aus.
. L. R. ...	...	...	Quebec Law Reports	...	...	...	...	Can.
Q. L. R. (Beor)...	...	...	Queensland Law Reports by Beor	...	...	...	...	Aus.
Q. P. R. ...	...	...	Quebec Practice Reports	...	...	...	...	Can.
Q. R. (Vol.) K. B. or Q. B.	...	...	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current)	...	...	...	...	Can.
Q. R. (Vol.) S. O	...	...	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current)	...	...	...	...	Can.
. S. O. R. ...	...	...	Queensland Supreme Court Reports	...	...	...	...	Aus.
. S. R. ...	...	...	Queensland State Reports	...	...	...	...	Aus.
Q. W. N. ...	...	...	Weekly Notes, Queensland	...	...	...	...	Aus.
R. ...	...	...	The Reports, 15 vols., 1893—1895	...	...	...	...	Eng.
R. ...	...	...	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878	...	...	...	...	S. Af.
R. (Ct. of Sess.)	...	...	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898	...	...	...	...	Scot.
R. A. C. ...	...	...	Ramsay, Appeal Cases	...	...	...	...	Can.
R. & O. ...	...	...	Nova Scotia Reports (Russell & Chesney)	...	...	...	...	Can.
R. & G. ...	...	...	Nova Scotia Reports (Russell and Geldert)	...	...	...	...	Can.
R. C. ...	...	...	La Revue Critique de Législation et de Jurisprudence de Canada	...	...	...	...	Can.
R. de J. ...	...	...	Revue de Jurisprudence	...	...	...	...	Can.
R. de L. ...	...	...	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848	...	...	...	...	Can.
R. E. D. ...	...	...	New South Wales, Reserved and Equity Decisions	...	...	...	...	Aus.
R. E. D. ...	...	...	Ritchie's Equity Decisions (Russell)	...	...	...	...	Can.
R. J. R. Q. ...	...	...	Quebec Revised Reports	...	...	...	...	Can.
R. L. N. S. ...	...	...	Revue Légale, New Series, 1895—(current)	...	...	...	...	Can.
R. L. O. S. ...	...	...	Revue Légale, Old Series, 21 vols., 1869—1892	...	...	...	...	Can.
R. P. C. ...	...	...	Reports of Patent Cases, 1884—(current)	...	...	...	...	Eng.
R. R. ...	...	...	Revised Reports	...	...	...	...	Eng.
Rast. ...	...	...	Rastell's Entries	...	...	...	...	Eng.
Rayn. ...	...	...	Rayner's Tithe Cases, 3 vols., 1575—1782	...	...	...	...	Eng.
Real Prop. Cas.	...	...	Real Property Cases, 2 vols., 1843—1847	...	...	...	...	Eng.
Rep. Ch. ...	...	...	Reports in Chancery, fol., 3 vols., 1615—1710	...	...	...	...	Eng.
Rep. in C. of A.	...	...	Reports in Courts of Appeal	...	...	...	...	N.Z.
Res. & Eq. Jud.	...	...	New South Wales Reserved and Equity Judgments	...	...	...	...	Aus.
Reserv. Cas. ...	...	...	Reserved Cases	...	...	...	...	Ir.
Rick. & M. ...	...	...	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889	...	...	...	...	Eng.
Rick. & S. ...	...	...	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894	...	...	...	...	Eng.
Ridg. L. & S. ...	...	...	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795	...	...	...	...	Ir.
Ridg. Parl. Rep.	...	...	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796	...	...	...	...	Ir.
Ridg. temp. H. ...	...	...	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746	...	...	...	...	Eng.
Ritch. Eq. Rep.	...	...	Ritchie's Equity Reports	...	...	...	...	Can.
Rob. Eccl. ...	...	...	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853	...	...	...	...	Eng.
Rob. L. & W. ...	...	...	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1840—1851	...	...	...	...	Eng.
Robert. App. ...	...	...	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727	...	...	...	...	Scot.
Robin. App. ...	...	...	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841	...	...	...	...	Scot.
Roll. Abr. ...	...	...	Rolle's Abridgment of the Common Law, fol., 2 vols.	...	...	...	...	Eng.
Roll. Rep. ...	...	...	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625	...	...	...	...	Eng.
Rom. ...	...	...	Romilly's Notes of Cases in Equity, 1 part, 1772—1787	...	...	...	...	Eng.
Roscoe's B.C. ...	...	...	Roscoe, Digest of Building Cases	...	...	...	...	Eng.
Rose ...	...	...	Rose's Reports, Bankruptcy, 2 vols., 1810—1816	...	...	...	...	Eng.
Ross, L. C. ...	...	...	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols.	...	...	...	...	Eng.
Rowe ...	...	...	Rowe's Reports (England and Ireland), 1 vol., 1798—1823	...	...	...	...	Eng.
Rul. Cas. ...	...	...	Campbell's Ruling Cases, 25 vols.	...	...	...	...	Eng.
Russ. ...	...	...	Russell's Reports, Chancery, 5 vols., 1824—1829	...	...	...	...	Eng.
Russ. & M. ...	...	...	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833	...	...	...	...	Eng.
Russ. & Ry. ...	...	...	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	...	...	...	...	Eng.
Russ. E. R. ...	...	...	Russell's Election Reports	...	...	...	...	Can.
Ry. & Can. Cas.	...	...	Railway and Canal Cases, 7 vols., 1835—1854	...	...	...	...	Eng.
Ry. & Can. Tr. Cas.	Railway and Canal Traffic Cases, 1855—(current)	Eng.
Ry. & M.	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826	Eng.

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Ryde & K. Rat. App.	Ryde and Konstan's Reports of Rating Appeals, 1 vol., 1894—1904	Eng.
Ryde, Rat. App.	Ryde's Rating Appeals, 3 vols., 1871—1893	Eng.
	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J.	South African Law Journal	S. Af.
S. A. L. R.	South Australian Law Reports	Aus.
S. A. L. R.	South African Law Reports	S. Af.
S. A. R.	Reports of the High Court of the South African Republic, 1881—1892	S. Af.
S. C.	Reports of the Supreme Court of the Cape of Good Hope from 1892	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date).	Court of Session Cases (Scotland) (House of Lords), since (<i>e.g.</i> , [1906] S. C. (H. L.))	Scot.
S. C. (J.) (preceded by date).	Court of Justiciary Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C. (J.))	Scot.
S. C. R.	Canada, Supreme Court Reports	Can.
S. L. T.	Scots Law Times, 1893 (current)	Scot.
S. Q. R.	Queensland State Reports	Aus.
S. R.	Reports of the High Court of Southern Rhodesia	S. Af.
S. R. C.	Stuart's Lower Canada Reports	Can.
S. R. N. S. W.	New South Wales, State Reports	Aus.
S. R. Q.	Queensland Reports, Supreme Court	Aus.
S. V. A. R.	Stuart's Vice-Admiralty Reports	Can.
Saint	Saint's Digest of Registration Cases, 1843—1906, 1 vol.	Eng.
	Salkeld's Reports, King's Bench, 3 vols., 1689—1712	Eng.
Sask. L. R.	Saskatchewan Law Reports	Can.
Sau. & Sc.	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840	Ir.
Saund.	Saunders's Reports, King's Bench, 2 vols., 1666—1672	Eng.
Saund. & A.	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B.	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
Saund. & C.	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1849	Eng.
Saund. & M.	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858	Eng.
Sav.	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591	Eng.
Say.	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756	Eng.
Sc. Jur.	Scottish Jurist, 46 vols., 1829—1873	Scot.
Sc. L. R.	Scottish Law Reporter, 1865—(current)	Scot.
Sc. R. R.	Scots Revised Reports	Scot.
Sch. & Lef.	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806	Ir.
Scott	Scott's Reports, Common Pleas, 8 vols., 1834—1840	Eng.
Scott, N. R.	Scott's New Reports, Common Pleas, 8 vols., 1840—1845	
Sea. & Sm.	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860	Eng.
Sel. Cas. Ch.	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.)	Eng.
Sess. Cas. K. B.	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sh. (Ct. of Sess.)	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838	Scot.
Sh. & MacI.	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838	Scot.
Sh. Dig.	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868	Scot.
Sh. Just.	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	Scot.
Sh. Sc. App.	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct.	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch.	Sheppard's Touchstone of Common Assurances	Eng.
Show.	Shower's Reports, King's Bench, 2 vols., 1678—1695	Eng.
Show. Parl. Cas.	Shower's Cases in Parliament, fol., 1 vol., 1694—1699	Eng.
Sid.	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670	Eng.
Sim.	Simons' Reports, Chancery, 17 vols., 1826—1852	Eng.
Sim. & St.	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826	Eng.
Sim. N. S.	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852	Eng.
Skin.	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697	Eng.
Sm. & Bat.	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825	Ir.
Sm. & G.	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857	Eng.
Smith, K. B.	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806	Eng.
Smith, L. C.	Smith's Leading Cases, 2 vols.	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Smith, Reg. Cas.	O. L. Smith's Registration Cases, 1895—(current)	Eng.
Smythe ...	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	Ir.
Sol. Jo. ...	Solicitors' Journal, 1856—(current)	Eng.
Spence ...	Spence's Equitable Jurisdiction of the Court of Chancery	Eng.
Spinks ...	Spinks' Prize Court Cases, 2 parts, 1854—1856	Eng.
St. R. Qd. (preceded by date) ...	Queensland State Reports, since 1902 (<i>e.g.</i> , [1902] St. R. Qd.)	Aus.
Stair Rep. ...	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681	Scot.
Stark. ...	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823	Eng.
State Tr. ...	State Trials, 34 vols., 1163—1820	Eng.
State Tr. N. S.	State Trials, New Series, 8 vols., 1820—1858	Eng.
Stewart ...	Stewart's Nova Scotia Admiralty Reports, 1803—1813	Can.
Stockton ...	Stockton's Vice-Admiralty Report and Digest	Can.
Story ...	Story's Commentaries on Equity Jurisprudence	Eng.
Stu. M. & P. ...	Strange's Reports, 2 vols., 1716—1747	Eng.
Stuart ...	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—	Scot.
Stuart ...	Sessions Cases (Stuart)	Scot.
Stuart, Adm. ...	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856	Can.
Stuart, Adm. N. S.	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874	Can.
Stuart, K. B. ...	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada),	Can.
Sty. ...	Style's Reports, King's Bench, fol., 1 vol., 1646—1655	Eng.
Sw. ...	Swabey's Reports, Admiralty, 1 vol., 1855—1859	Eng.
Sw. & Tr. ...	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865	Eng.
Swin. ...	Swanston's Reports, Chancery, 3 vols., 1818—1821	Eng.
Syme ...	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841	Scot.
	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829	Scot.
T. & M. ...	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—	Eng.
T. H. ...	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909	S. Af.
T. Jo. ...	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685	Eng.
T. L. ...	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current)	S. Af.
T. L. R.	The Times Law Reports, 1884—(current)	Eng.
T. P. ...	Reports of the Supreme Court of the Transvaal, 1910—(current)	S. Af.
T. P. D.	South African Law reports, Transvaal Provincial Division	S. Af.
T. Raym.	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—	Eng.
T. S. ...	Reports of the Supreme Court of the Transvaal, 1902—1909	S. Af.
Taml. ...	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830	Eng.
Tas. L. R.	Tasmanian Law Reports	Aus.
Taunt. ..	Taunton's Reports, Common Pleas, 8 vols., 1807—1819	Eng.
Tax Cas.	Tax Cases, 1875—(current)	Eng.
Tay. ...	Taylor's King's Bench Reports	Can.
Temp. Wood	Manitoba Reports <i>temp.</i> Wood	Can.
Term Rep.	Term Reports (Durnford and East), fol., 8 vols., 1785—1800	Eng.
Terr. L. R.	Territories Law Reports	Can.
Thom. ...	Nova Scotia Reports (Thomson)	Can.
Toth. ...	Tothill's Transactions in Chancery, 1 vol., 1559—1646	Eng.
Town. St. Tr.	Townsend, Modern State Trials	Eng.
Trist. ...	Tristram's Consistory Judgments, 1 vol., 1872—1890	Eng.
Tudor, L. C. Merc. Law.	Tudor's Leading Cases on Mercantile and Maritime Law	Eng.
Tudor, L. C. Real. Prop.	Tudor's Leading Cases on Real Property	Eng.
Turn. & R.	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825	Eng.
Tyr. ...	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835	Eng.
Tyr. & Gr.	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	Eng.
U. C. Jur.	Upper Canada Jurist	Can.
U. C. L. J. N. S.	Canada Law Journal, New Series, 1865—(current)	Can.
U. C. L. J. O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
U. C. R.	Upper Canada Reports, Queen's Bench	Can.
Udal ...	Fiji Law Reports (Udal)	Fiji.
V. L. R.	Victorian Law Reports	Aus.
V. R. ...	Victorian Reports	Aus.
V. R. (Adm.)	Victorian Reports (Admiralty)	Aus.
V. R. (Eq.)	Victorian Reports (Equity)	Aus.
V. R. (Law)	Victorian Reports (Law)	Aus.

xxxii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Vaugh.	...	...	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673	...	Eng.
Vent.	...	...	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	...	Eng.
Vern.	...	...	Vernon's Reports, Chancery, 2 vols., 1680—1719	...	Eng.
Vern. & Scr.	...	...	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	...	Ir.
Ves.	...	...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	...	Eng.
Ves. & B.	...	...	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	...	Eng.
Ves. Sen.	...	...	Vesey Sen.'s Reports, 2 vols., 1747—1756	...	Eng.
Vin. Abr.	...	...	Viner's Abridgment of Law and Equity, fol., 22 vols.	...	Eng.
Vin. Supp.	...	...	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	...	Eng.
W.	...	...	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	...	S. Af.
W. A. L. R.	...	...	West Australian Law Reports	...	Aus.
W. A'B. & W.	...	...	Webb, A'Beckett and Williams' Victorian Reports	...	Aus.
W. & W.	...	...	Wyatt and Webb	...	Aus.
W. C. C.	...	...	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	...	Eng.
W. H. C.	...	...	South African Law Reports, Witwatersrand High Court	...	S. Af.
W. Jo.	...	...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	...	Eng.
W. L. D.	...	...	South African Law Reports, Witwatersrand Local Division	...	S. Af.
W. L. R.	...	...	Western Law Reporter	...	Can.
W. L. T.	...	...	Western Law Times	...	Can.
W. N. (preceded by date)	...	...	Law Reports, Weekly notes, 1866—(current) (e.g., [1866] W. N.)	...	Eng.
W. N.	...	...	Calcutta Weekly Notes	...	Ind.
W. R.	...	...	Weekly Reporter, 54 vols., 1852—1906	...	Eng.
W. R.	...	...	Sutherland's Weekly Reporter	...	Ind.
W. R.	...	...	Weekly Reporter, reporting cases in the Cape Provincial Division	...	S. Af.
W. W. & A'B.	...	...	Wyatt, Webb and A'Beckett	...	Aus.
W. W. R.	...	...	Western Weekly Reports	...	Can.
Wallis	...	...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	...	Ir.
Web. Pat. Cas.	...	...	Webster's Patent Cases, 2 vols., 1602—1855	...	
Welsh, Reg. Cas.	...	...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	...	Ir.
Went. Off. Ex.	...	...	Wentworth's Office and Duty of Executors	...	Eng.
West	...	...	West's Reports, House of Lords, 1 vol., 1839—1841	...	Eng.
West temp. Hard.	...	...	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740	...	Eng.
West. Tithe Cas.	...	...	Western's London Tithe Cases, 1 vol., 1592—1822	...	Eng.
White	...	...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	...	Scot.
White & Tud. L. C.	...	...	White and Tudor's Leading Cases in Equity, 2 vols.	...	Eng.
Wight.	...	...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	...	Eng.
Will. Woll. & Dav.	...	...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	...	Eng.
Will. Woll. & H.	...	...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	...	Eng.
Willes	...	...	Willes' Reports, Common Pleas, 1 vol., 1737—1758	...	
Wilm.	...	...	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	...	Eng.
Wils.	...	...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	...	Eng.
Wils & S.	...	...	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	...	Scot.
Wils. Ch.	...	...	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	...	Eng.
Wils. Ex.	...	...	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	...	Eng.
Win.	...	...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	...	Eng.
Wm. Bl.	...	...	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	...	Eng.
Wm. Rob.	...	...	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	...	Eng.
Wms. Saund.	...	...	Williams' Notes to Saunders' Reports, 2 vols.	...	Eng.
Wolf. & B.	...	...	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	...	Eng.
Wolf. & D.	...	...	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	...	Eng.
Woll.	...	...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	...	Eng.
Wood	...	...	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	...	Eng.
Y. A. D.	...	...	Young's Vice-Admiralty Reports	...	Can.
Y. & C. Ch. Cas.	...	...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843	...	Eng.
Y. & C. Ex.	...	...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols.,	...	Eng.
Y. & J.	...	...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830	...	Eng.
Y. B.	...	...	Year Books	...	Eng.
Yelv.	...	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613	...	Eng.
You.	...	...	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832	...	Eng.

ABBREVIATIONS

USED IN THIS WORK.

(For Abbreviations used in citing Reports, see pp. xvii.—xxxii., *ante.*)

A.-G.	for Attorney-General.
Admlty.	„ Actiengesellschaft.
Affd.	„ Admiralty.
Affg.	„ Affirmed.
Akt.	„ Affirming.
Anon.	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Apld.	„ Anonymous.
Appet	„ Applied.
Appln.	„ Applicant.
Appln.	„ Application.
Applt.	„ Application to Register a Trade Mark
Apprvd	„ Appellant.
Arbn.	„ Approved.
Archbp	„ Arbitration.
Art.	„ Archbishop.
Assce.	„ Article.
Assocn	„ Assurance.
	„ Association.
B. C.	„ Borough Council.
Bkpey.	„ Bankruptcy.
Bkpt.	„ Bankrupt.
Bldg. Soc.	„ Building Society.
Bp.	„ Bishop.
C. A.	„ Court of Appeal.
C. & S. L. Ry. Co.	„ City & South London Railway Co.
C. C. A.	„ Court of Criminal Appeal.
C. C. R.	„ County Court Rules.
C. C. R.	„ Court of Crown Cases Reserved.
C. L. P. Act	„ Common Law Procedure Act.
C. L. Ry. Co.	„ Central London Railway Co.
C. S. U. C.	„ Consolidated Statutes of Upper Canada.
Cale Ry. Co.	„ Caledonian Railway Co.
Ct.	„ Court.
Ct. of Eq.	„ Court of Equity.
Ct. of R.	„ Court of Review.
Co.	„ Company.
Co-op. Assocn.	„ Co-operative Supply Association.
Comrs.	„ Commissioners.
Consd.	„ Considered.
Corpn.	„ Corporation.
D. C.	Divisional Court.
Dbtd.	Doubted.
Deft.	„ Defendant
Distd	„ Distinguished.
Ecccl. Comrs.	Ecclesiastical Commissioners
Ecccl. Ct.	Ecclesiastical Court.

Ex. Ch.	.	.	.	.	for Exchequer Chamber.
<i>Ex p.</i>	.	.	.	.	„ <i>Ex parte</i> .
Exch.	.	.	.	.	„ Exchequer.
Exor.	.	.	.	.	„ Executor.
Exorship.	.	.	.	.	„ Executorship.
Expld.	.	.	.	.	„ Explained.
Extd.	.	.	.	.	„ Extended.
Extrix.	.	.	.	.	„ Executrix.
Folld.	.	.	.	.	„ Followed.
G. & S. W. Ry. Co.	.	.	.	.	„ Glasgow & South Western Railway Co.
G. C. Ry. Co.	.	.	.	.	„ Great Central Railway Co.
G. E. Ry. Co.	.	.	.	.	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	.	.	.	.	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co.	.	.	.	.	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	.	.	.	.	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	.	.	.	.	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co.	.	.	.	.	„ Great Western Railway Co.
Govt.	.	.	.	.	„ Government.
Grdns.	.	.	.	.	„ Guardians or Guardians of the Poor.
H. C. of A.	.	.	.	.	„ High Court of Australia.
. L.	.	.	.	.	„ House of Lords.
I. R. Comrs.	.	.	.	.	„ Inland Revenue Commissioners.
Insee.	.	.	.	.	„ Insurance.
JJ.	.	.	.	.	„ Justices.
Jud. Act	.	.	.	.	„ Judicature Act.
L. & B. Ry. Co.	.	.	.	.	„ London & Brighton Railway Co.
L. & N. W. Ry. Co.	.	.	.	.	„ London & North Western Railway Co.
L. & S. W. Ry. Co.	.	.	.	.	„ London & South Western Railway Co.
L. & Y. Ry. Co.	.	.	.	.	„ Lancashire & Yorkshire Railway Co.
L. B.	.	.	.	.	„ Local Board.
L. B. & S. C. Ry. Co.	.	.	.	.	„ London, Brighton & South Coast Railway Co.
L.C.	.	.	.	.	„ Lord Chancellor.
L. C. & D. Ry. Co.	.	.	.	.	„ London, Chatham & Dover Railway Co.
L. C. C.	.	.	.	.	„ London County Council.
L. Elec. Ry. Co.	.	.	.	.	„ London Electric Railway Co.
L. G. Board	.	.	.	.	„ Local Government Board.
L.J.	.	.	.	.	„ Lord Justice.
L.JJ.	.	.	.	.	„ Lords Justices.
L. T. & S. Ry. Co.	.	.	.	.	„ London, Tilbury & Southend Railway Co.
M. S. Act	.	.	.	.	„ Merchant Shipping Act.
M. S. & L. Ry. Co.	.	.	.	.	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags.	.	.	.	.	„ Magistrates.
Mentd.	.	.	.	.	„ Mentioned.
Met. Dist. Ry. Co.	.	.	.	.	„ Metropolitan District Railway Co.
Met. Ry. Co.	.	.	.	.	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co.	.	.	.	.	„ Midland Great Western Railway Co.
Mid. Ry. Co.	.	.	.	.	„ Midland Railway Co.
Mtge.	.	.	.	.	„ Mortgage.
Mtgee.	.	.	.	.	„ Mortgagee.
Mtgor.	.	.	.	.	„ Mortgagor.
N. B. Ry. Co.	.	.	.	.	„ North British Railway Co.
N. E. Ry. Co.	.	.	.	.	„ North Eastern Railway Co.
N. F.	.	.	.	.	„ Not Followed.
N. P.	.	.	.	.	„ Nisi Prius.
O.	.	.	.	.	„ Order.
O. H.	.	.	.	.	„ Outer House.
Overd.	.	.	.	.	„ Overruled.
P. C.	.	.	.	.	„ Privy Council.
Petn.	.	.	.	.	„ Petition or Election Petition.
Pltf.	.	.	.	.	„ Plaintiff.
R. C.	.	.	.	.	„ Rural Council.
R. D. C.	.	.	.	.	„ Rural District Council.
R. S. A.	.	.	.	.	„ Rural Sanitary Authority.
R. S. O.	.	.	.	.	„ Revised Statutes of Canada.

R. S. C.	.	.	.	.	for Rules of the Supreme Court, 1883.
Refd.	.	.	.	.	„ Referred.
Regn. of Trade Mk.	.	.	.	.	„ Registration of Trade Mark.
Regr. of Trade Mks.	.	.	.	.	„ Registrar of Trade Marks.
Resp.	.	.	.	.	„ Respondent.
Restg.	.	.	.	.	„ Restoring.
Revsd.	.	.	.	.	„ Reversed.
Revsg.	.	.	.	.	„ Reversing.
Ry. Co.	.	.	.	.	„ Rail. Co. or Railway Co.
S. C.	.	.	.	.	„ Same Case.
S. O. (name of colony following)	.	.	.	.	„ Supreme Court of a Colony.
S. E.	.	.	.	.	„ Settled Estates.
S. E. & O. Ry. Co.	.	.	.	.	„ South Eastern & Chatham Railway Co.
S. E. Ry. Co.	.	.	.	.	„ South Eastern Railway Co.
S. P.	.	.	.	.	„ Same Point.
S.S. Co.	.	.	.	.	„ Steamship Co.
Sect.	.	.	.	.	„ Section.
Set. Land Act	.	.	.	.	„ Settled Land Act.
Settlmt.	.	.	.	.	„ Settlement.
Soc.	.	.	.	.	„ Society.
Soc. Anon.	.	.	.	.	„ Société Anonyme, etc.
Solr.	.	.	.	.	„ Solicitor.
Trade Mk.	.	.	.	.	„ Trade Mark.
Tram. Co.	.	.	.	.	„ Tramways Company.
U. C.	.	.	.	.	„ Urban Council.
U. D. C.	.	.	.	.	„ Urban District Council.
U. S. A.	.	.	.	.	„ United States of America.
Union Assmt. Com.	.	.	.	.	„ Union Assessment Committee.
Urban S. A.	.	.	.	.	„ Urban Sanitary Authority.
V. A. C.	.	.	.	.	„ Vice-Admiralty Court.
V.-C.	.	.	.	.	„ Vice-Chancellor.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases are listed chronologically except such as are classified as " Referred to " or " Mentioned." These come at the end and are arranged *inter se* in chronological order. The terms used in classifying the annotating cases are as follows :—

- " APPLIED " (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- " APPROVED " (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- " CONSIDERED " (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- " DISTINGUISHED " (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- " DOUBTED " (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- " EXPLAINED " (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- " EXTENDED " (Extd.).—Compare " APPLIED," *supra*.
- " FOLLOWED " (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- " NOT FOLLOWED " (N.F.).—Compare " FOLLOWED," *supra*, to which it is the adverse.
- " OVERRULED " (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- " REFERRED " (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- " MENTIONED " (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

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<i>Mortgages, generally</i>	„ MORTGAGE.	<i>Bankruptcy</i>	See BANKRUPTCY AND
<i>Pledge of Chattels</i>	„ PAWNS AND PLEDGES.		INSOLVENCY.

NOTE.—The Acts now in force in England are Bills of Sale Act, 1878 (c. 31), Bills of Sale Act (1878) Amendment Act, 1882 (c. 43), Bills of Sale Act, 1890 (c. 53), & Bills of Sale Act, 1891 (c. 35), herein referred to as 1878 Act, 1882 Act, 1890 Act, & 1891 Act respectively. In considering the cases set out in this title regard must be had to their date, the Act under which they were decided, & the effect of the subsequent Acts.

Part I.—Objects and Application of Bills of Sale Acts.

See 1878 Act, ss. 3, 20, 23 : 1882 Act, ss. 3, 15.

1. 1854 Act—Protection of creditors.—The object of the above Stat. is to provide against frauds committed by secret bills of sale of personal chattels, whereby debtors are enabled to keep up the appearance of being possessed of their property (STUART, V.-C.).—PIERCY v. HUMPHREYS (1868), 17 L. T. 463.

2. 1878 Act Applies only when grantor in possession or apparent possession.—The above Act does not affect the validity of an unregistered bill of sale, where the grantor is not in possession of the goods.—HALL v. SMITH (1887), 3 T. L. R. 805, C. A.

3. — Extent of repeal of—1878 Act, s. 8.—The above sect. is still in force as regards absolute

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bills of sale.—ROBINSON v. TUCKER (1883), 1 Cab. & El. 173.

4. ——— 1878 Act, s. 10.]—1882 Act repeals the above sect. only so far as that sect. relates to bills of sale given by way of security for the payment of money.—CASSON v. CHURCHLEY (1884), 53 L. J. Q. B. 335; 50 L. T. 568, D. C.

Annotation:—*Reid*. Read v. Joannon (1890), 25 Q. B. D. 300.

5. ——— 1878 Act, s. 20.]—1882 Act repeals the above sect. in respect of bills of sale given by way of security, but not in respect of bills of sale given by way of absolute transfer.—SWIFT v. PANNELL (1883), 24 Ch. D. 210; 53 L. J. Ch. 341; 48 L. T. 351; 31 W. R. 543.

Annotations:—*Consd.* Robinson v. Tucker (1883), Cab. & El. 173. *Foll.* Casson v. Churchley (1884), 53 L. J. Q. B. 335. *Apld.* Hall v. Smith (1887), 3 T. L. R. 805. *Reid*. Reeves v. Barlow (1883), 11 Q. B. D. 610; Read v. Joannon (1890), 25 Q. B. D. 300; Heseltine v. Simmons, [1892] 2 Q. B. 547.

6. ——— Protection of creditor—1882 Act—Protection of debtor.]—The object of the earlier Bills of Sale Acts was entirely different from that of 1882. The former enactments were designed for the protection of creditors, & to prevent their rights being affected by secret assurances of chattels which were permitted to remain in the ostensible possession of a person who had parted with his property in them. The bills of sale were made void only as against creditors or their representatives. As between the parties to them they were perfectly valid. The purpose of 1882 Act was essentially distinct. It was to prevent needy persons being entrapped into signing complicated documents, which they might often be unable to comprehend, & so being subjected by their creditors to the enforcement of harsh & unreasonable provisions. A form was provided to which

bills of sale were to conform, & the result of non-compliance with the Act was to render the bill of sale void, even as between the parties to it. But, this being the object, the enactment is limited to bills of sale given "by way of security for the payment of money by the grantor thereof" (LORD HERSCHELL).—MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO. v. NORTH CENTRAL WAGON CO. (1888), 13 App. Cas. 554; 58 L. J. Ch. 219; 59 L. T. 730; 37 W. R. 305; 4 T. L. R. 728, H. L.; *affg.* S. C. *sub nom.* NORTH CENTRAL WAGON CO. v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO. (1887), 35 Ch. D. 191, C. A. *Annotations*:—*Mentd.* French v. Bombardier (1888), 60 L. T. 48; Haydon v. Brown (1888), 59 L. T. 330; Newlove v. Shrewsbury (1888), 21 Q. B. D. 41; Redhead v. Westwood (1888), 59 L. T. 293; *Re* Yates, Batchelor v. Yates (1888), 38 Ch. D. 112; Jones v. Tower Furnishing Co. (1889), 61 L. T. 84; *Re* Yarrow, Collins v. Weymouth (1889), 59 L. J. Q. B. 18; *Re* Watson, *Ex p.* Official Receiver in Bkcy. (1890), 25 Q. B. D. 27; Beckett v. Tower Assets Co., [1891] 1 Q. B. 1; Grigg v. National Guardian Assoc., [1891] 3 Ch. 206; Secretary of State in Council of India v. British Empire Mutual Life Assoc. (1892), 67 L. T. 434; *Re* Whiteley, *Ex p.* Smith (1892), 66 L. T. 291; *Re* Hood, *Ex p.* Blandford (1893), 41 W. R. 558; Ramsay v. Margrett, [1891] 2 Q. B. 18; Clapham v. Ives (1901), 91 L. T. 69.

7. ——— ——— ———.]—That 1854 & 1878 Acts were intended to prevent false credit being given to people who had been allowed to remain in possession of goods which apparently were theirs, the ownership, however, of which they had parted with, is manifest enough by the language of those Acts. The Acts intended, in a case with creditors, that if people were allowed to remain in possession of goods, of which nevertheless the ownership was no longer theirs, those goods & chattels should be subject to the execution of *bona fide* creditors, who ought not to have been

PART I.

a. *Chattel Mortgage Act—Transfer of possession.*]—When two locomotives were half finished plf's. agreed by word of mouth with G., the manufacturer, to buy them from him, the locomotives to be finished by him. Subsequently, by deed reciting the arrangement, G. conveyed the locomotives to plf's. Defl. claimed under an execution issued after the agreement:—*Held*: (1) by the oral agreement the property passed, & Chattel Mtge. Act did not apply, a change of possession being impossible in the circumstances; (2) the execution in the sheriff's hands could not affect plf's claim as against defl.—BURTON v. BELHOUSE (1860), 20 U. C. R. 60.—CAN.

b. ——— ——— ———.]—Protection of creditors.]—BARKER v. LEESON (1882), 1 O. R. 114.—CAN.

c. 1862 Act—As compared with English 1854 Act.—BLACK v. SAWYER (1865), 2 Old. L. Overd. DURKEE v. FLINT (1886), 19 N. S. R. 487.—CAN.

d. 37 Vict. c. 14.—Retrospective operation.]—The above Act, which required the filing of bills of sale made after the passing of the Act, did not come into force until Oct. 1, 1874, though it was passed on Apr. 8 preceding:—*Held*: after it came into force, its provisions then applied to all bills of sale made after Apr. 8.—RITCHIE v. SHERIFF (1877), 1 P. & B. 59.—CAN.

e. 59 Vict. c. 34.—Not retrospective—Filing of agreement to give chattel mortgage.]—An unregistered agreement was made by debtor to give to his creditor upon default in payment, or upon demand, a chattel mtge. upon his "present & future goods & chattels." After judgment in favour of debtor's assignee for benefit of creditors the above Act was passed, & the agreement was registered:—*Held*: this did not validate it.—HOPE v. MAY (1897), 24 A. R. 16.—CAN.

f. *Bills of Sale Act—Not applicable where goods in hands of third party—Transfer of property & possession.*]—C. & Co., carrying on business in Chicago for the manufacture of mill machinery, etc., had certain machinery manufactured for them in Stratford, Ontario, which was warehoused with M. & T., at Woodstock, Ontario. C. & Co. being pressed by plf's., their bankers in Chicago, for collateral security for two of their notes of \$5,000 each, discounted by plf's., indorsed over to plf's. the warehouse receipts for the goods. At the maturity of the notes, C. & Co. not being able to retire them, in pursuance of an arrangement to that effect, the warehouse receipts were cancelled & new ones, dated Oct. 12, 1883, were made out direct to plf's. On Sept. 3, 1883, C. & Co. had made an assignment to a trustee in Chicago for the benefit of creditor. On Nov. 22 defl. placed writs of execution in the sheriff's hands against C. & Co., under which the goods were seized. No fraudulent preference or intent was proved:—*Held*: there was a transfer of both property & possession in the goods to plf's., subject to the trustee's rights, if any, & the goods being in the hands of third parties & not of C. & Co., Bills of Sale Act did not apply.—COMMERCIAL NATIONAL BANK OF CHICAGO v. CORCORAN (1884), 6 O. R. 527.—CAN.

g. ——— ——— ———.]—Not applicable to foreign bill of sale.]—A bill of sale made in the State of Maine, of chattels then there, does not require to be registered under Bills of Sale Act.—GOSLINE v. DUNBAR (1894), 32 N. B. R. 325.—CAN.

h. *Mortgage upon chattels in Ontario—Parties resident abroad—Whether governed by Ontario law.*]—A co. incorporated in the State of Michigan, while insolvent, had given a mtge. upon chattels in Ontario to defl.,

a Michigan creditor, to secure previous cash advances made to the co. under verbal promises by two directors that security would be given. The effect of the mtge. was to delay & prejudice other creditors & give defl. a preference over them:—*Held*: the property mortgaged being in Ontario, the transaction was governed by the laws of Ontario without regard to the laws of Michigan.—RIVER STAVE CO. v. SILL (1886), 12 O. R. 557.—CAN.

k. ——— ——— ———.]—goods which were in Ontario at the time of the execution of a document of hypothecation of them were subject to R. S. O. 1887, c. 125, although the parties thereto were at the time domiciled in a foreign country.—MARTINSON v. PATTERSON (1892), 20 O. R. 720; 19 A. R. 188.—CAN.

l. 4th R. S., c. 84—As amended by 1883 Acts, c. 11, s. 1—Words as to affidavit merely directory.]—The above Act requiring the affidavit contained no negative words, & was silent as to the effect of the want of the affidavit on the bill of sale:—*Held*: the words of the Act were merely directory.—MCBRIDE v. WARD (1886), 7 R. & G. 115; 7 C. L. T. 148.—CAN.

m. 5th R. S., c. 92, s. 3—Not applicable when subject matter out of Province.]—*Held*: the above Act was not applicable to a bill of sale made between parties & in respect to a subject matter out of Nova Scotia.—SINGER SEWING MACHINE CO. v. MCLEOD (1888), 20 N. S. R. (8 R. & G.) 341; 9 C. L. T. 60.—CAN.

n. ——— ——— ———.]—*Held*: the above Act was not applicable, the subject matter of the contract being property in Ontario, where the contract was made, & brought into Nova Scotia subsequently.—MCGREGOR v. KERR (1896), 29 N. S. R. 45.—CAN.

induced to give credit by the apparent ownership of the goods being in those persons, & who were entitled to have their debts satisfied when, by the default of the assignees of those goods, they had been allowed to continue in the possession of persons to whom the property in them no longer belonged. That was the intended policy; & for such purposes it is manifest that the Legislature would desire to give the widest possible interpretation to every one of the documents by which the ownership was really intended to be practically changed, while the goods still remained in the apparent possession & dominion of the persons from whom the ownership had nevertheless really passed away. 1882 Act was directed to a totally different subject-matter. It was thought by the Legislature, rightly or wrongly, that a great number of impecunious debtors might be induced to sign documents, the legal effect of which those persons did not understand. It was intended by the Legislature, in order to protect them, to give

a particular form of words which should plainly express the nature of the contract as to the loan & the security for the loan. The Legislature, in order to effect the object, gave a form of bill of sale, & made every bill of sale void, unless it was in accordance with the form given by the Act. The Legislature neither intended to interfere, nor is it the effect of the legislation to which I have referred to interfere, with other transactions than those which the Legislature has expressly pointed out (LORD HALSBURY, C.).—*CHARLESWORTH v. MILLS*, [1892] A. C. 231; 61 L. J. Q. B. 830; 66 L. T. 690; 41 W. R. 129, H. L.; *reversg.* S. C. *sub nom.* *MILLS v. CHARLESWORTH* (1890), 25 Q. B. D. 421, C. A.

Annotations:—*Refd.* G. E. Ry. Co. v. Lord's Trustee, [1909] A. C. 109. *Mentd.* *Grigg v. National Guardian Assoc.*, [1891] 3 Ch. 206; *Morris v. Delobel-Flipo*, [1892] 2 Ch. 352; *Ramsay v. Margrett*, [1894] 2 Q. B. 18; *Withers v. Berry* (1895), 39 Sol. Jo. 559; *Clapham v. Ives* (1904), 91 L. T. 69; *Dublin City Distillery v. Doherty*, [1914] A. C. 823; *Re Lavey, Ex p. Trustee*, [1918-19] B. & C. R. 116.

Part II.—What Transactions are Bills of Sale and require Registration.

SECT. 1.—IN GENERAL.

8. *Contract of bailment.*—*Semble*: a bill of sale is simply a contract of bailment.—*COOPER v. BRAHAM* (1867), 15 L. T. 610.

9. *Whether deed necessary.*—A mtge. of a personal chattel may be made without deed.—*FLORY v. DENNY* (1852), 7 Exch. 581; 21 L. J. Ex. 223; 19 L. T. O. S. 158; 155 E. R. 1080.

Annotations:—*Consd.* *Maughan v. Sharpe* (1864), 17 C. B. N. S. 443; *Johnson v. Diprose* (1893), 68 L. T. 485. *Refd.* *Sewell v. Burdick* (1881), 10 App. Cas. 74. *Mentd.* *Cochrane v. Moore* (1890), 25 Q. B. D. 57.

o. — *After-acquired property.*—*Semble*: the above Act does not refer to after-acquired property.—*WYNACHT v. MCGINTY* (1912), 12 E. L. R. 116.—CAN.

p. 1892 Acts, c. 1 *Not applicable to foreign corporation—Headquarters out of Province.*—The clause of the Act requiring mtges., etc., to be filed in the county where the grantor resides is not applicable to a foreign corp., with headquarters out of Nova Scotia.—*DON v. WARNER* (1896), 28 N. S. R. 202.—CAN.

q. *North West Territories Ordinance No. 18, 1889—Applicable only to mortgages made in Territories.*—*BONIN v. ROBERTSON* (1893), 2 Terr. L. R. 21; 14 C. L. T. Occ. N. 150.—CAN.

r. *Sale in Manitoba—Goods sub-ly brought into Saskatchewan—Governed by Manitoba Law.*—*SAWYER & MASSEY Co. v. BOYCE* (1908), 1 Sask. L. R. 230; 8 W. L. R. 834.—CAN.

s. *Bulk Sales Act—Effect of, on mortgage on stock-in-trade.*—The above Act is not intended to destroy a security in the shape of a mtge. on a stock-in-trade, & to enable the general creditors of a mtgor. to share equally with a secured creditor. A sale of a stock-in-trade by such a mtge. is not within the Act.—*DRINKLE v. REGAL SHOE Co., LTD.* (1914), 20 B. C. R. 314; *affd.* (1916), 23 B. C. R. 24.—CAN.

t. *Chattel Transfer Act, 1889—As distinguished from English Acts.*—An instrument in the form of a bailment which in reality is only a security for money lent is void. The effect of such an instrument is to conceal the true nature of the transaction, & to defeat the object of the above Act.

Cases decided upon the English Act are distinguishable from cases decided upon the New Zealand Act, in that bailments require to be registered under the latter, but do not require to be registered under the former.—*Re v. BERKLEY* (1893), 12 N. L. R. 339.—N.Z.

w. — *Misdemeanour if grantor defrauds grantee—When offence committed.*—The above Act, s. 52, making it a misdemeanour for the grantor of an instrument by way of security to defraud or attempt to defraud the grantee of the chattels comprised in the instrument, applies only to valid instruments by way of security under the Act; & the offence has not been committed where the residence & occupation of the attesting witness to the document relied on as an instrument have not been added to his signature as required by s. 49.

The Act does not take away rights which the parties would have had, as between themselves, at common law.—*R. v. DIBB IDO* (1897), 15 N. Z. L. R. 591.—N.Z.

x. *Chattel Transfer Act, 1889, s. 27.*—The above sect. has been superseded & virtually repealed by *Bkpey. Act, 1892, s. 79 (2)*.—*WILLIAMS & KETTLE v. HARDING (OFFICIAL ASSIGNEE OF)* (1908), 27 N. Z. L. R. 871.—N.Z.

z. *Bankruptcy Acts Amendments Act, 1896, ss. 31, 32, 33.*—The above Act does not apply to bills of sale given before Nov. 13, 1896.—*Re GEOGHEGAN, Ex p. OFFICIAL ASSIGNEE* (1897), 18 N. S. W. B. 26.—AUS.

PART II. SECT. 1.

10 i. *Acts apply to documents & not transactions—Verbal sale.*—B. made a

See, generally, MORTGAGE.

10. *Acts apply to documents & not transactions—Right given by law—Vendor's lien.*—*Held*: a vendor's lien, being given by law, & there being nothing which could be registered 1878 Act did not apply.—*Re VULCAN IRONWORKS LTD.* (1888), 4 T. L. R. 312.

11. *Document must amount to an assurance.*—The owner of household goods, which had been seized under a *fi. fa.*, agreed verbally with an auctioneer that, in consideration of his paying

verbal sale of goods to plff., who executed a lease of the goods to B., who continued in apparent possession thereof. The goods having been seized by the sheriff, were claimed by plff.:—*Held*: verbal sales of goods were not prohibited by the Act, which contained no provision requiring written evidence of such sales to be registered.—*ESNOUF v. GURNEY* (1895), 4 B. C. R. 144.—CAN.

10 ii. — — — — — *HENDRY v. LAIRD* (1919), 2 W. W. R. 311.—CAN.

10 iii. — *Verbal mortgage of chattels.*—*HURREY v. BANK OF NEW SOUTH WALES* (1882), 1 N. Z. L. R. C. A. 115.—N.Z.

10 iv. — *Verbal agreement to mortgage chattels security.*—An equitable mtge. of a chattels security may be created by an oral agreement to mtge. the security, accompanied by the handing over of the document. *Chattels Transfer Act, 1908, s. 50*, has not altered the law, as the sect. relates only to the absolute transfer of an instrument dealing with chattels.—*CARSON v. FRASER* (1919), N. Z. L. R. 53.—N.Z.

a. *Chattel mortgage of goods in bond.*—Where the goods forming the subject of a chattel mtge. are in bond, it is not necessary that the mtge. should be registered.—*MAY v. SECURITY LOAN & SAVINGS Co.* (1880), 45 U. C. R. 106.—CAN.

b. *Document not being mere promise only.*—Every assignment of goods, whether legal or equitable, amounting to anything more than almost a mere promise, is subject to the operation of the Act for registration of bills of sale.—*Re SPOTTEN & Co., Ex p. MERCHANT BANKING Co.* (1876), 10 L. T. 46.—IR.

Sect. 1.—In General. Sects. 2 & 3: Sub-sect. 1.]

out the sheriff, the auctioneer should hold possession of the goods, sell them by auction & pay over the balance, if any, to the owner. The agreement was reduced into writing & the sheriff was paid out, the man in possession remaining in possession for the auctioneer:—*Held*: since the written agreement did not constitute the auctioneer's title, & was not intended to & did not come into operation until possession had been actually transferred from the sheriff to the auctioneer, it was not an "assurance," or in any other respect a bill of sale within 1878 & 1882 Acts.—*CHARLESWORTH v. MILLS*, [1892] A. C. 231; 61 L. J. Q. B. 830; 66 L. T. 690; 56 J. P. 628; 41 W. R. 129; 8 T. L. R. 484; 36 Sol. Jo. 411, H. L.; *reusq. S. C. sub nom. MILLS v. CHARLESWORTH* (1890), 25 Q. B. D. 421, C. A.

Annotations:—*Consd.* *Morris v. Delobel-Filpo*, [1892] 2 Ch. 352; *Ramsay v. Margrett*, [1894] 2 Q. B. 18; *Dublin City Distillery v. Doherty*, [1914] A. C. 823. *Refd.* *Grigg v. National Guardian Assee.*, [1891] 3 Ch. 206; *Withers v. Berry* (1895), 39 Sol. Jo. 559; *Clapham v. Ives* (1904), 91 L. T. 69; *G. E. Ry. Co. v. Lord's Trustee*, [1909] A. C. 109; *Re Lavey, Ex p. Trustee*, [1918-19] B. & C. R. 116.

12. Whether property passing independently.]—In order that an inventory of goods with receipt attached, or a receipt for purchase-money of goods, may be a bill of sale within 1878 Act, s. 4, it must amount to an assurance of the chattels at law or in equity.—*NORTH CENTRAL WAGON CO. v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.* (1887), 35 Ch. D. 191; 56 L. J. Ch. 609; 56 L. T. 755; 35 W. R. 443; 3 T. L. R. 206, C. A.; *affd. S. C. sub nom. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO. v. NORTH CENTRAL WAGON CO.* (1888), 13 App. Cas. 554, H. L.

Annotations:—*Consd.* *French v. Bombardier* (1888), 60 L. T. 48; *Haydon v. Brown* (1888), 59 L. T. 330; *Redhead v. Westwood* (1888), 59 L. T. 293; *Re Watson, Ex p. Official Receiver in Bkpy.* (1890), 25 Q. B. D. 27; *Re Hood, Ex p. Blandford* (1893), 41 W. R. 558. *Refd.* *Newlove v. Shrewsbury* (1888), 21 Q. B. D. 41; *Re Yates, Batchelor v. Yates* (1888), 38 Ch. D. 112; *Jones v. Tower Furnishing Co.* (1889), 61 L. T. 84; *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 1; *Ramsay v. Margrett*, [1894] 2 Q. B. 18. *Mentd.* *Re Yarrow, Collins v. Weymouth* (1889), 59 L. J. Q. B. 18; *Grigg v. National Guardian Assee.*, [1891] 3 Ch. 206; *Re Whitely, Ex p. Smith* (1892), 66 L. T. 291; *Secretary of State in Council of India v. British Empire Mutual Life Assee.* (1892), 67 L. T. 431; *Clapham v. Ives* (1904), 91 L. T. 69.

See, further, Sect. 3, post.

13. ——— Memorandum in writing required by Statute of Frauds.]—*Re ROBERTS, EVANS v. ROBERTS*, No. 53, *post*.

14. Court will regard true nature & not form of transaction—Hire-purchase agreement.]—A transaction purported to be a sale of personal chattels, followed by a hiring & purchase agreement, whereby the vendor agreed to hire the chattels from the purchaser & to pay quarterly sums as for such hire, until a certain amount was paid, when the chattels were to become again the property of the vendor, & power was given to the purchaser to take possession of the chattels on default in payment. No sale or hiring of the chattels was really intended, the object being merely to create a security for a loan of money to the supposed vendor from the supposed purchaser:

14 i. Court will regard true nature & not form of transaction—Memorandum of sale with receipt.]—In determining whether a document containing a memorandum of sale & a receipt for money paid is a bill of sale, the ct. is not bound by the form of the document, but will look at the transaction between the parties.—*YOUNG v. MOOK & MENG* (1891), 17 V. L. R. 140.—*AUS.*

14 ii. —.]—Where there is an

agreement for sale, delivery of the chattels sold, & payment of part of the purchase-money, it is a sale & not a bailment of the chattel, even though the agreement provides that the property shall not pass until the entire price be paid, & that the vendor may retake possession of the chattel if the balance of the purchase-money shall remain unpaid. The description of such an agreement in the affidavit of execution as "an agreement or con-

tract of bailment" does not alter its nature.—*Re CRAWFORD, Ex p. OFFICIAL ASSIGNEE* (1887), 6 N. Z. L. R. 56.—*N.Z.*

Annotations:—*Consd.* *Re Eastern & Mid. Ry. Co.* (1891), 65 L. T. 668; *Madell v. Thomas*, [1891] 1 Q. B. 230. *Refd.* *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 638; *Edwards v. Marcus*, [1894] 1 Q. B. 587.

15. ———.]—M., who had made a contract to buy a hotel & its furniture, being unable to find all the money, agreed with a wine merchant that he should provide £2,000. The wine merchant went to the vendor & paid him £2,000, the vendor giving a receipt for that sum as the purchase-money of the furniture. The same day the wine merchant & M. signed a hire-purchase agreement, by which the wine merchant let, & M. hired, the furniture for £2,412 to be paid by instalments, the furniture not to become the property of M. till all the instalments were paid. The purchase of the hotel was then completed & M. took possession. After paying some of the instalments M. became bkpt.:—*Held*: the circumstances showed that as a matter of fact the sale to the wine merchant was only colourable, & the transaction between the wine merchant & M. was really a loan upon the security of the hire-purchase agreement, & that agreement not having been registered under Bills of Sale Acts was void as against M.'s creditors.—*MAAS v. PEPPER*, [1905] A. C. 102; 74 L. J. K. B. 452; 92 L. T. 371; 53 W. R. 513; 21 T. L. R. 304; 12 Mans. 107, H. L.; *affg. S. C. sub nom. MELLOR'S TRUSTEE v. MAAS*, [1903] 1 K. B. 226, C. A.

Annotation:—*Consd.* *Johnson v. Rees* (1915), 84 L. J. K. B. 1276.

Hire-purchase agreements generally, *see* Sect. 5, sub-sect. 4, *post*.

Capacity of parties to make & take bill of sale.]—*See* particular titles *passim*.

Bill of sale amounting to—Act of bankruptcy.]—*See* BANKRUPTCY & INSOLVENCY, Vol. IV., pp. 52-71.

Fraudulent conveyance.]—*See* BANKRUPTCY & INSOLVENCY, Vol. V., pp. 883-893; FRAUDULENT & VOIDABLE CONVEYANCES.

Consideration—Illegality of.]—*See* CONTRACT.

Statement of.]—*See* Part V., Sect. 1, *post*.

SECT. 2.—DECLARATIONS OF TRUST WITHOUT TRANSFER.

See 1878 Act, s. 4; 1890 Act, s. 1; 1891 Act, s. 1.

16. Hypothecation note—Bills of lading as security—Goods at sea.]—T., a fruit-broker, applied to his bankers for an advance as against certain goods which had been consigned to him & were then at sea, he depositing with them the indorsed bills of lading. Before making the advance the bankers required him to sign a letter of hypothecation, by which he undertook to hold the goods in trust for the bankers, & to hand over to them the

tract of bailment" does not alter its nature.—*Re CRAWFORD, Ex p. OFFICIAL ASSIGNEE* (1887), 6 N. Z. L. R. 56.—*N.Z.*

c. "Instrument."]—The English decisions as to "bill of sale" in 1878 Act, apply to the interpretation of "instrument" under New Zealand Act.—*SLATTERY (OFFICIAL ASSIGNEE) v. SLATTERY* (1895), 16 N. Z. L. R. 332.—*N.Z.*

PART II.—WHAT TRANSACTIONS ARE BILLS OF SALE.

proceeds, "as & when received," to the amount of the advance:—*Held*: such hypothecation note was a bill of sale within 1878 & 1882 Acts, as being a declaration of trust without transfer.—*R. v. TOWNSHEND* (1884), 15 Cox, C. C. 466.

See, further, Part III., Sects. 4 & 5, post.

SECT. 3.—INVENTORIES OF GOODS AND RECEIPTS.

SUB-SECT. 1.—BEFORE 1878.

17. Not within Act—Inventory & receipt not mentioned in Act.]—A tradesman expecting the execution of a writ of *fi. fa.* issued by the Ct. of Ch. for payment of costs in a suit, effected a sale of the whole of his furniture & stock-in-trade. The only document passing upon the occasion was a receipt for the money paid upon the purchase:—*Held*: the receipt given for the goods did not amount to a bill of sale under 1854 Act, & it did not require registration.—*HALE v. METROPOLITAN SALOON OMNIBUS Co.* (1859), 4 Drew. 492; 28 L. J. Ch. 777; 7 W. R. 316; 62 E. R. 189.

*Annotations:—**Appld.* *Thomson v. Barrett* (1860), 1 L. T. 268. *Refd.* *Re Baum, Ex p. Cooper* (1878), 10 Ch. D. 313; *North Central Wagon Co. v. M. S. & L. Ry. Co.* (1887), 35 Ch. D. 191.

18. ———.]—The trustees of a married woman purchased for her use furniture of her husband, for which he gave a receipt referring to an inventory of the goods, & to the power under which the trustees bought:—*Held*: the document was not a bill of sale within 1854 Act.—*ALLSOPP v. DAY* (1861), 7 H. & N. 457; 31 L. J. Ex. 105; 5 L. T. 320; 8 Jur. N. S. 41; 10 W. R. 135; 158 E. R. 552.

*Annotations:—**Appld.* *Byerley v. Prevost* (1871), L. R. 6 C. P. 144. *Distd.* *Re Bampffield, Ex p. Stooke, Re Bampffield, Ex p. Newport Credit Co.* (1872), 20 W. R. 925; *Re Baum, Ex p. Cooper* (1878), 10 Ch. D. 313. *Dbtd.* *Re Walden, Ex p. Odell* (1878), 10 Ch. D. 76. *Consd.* *Marsden v. Meadows* (1881), 7 Q. B. D. 80; *North Central Wagon Co. v. M. S. & L. Ry. Co.* (1887), 35 Ch. D. 191. *Refd.* *Salter v. Brooks* (1879), De Colyar's County Ct. Cases, 82.

19. Consideration for past debt.]—Upon the trial of an interpleader issue, *pltf.*, to prove a sale of the goods to him, put in a receipt, as follows: "Received of B. £90, being the amount agreed to be paid for the purchase of household furniture & effects on the premises, No. 94, etc., of which I have this day taken possession. B." No money passed at the time; but the consideration for the giving of the receipt was a past debt, & the goods remained in debtor's possession:—*Held*: the instrument did not require registration under 1854 Act.—*BYERLEY v. PREVOST* (1871), L. R. 6 C. P. 144.

*Annotations:—**Consd.* *Graham v. Wilcockson* (1876), 46 L. J. Q. B. 55. *Dbtd.* *Re Walden, Ex p. Odell* (1878), 10 Ch. D. 76. *Consd.* *North Central Wagon Co. v. M. S. & L. Ry. Co.* (1887), 35 Ch. D. 191. *Refd.* *Re Bampffield, Ex p. Stooke, Re Bampffield, Ex p. Newport Credit Co.* (1872), 20 W. R. 925; *Re Baum, Ex p. Cooper* (1878), 10 Ch. D. 313.

20. ———.]—Being pressed to pay rent in arrear, a tenant & his partner sold their furniture to the landlord under an arrangement, by which the purchase-money was to be applied in payment of the rent due, & the following document was drawn up: "Bought of D. & J. W. [certain goods at specified prices]. Memorandum. We acknowledge that we have this day sold & delivered to M. the above articles & effects for the price we named £163 13s., & that payment there has been made to us, of that amount in between us, & under the agreement arrived to be made with respect to the amount owing by us to him for rent, interest & expenses." The sale was subsequently advertised. The goods were delivered to the landlord, & then let by him

to the tenant, who remained in possession of them until they were seized by the sheriff under a *fi. fa.* issued by an execution creditor of J. W.:—*Held*: the document was a mere receipt, &, notwithstanding the memorandum, did not need registration as a transfer under 1854 Act.—*GRAHAM v. WILCOCKSON* (1876), 46 L. J. Q. B. 55; 35 L. T. 601.

*Annotations:—**Consd.* *Re Baum, Ex p. Cooper* (1878), 10 Ch. D. 313; *North Central Wagon Co. v. M. S. & L. Ry. Co.* (1887), 35 Ch. D. 191.

See, now, 1878 Act.

21. Within Act if an assurance—Mere receipt—Grantee taking possession of growing crops.]—A creditor agreed with his debtor to take a growing crop in satisfaction, debtor gave him a receipt for the amount of the debt, as if for money paid on a sale of the crop, & the creditor took possession:—*Held*: the transfer, though not registered, was good as against an execution creditor.—*NEWMAN v. CARDINAL* (1862), 2 F. & F. 840, N. P.

*Annotation:—**Refd.* *Brantom v. Griffiths* (1876), 45 L. J. Q. B. 588.

22. ——— Mortgage by memorandum of sale & receipt.]—B. mortgaged an engine to an assocn. as security for a loan then made to him, & the assocn. marked its initials upon the engine. The mtgce. was taken in the form of a memorandum of sale & receipt, with a power of removal at the convenience of the mtgees. On the afternoon of the day on which B. filed his petition for liquidation, the assocn., without any notice of such petition having been filed, made a demand for possession of the engine. The sheriff was in possession at the time of the demand under some executions:—*Held*: the receipt was a bill of sale within 1854 Act, & not having been registered was void as against the trustees in bkpcy.—*Re BAMPFIELD, Ex p. STOOKE, Re BAMPFIELD, Ex p. NEWPORT CREDIT Co.* (1872), 20 W. R. 925.

23. ——— Property passing independently—Receipt—Record of verbal transaction.]—A mere memorandum or receipt for purchase-money, not intended to operate as a record of a sale absolute or conditional of chattels, does not require to be registered under 1854 Act.—*THOMSON v. BARRETT* (1860), 1 L. T. 268.

*Annotations:—**Consd.* *Cochrane v. Matthews* (1878), 10 Ch. D. 80, n. *Distd.* *Re Walden, Ex p. Odell* (1878), 10 Ch. D. 76. *Consd.* *North Central Wagon Co. v. M. S. & L. Ry. Co.* (1887), 35 Ch. D. 191. *Refd.* *Re Baum, Ex p. Cooper* (1878), 10 Ch. D. 313. *Mentd.* *Allsopp v. Day* (1861), 7 H. & N. 457.

24. ——— Receipt on sale by sheriff.]—A sheriff's officer seized goods of the judgment debtor at his house under a *fi. fa.*, & sold them to debtor's father-in-law, to whom he gave a receipt for the purchase-money, with an inventory of the goods written under it. On the same day the purchaser let the goods to debtor, who kept possession of them until they were again seized in execution:—*Held*: the receipt did not require registration as a bill of sale under 1854 Act, because the sale by the sheriff's officer was a transaction complete & effectual in itself, & the receipt was not the medium of transfer of the goods.—*WOODGATE v. GODFREY* (1879), 5 Ex. D. 24; 49 L. J. Q. B. 1; 42 L. T. 31; 28 W. R. 88, C. A.

*Annotations:—**Folld.* *Marsden v. Meadows* (1881), 7 Q. B. D. 80. *Consd.* *Re Hardwick, Ex p. Hubbard* (1886), 34 W. R. 790; *French v. Bombard* (1888), 60 L. T. 48; *Re Jones, Ex p. Tower Furnishing Co.* (1889), 6 Morr. 193. *Refd.* *Salter v. Brooks* (1879), De Colyar's County Ct. Cases, 82; *M. S. & L. Ry. Co. v. North Central Wagon Co.* (1888), 13 App. Cas. 554; *Re Hood, Ex p. Burgess* (1893), 9 T. L. R. 511; *Ramsay v. Margrett*, [1891] 2 Q. B. 18. *Mentd.* *Re Roberts, Evans v. Roberts* (1887), 36 Ch. D. 196.

Cases relating to receipts given on sales by sheriff after 1878, *see* sub-sect. 2, *post*.

*Sect. 3.—Inventories of goods and receipts: Sub-sects.***25. Contemporaneous letting agreement.]**

—C., a money-lender, advanced £50 to a trader, who gave him at the foot of an inventory of furniture a receipt in the following words: "Received of C. £50 for the absolute sale to him of the above-mentioned articles of furniture & other effects." On the same day C. let the furniture to the trader, under an agreement similar to that in *Re Walden*, *Ex p. Odell*, No. 26, *post*. The trader made default, & in an action by C. to establish his claim to the proceeds of the sale of the furniture:—*Held*: the documents together constituted a bill of sale within 1854 Act.—*COCHRANE v. MATTHEWS* (1878), 10 Ch. D. 80, n.; 48 L. J. Bcy. 3, n.; 39 L. T. 334, n.; 27 W. R. 275.

Annotations:—*Apprvd. & Apld. Re Walden, Ex p. Odell* (1878), 10 Ch. D. 76. *Consd. French v. Bombernard* (1888), 60 L. T. 48; M. S. & L. Ry. Co. v. North Central Wagon Co. (1888), 13 App. Cas. 554. *Refd. Re Cunningham, Attenborough's Case* (1885), 28 Ch. D. 682; *Haydon v. Brown* (1888), 59 L. T. 330; *Redhead v. Westwood* (1888), 59 L. T. 293; *Jones v. Tower Furnishing Co.* (1889), 61 L. T. 84; *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 1.

26. ———.]—C., on July 18, advanced W., who had then an execution in his house, £150, which was employed partly in paying out the execution. An inventory was made of W.'s furniture, & at the foot of it W. signed a receipt for the £150, as "for the absolute sale" to C. "of the above-mentioned articles." On the same day a written agreement was entered into between C. & W. for the letting of the same furniture, specified in a schedule, by C. to W. for two months for £170, to be paid by W. to C. on Sept. 18 or such other time as might be agreed on. The agreement gave C. power, in case the £170 should not be duly paid, or if at any time during the continuance of the agreement the goods should be taken under an execution or distress, or W. should become bkpt. or take proceedings for liquidation of his affairs or composition, or on the happening of some other specified events, to determine the agreement, & thereupon to take possession of the goods & to sell them. If upon a sale he should realise more than what was due to him under the agreement & his expenses, he was to pay the surplus to W.; if he should realise less, W. was to make good the deficiency. On the payment of the £170 & expenses the goods were to become the property of W.:—*Held*: the two documents together constituted a mtgc. to secure £170, & they required registration under 1854 Act.—*Re WALDEN, Ex p. ODELL* (1878), 10 Ch. D. 76; 48 L. J. Bcy. 1; 39 L. T. 333; 27 W. R. 274, C. A.

Annotations:—*Distd. Lincoln Waggon & Engine Co. v. Mumford* (1879), 41 L. T. 655; *Woodgate v. Godfrey* (1879), 4 Ex. D. 59. *Consd. French v. Bombernard* (1888), 60 L. T. 48; M. S. & L. Ry. Co. v. North Central Wagon Co. (1888), 13 App. Cas. 554; *United Forty-Pound Loan Club v. Bexton* (1890), [1891] 1 Q. B. 28, n.; *Re Watson, Ex p. Official Receiver in Bkpey.* (1890), 25 Q. B. D. 27; *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 1. *Refd. Re Baum, Ex p. Cooper* (1878), 10 Ch. D. 313; *Salter v. Brooks* (1879), *De Colyar's County Ct. Cases*, 82; *Marsden v. Meadows* (1881), 7 Q. B. D. 80; *Re Cunningham, Attenborough's Case* (1885), 28 Ch. D. 682; *Simpson v. Charing Cross Bank* (1886), 34 W. R. 568; *Sharp v. McHenry, Sharp v. Brown* (1887), 38 Ch. D. 427; *Haydon v. Brown* (1888), 59 L. T. 330; *Redhead v. Westwood* (1888), 59 L. T. 293; *Re Jones, Ex p. Tower Furnishing Co.* (1889), 6 Morr. 193.

PART II. SECT. 3, SUB-SECT. 2.

28 i. Whether property passing independently.]—A receipt, not intended simply as a receipt for payment of money, but expected to operate as proof of change of ownership of the goods, is an assurance & a bill of sale.—*HENDRY v. LAIRD* (1919), 2 W. W. R. 341.—CAN.

e. ——— Memorandum of sale with receipt.]—A document containing a memorandum of sale & a receipt for money paid is not expressly included in the definition of a bill of sale in Victorian 1864 Act, although it is in English 1878 Act. If the receipt on such a document is only evidence of payment, & not a medium of transfer, it is not an "assurance" within s. 63.—

YOUNG v. MOOK & MENG (1891), 17 V. L. R. 140.—AUS.

f. ——— Settlement of accounts.]—A. being indebted to B., an account was made out by B. showing the amount which A. owed him, & crediting certain articles, including a waggon, leaving a small balance in favour of B. The account was signed by A. The

27. Inventory with receipt attached.]

An inventory of goods with receipt for purchase-money attached, the vendor remaining in apparent possession of the goods, is a bill of sale within 1854 Act, & requires registration.—*Re BAUM, Ex p. COOPER* (1878), 10 Ch. D. 313; 48 L. J. Bcy. 40; 39 L. T. 521; 27 W. R. 298, C. A.

Annotations:—*Expld. & N.F. Woodgate v. Godfrey* (1879), 5 Ex. D. 24. *Consd. Marsden v. Meadows* (1881), 7 Q. B. D. 80. *Consd. & Apld. Haydon v. Brown* (1888), 59 L. T. 330. *Consd. M. S. & L. Ry. Co. v. North Central Wagon Co.* (1888), 13 App. Cas. 554. *Refd. Salter v. Brooks* (1879), *De Colyar's County Ct. Cases*, 82; *Carrard v. Meek* (1880), 50 L. J. Q. B. 187; *Re Watson, Ex p. Official Receiver in Bkpey.* (1890), 63 L. T. 209. *Mentd. Re Cross, Ex p. Payne* (1879), 11 Ch. D. 539; *Re Hood, Ex p. Burgess* (1893), 9 T. L. R. 541.

SUB-SECT. 2.—AFTER 1878.

See 1878 Act, s. 4.

28. Whether property passing independently—

Sale by sheriff.]—The sheriff having seized the goods of deft. under a writ of *fi. fa.* issued by C., sold them to claimant for £65. A deposit of £40 was paid at the time of sale, & £25 on the following day; the sheriff, thereupon, gave to claimant an inventory of the goods, & a receipt for the price, which were never registered under 1878 Act. Deft. remained in possession of the goods, which were afterwards seized by the sheriff under another writ of *fi. fa.*:—*Held*: the inventory & receipt did not amount to a bill of sale, & claimant was entitled to the goods as against plffs.—*MARSDEN v. MEADOWS* (1881), 7 Q. B. D. 80; 50 L. J. Q. B. 536; 45 L. T. 301; 29 W. R. 816, C. A.

Annotations:—*Consd. Preece v. Gilling* (1885), 53 L. T. 763. *Apld. Fox v. Barnett* (1886), 2 T. L. R. 233. *Consd. North Central Wagon Co. v. M. S. & L. Ry. Co.* (1887), 35 Ch. D. 191; *Re Roberts, Evans v. Roberts* (1887), 36 Ch. D. 196; *French v. Bombernard* (1888), 60 L. T. 48. *Fold. Jones v. Tower Furnishing Co.* (1889), 61 L. T. 84. *Refd. Re Hall, Ex p. Close* (1881), 14 Q. B. D. 386; *Re Hardwick, Ex p. Hubbard* (1886), 34 W. R. 790; *Haydon v. Brown* (1888), 59 L. T. 330; *Madell v. Thomas* (1890), 64 L. T. 9; *Grigg v. National Guardian Assoc.* (1891), 64 L. T. 787; *Re Hood, Ex p. Burgess* (1893), 9 T. L. R. 541; *Ramsay v. Margrett* (1894), 70 L. T. 788; *Stammers v. Margrett* (1905), 21 T. L. R. 342.

29. Contemporaneous letting to

debtor's wife.]—The goods of deft. were seized by the sheriff under a writ of *fi. fa.* issued by claimant, & were sold by private contract to claimant, who agreed to let them to deft.'s wife on certain terms. On completion of the sale the sheriff gave claimant an inventory of the goods, which were afterwards seized by the sheriff under another writ of *fi. fa.* issued by pltf. An interpleader issue having been tried in the county ct., the judge found there had been a complete transaction of purchase & sale irrespective of the inventory: *Held*: there was evidence to justify the finding, & the inventory was not an assurance within 1878 & 1882 Acts.—*HAYDON v. BROWN* (1888), 59 L. T. 810, C. A.

30. ———.]—A sheriff having seized pltf.'s goods under a writ of execution, an order was made by consent giving the sheriff power to sell them by private contract to deft. co. The goods were sold to the co. for the amount of the execution debt; the money was paid, & a receipt for it, together with an inventory of the goods, sent by post. The same day deft. co. let the

goods to debtor's wife on a hiring agreement. Debtor became bkpt., & his trustee claimed the goods. The receipt and inventory were not registered:—*Held*: the transaction was one of purchase & sale, & the documents did not require registration.—*JONES v. TOWER FURNISHING CO.* (1889), 61 L. T. 84; *sub nom. Re JONES, Ex p. TOWER FURNISHING CO.*, 6 Morr. 193, D. C.

Annotations:—*Consd. Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 1. *Folld. Stammers v. Margrett* (1905), 21 T. L. R. 342.

31. ———.]—On Aug. 17, 1887, a creditor issued a writ of execution on a judgment recovered against A. On the next day A. made a statutory declaration authorising pltf's., as far as they could purchase the furniture from the sheriff, to do so, & thus to avoid a sale by auction on the premises, & on that day an order was obtained at chambers, by consent of A. & the judgment creditor, that the sheriff should be at liberty to sell the furniture to pltf's. for £800, describing it as "then seized by the sheriff," but it had not in fact then been seized, although an officer had been sent down to make an inventory. On the 19th, the warrant was issued on the writ to an officer to execute the writ, & a receipt was given by the officer to pltf's. for £800, then paid by them to him, the receipt being "for £800 for furniture seized & sold" by the officer, & it was dated on the 19th, though not actually given until the 20th. On the 19th there was an agreement in writing between pltf's. & A.'s wife, which agreement on the face of it was a hiring agreement, i.e., an agreement to let her the furniture on hire, & that she should pay £1,200 for it in monthly instalments of £25, & that on full payment it should become hers, & so the furniture was left in the house as before. In Nov., 1887, deft. recovered judgment against A. for above £900 & issued a writ of execution against the furniture, & an interpleader issue was directed, to try whether the goods at the time of deft.'s execution belonged to A. or to pltf's. The judge told the jury that in substance the question was whether the transaction was honest & *bonâ fide*, & was really what it purported to be, & that if so there would be no objection to it, that it was the only way to protect the furniture of a judgment debtor, & that if the transaction was real they should find for pltf's., which they did:—*Held*: the jury, in finding that the transaction was honest & was really what it purported to be, had virtually negatived the suggestion that it had been something different, & an application for a new trial must be dismissed.—*TOWER FINANCE & FURNISHING CO. v. BROWN* (1890), 6 T. L. R. 192, D. C.

32. ———. **Receipt containing terms of sale.**]—Although a document may be in form a receipt given by the sheriff on the sale of goods, if such document really is an embodiment of the contract made by the sheriff with the purchaser, & was intended by the parties as such, it amounts to an assurance, & must be registered as a bill of sale.

Goods seized by the sheriff under a writ of execution were sold privately by leave of the ct., & a receipt was given by the sheriff to the purchaser in the following form: "Received from, etc. . . . £122 1s. 9d. being for the goods, chattels, &

effects now in & upon the premises No. 471, Bethnal Green Road, which were seized by the sheriff of the county of London under & by virtue of a writ of *fi. fa.*, & hereby sold as far as he lawfully can or may, without any warranty of title & with the consent of deft., who is a builder, & under an order of the master, dated, etc." :—*Held*: the document was a bill of sale & not being registered must be declared void.—*Re HOOD, Ex p. BURGESS* (1893), 42 W. R. 23; 9 T. L. R. 541; 37 Sol. Jo. 602; 10 Morr. 231; 4 R. 502, C. A.

33. ———.]—An execution having been levied on the goods of B. an arrangement was made that S. should buy the goods from the sheriff & let them on hire to B. A few days afterwards S. applied to the auctioneers who had been employed by the sheriff for an inventory, which was sent to him, with a receipt from the sheriff's officer, for which no request had been made. The goods were afterwards taken in execution while in B.'s possession:—*Held*: S. had a good title without the documents, & the inventory & receipt did not require registration.—*STAMMERS v. MARGRETT* (1905), 21 T. L. R. 342.

Case relating to receipt given on sale by sheriff before 1878, see No. 24, *ante*.

34. ———. **Sale by county court bailiff.**]—The bailiff executing a county ct. judgment seized goods on which C. had a bill of sale. C., by letter to the bailiff, offered to buy the goods at a valuation, deducting the amount of his advance. The bailiff assented, & the goods were delivered to C., with an inventory, on which was written a memorandum of the sale to C.:—*Held*: the letter was only an offer, & what really transferred the property was the subsequent oral sale, & the letter & the memorandum did not need registration.—*GRACE v. GARD* (1889), 6 T. L. R. 74, D. C.

35. ———. **Sale by owner.**]—In an execution on a judgment obtained by deft. against K. certain bricks were seized, which were claimed by pltf. Pltf.'s claim was that K. had sold him 60,000 bricks, & a receipt for £80 as the price of them was produced. It was proved that K. had in his possession a larger number of bricks & continued dealing with them & there was no evidence that any had been appropriated to the contract:—*Held*: pltf.'s title depended on the receipt, which was a bill of sale & void for want of registration.—*SNELL v. HEIGHTON* (1883), 1 Cab. & El. 95.

36. ———. **Sale by trustee in bankruptcy.**]—An execution having been levied on the goods of H., he filed a liquidation petition, & the trustee in the liquidation paid out the sheriff & sold the goods to P., giving him a receipt & inventory. P. then let the goods on hire to H., & execution was afterwards levied on them for another debt of H.:—*Held*: the inventory & receipt given by the trustee did not require registration.—*PARNACOTT v. DIEUDONNÉ* (1885), 2 T. L. R. 98.

37. ———. **Debtor & grantee living in same house.**]—B. having become bkpt. was allowed to retain some of his furniture, which he sold to J. The remainder was sold to J. by the trustee in bkpey., a receipt being given in each case. B. & J. were living in the same house & continued to do so after the sales to J. Execution being levied on the furniture for a debt of B. it was claimed by

waggon was in A.'s possession at the time, in an unfinished state, & was left with him to be completed in consideration of the balance due on the account. There was no other evidence of a sale of the waggon from A. to B.:—*Held*: as there was no sale of the waggon independent of the written document,

it amounted to a bill of sale.—*SHIRREFF v. VYE* (1885), 24 N. B. R. 572.—*CAN.*

35 i. ———. **Sale by owner.**]—At the trial of an interpleader issue involving the question of ownership of certain horses, pltf. gave evidence of having bought the horses from execution

debtor, & put in evidence a document purporting to be a receipt for the purchase-money. The judge having non-suited pltf., on the ground that the document was an assurance of personal chattels, requiring to be registered under 1898 Act, s. 3:—*Held*: the non-suit must be set aside, as the document

Inventories of goods and receipts

2.]

J. :—*Held* : the receipts did not require registration.—*FOX v. BARNETT* (1886), 2 T. L. R. 233, C. A.

38. — Sale by tenant to landlord—Furniture & house relet to tenant—Inventory in lease.—A tenant being in arrear with his rent, agreed to sell his furniture to the landlord, the purchase-money being used to pay the arrears of rent. The house was then let with the furniture to the tenant, the lease containing an inventory of the furniture & providing that on payment of £200 the tenant might repurchase it. Execution was afterwards levied on the furniture under a judgment obtained against the tenant by a third party :—*Held* : there was a *bonâ fide* sale, & the lease did not require registration.—*VICTORIA DAIRY CO. v. WEST* (1895), 11 T. L. R. 233, D. C.

Annotation :—*Folld. Clapham v. Ives* (1904), 91 L. T. 69.

39. — — — — —.—I. being indebted to H., agreed to sell his "valuation" at the S. Hotel to him, T. to value for both. T. prepared & signed an inventory, & valuation for £930 12s. 7d., which was stamped & dated Aug. 9, 1902. Subsequently, on Sept. 12, H. granted I. a quarterly lease of the hotel, & also let to him the fixtures & effects set out in the schedule, & at the end of the lease it was stated "the whole of the valuation as per inventory is the property of H. & Sons, brewers," & that was signed by I. :—*Held* : neither the document of Aug. 9 nor the lease of Sept. 12 constituted a bill of sale, as there was a good sale, which passed the property independently of the documents.—*CLAPHAM v. IVES* (1904), 91 L. T. 69 ; 48 Sol. Jo. 417, D. C.

40. — — — Goods delivered to purchaser—Subsequent letting agreement.—A lessee being in arrear with his rent, agreed for the sale to his lessor of the furniture on the premises for £1,500, to be applied in reducing the arrears, & the lessor agreed to grant the lessee a lease of the same furniture for six months with an option to buy it back at any time during that period for a like sum. A representative of the lessor gave cheques for £1,500 to the lessee, who thereupon handed him a chair by way of delivery of the whole furniture. The lessee then signed a document consisting of a receipt for £1,500 as consideration for the furniture comprised in the inventory attached. The lessee's part of the hiring agreement was next handed over duly executed, but the lessor did not execute the agreement till a day or two later. Finally the lessee indorsed the cheques over to the lessor in reduction of the arrears of rent. No document was registered as a bill of sale. Some four months later debts. distrained on the furniture for rates owing by the lessee in respect of the premises. Thereupon the lessor brought an action claiming a declaration that the furniture was his property :—*Held* : as the property in the furniture passed by delivery, the receipt with inventory attached was not an assurance, but a mere record of the sale which did not require to be registered.—*PRUDENTIAL MORTGAGE CO. v. MARYLEBONE BOROUGH COUNCIL* (1910), 8 L. G. R. 901 ; 71 J. P. Jo. 339.

41. — Prior oral agreement—Letting agreement contemporaneous with receipt.—The B. co., being in want of money & being in possession of wagons in which they had an interest, applied to

resp., who agreed to buy the wagons for £1,000, & advanced that sum, £257 thereof being paid to the owners of the wagons & the rest, £743, to the co. Resp. received from the co. an invoice for the wagons & a receipt for the £743, & from the owners of the wagons a receipt for the £257. At the same time resp. leased the wagons to the co. for three years, at a yearly rent payable quarterly, & calculated to replace the £1,000 with 7 per cent. interest, upon the terms that if all the payments were duly made the co. should have the option of purchasing the wagons at the end of the lease for a nominal sum, & that if the rent was not duly paid after demand resp. should be entitled to repossess & enjoy the wagons as of their former estate, & that the agreement should thereupon cease & determine. The co. having made default in payment of the rent, resp. claimed the wagons from a railway co. into whose possession they had come, but were resisted on the ground that the transaction was void under the 1878 & 1882 Acts, the documents not being in the form prescribed by those Acts :—*Held* : the transaction was in fact a purchase by resp., & was not a mtge. by the co. or a security for the payment of money, & the documents were not bills of sale, but even if they had been, resp. had made an independent title to the wagons.—*MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO. v. NORTH CENTRAL WAGON CO.* (1888), 13 App. Cas. 554 ; 58 L. J. Ch. 219 ; 59 L. T. 730 ; 37 W. R. 305 ; 4 T. L. R. 728, H. L. ; *affg. S. C. sub nom. NORTH CENTRAL WAGON CO. v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.* (1887), 35 Ch. D. 191, C. A.

Annotations :—*Distd. Re Yarrow, Collins v. Weymouth* (1889), 59 L. J. Q. B. 18. *Consd. Re Watson, Ex p. Official Receiver in Bkpy.* (1890), 25 Q. B. D. 27 ; *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 1. *Folld. Clapham v. Ives* (1904), 91 L. T. 69. *Reid. French v. Bombernard* (1888), 60 L. T. 48 ; *Haydon v. Brown* (1888), 59 L. T. 330 ; *Newlove v. Shrewsbury* (1888), 21 Q. B. D. 41 ; *Redhead v. Westwood* (1888), 59 L. T. 293 ; *Re Yates, Batchelor v. Yates* (1888), 38 Ch. D. 112 ; *Jones v. Tower Furnishing Co.* (1889), 61 L. T. 84 ; *Grigg v. National Guardian Assee.*, [1891] 3 Ch. 206 ; *Re Hood, Ex p. Trustee v. Burgess* (1893), 68 L. T. 591 ; *Ramsay v. Margrett*, [1891] 2 Q. B. 18. *Mentd. Secretary of State in Council of India v. British Empire Mutual Life Assee.* (1892), 67 L. T. 434 ; *Re Whiteley, Ex p. Smith* (1892), 66 L. T. 291.

42. — — — Goods in warehouse.—Furniture, the property of C., was deposited in a warehouse in the name of J., who paid the warehouse charges. C. subsequently agreed to sell the furniture to J. & R. for £55, & they sent C. a cheque for that amount. C. then sent them a list of the furniture with a receipt written at the end, & the furniture was shortly afterwards sent to them from the warehouse, the delivery order to the warehouse being signed by J. The furniture was afterwards settled by J. & R. on C.'s wife, & was in her possession :—*Held* : there had been a perfect & complete transaction of purchase & sale, by which J. & R. acquired a good title to the furniture, independently of the list & receipt, & the document was not a bill of sale.—*SHEPHERD v. PULBROOK* (1888), 59 L. T. 288 ; 4 T. L. R. 612, C. A.

43. — — — Consideration for guarantee of grantor's banking account.—Where, upon an oral agreement by which title to a personal chattel was given by way of security for an advance, the grantor of such chattel signed a "receipt," which was not intended to, & did not, express the contract between the parties :—*Held* : such document, not being an assurance, was not a bill of sale, &

was in form a receipt for the purchase-money, & since there was evidence of a sale completed independently of it, it should have been left to the jury to say whether such an independent

transaction had in fact taken place or not.—*TRACEY v. MADDEN* (1908), 7 C. L. R. 143.—**AUS.**

h.

Alleged sale by son to

father—*Son remaining in apparent possession.*—Debtor sold to his father all his stock-in-trade, etc., in connection with a business for their fair value, & signed the following docu-

the grantee in possession of the chattel under such agreement being able to defend his possession without reference to such document, his title was not affected by Bills of Sale Acts.—*NEWLOVE v. SHREWSBURY* (1888), 21 Q. B. D. 41—57 L. J. Q. B. 476; 36 W. R. 835, C. A.

Annotations:—*Reid*. *Bowker v. Williamson* (1889), 5 T. L. R. 382; *Mills v. Charlesworth* (1890), 25 Q. B. D. 421; *Grigg v. National Guardian Assce.*, [1891] 3 Ch. 206; *Morris v. Delobel-Filipo*, [1892] 2 Ch. 352; *London & Yorkshire Bank v. White* (1895), 11 T. L. R. 570.

44. — Prior independent bargain—Sale by husband to wife.—A wife, who had separate estate, agreed to purchase from her husband some furniture & other personal chattels belonging to him, which were in the house in which she lived with him. She stipulated that a receipt for the purchase-money should be given to her, & instructed her solicitor to draw the receipt. After the purchase-money had been paid to the husband he signed a receipt, which the wife's solr. had prepared. The document acknowledged the receipt from the wife of the agreed sum, as the purchase-money "for all my furniture, plate, etc., which I hereby acknowledge are now absolutely her property." There was no formal delivery of the goods by the husband to the wife, but they remained, as they had previously been, in the house in which the husband & the wife were living together. She subsequently sent part of the goods to her own bankers, & the remainder were afterwards taken in execution by a judgment creditor of the husband. In an interpleader issue between the wife & the execution creditor: *Held*: the receipt, notwithstanding the words at the end of it, did not form part of the transaction passing the property in the goods to the wife, but the property had passed to her by the prior & independent bargain, & the receipt did not require registration, & the wife was entitled to the goods as against the execution creditor.—*RAMSAY v. MARGRETT*, [1894] 2 Q. B. 18; 63 L. J. Q. B. 513; 70 L. T. 788; 10 T. L. R. 355; 1 Mans. 184; 9 R. 107, C. A.

Annotations:—*Folld*. *Withers v. Berry* (1895), 39 Sol. Jo. 559. *Apld.* *Chapman v. Ives* (1901), 91 L. T. 69. *Consd.* *Re Lavey, Ex p. Trustee*, [1918] 19 B. & C. R. 116. *Mentd.* *Re Satterthwaite, Ex p. Trustee* (1895), 2 Mans. 52; *Re Reis, Ex p. Clough*, [1904] 1 K. B. 451; *Re Magnus, Ex p. Salaman* (1910), 80 L. J. K. B. 71; *Rogers, Eungblut Co. v. Martin* (1910), 103 L. T. 527.

45. — Possession taken by grantee—Furniture subsequently let to grantor with house.—On Mar. 4, 1881, A. paid B. £200 for the purchase of his furniture, taking at the time of the purchase & payment a receipt for the purchase-money. The furniture remained in the possession of B. until Mar. 15, when A. removed it to a warehouse, paying for the removal & warehousing. On Mar. 26 A. again removed it to a house, which she let to B. from Mar. 29, together with the furniture therein. On Nov. 14 the furniture was taken in execution under a judgment obtained against B. in proceedings commenced in July:—*Held*: the purchase of the furniture being a *bonâ fide* transaction, A. had a good title thereto apart from the receipt, & the receipt was not a bill of sale, & did not require attestation & registration.—*PREECE v. GILLING* (1885), 53 L. T. 763; 2 T. L. R. 79, D. C.

46. — Out & out sale—By grantee of bill of sale.—The grantees under a bill of sale given by F. sold the goods to H. & gave him a receipt & inventory. H. allowed the goods to remain in the possession of F., & execution was levied upon them for a debt of F. H. having claimed the goods

against the execution creditor:—*Held*: the title had passed by the sale, & the receipt & inventory did not require registration.—*HAY v. NATHAN* (1886), 3 T. L. R. 11, C. A.

47. — Sale ostensibly by landlord's broker—Contemporaneous letting agreement to debtor's wife.—The household furniture of deft. was distrained by his landlord on two occasions, & was sold by the landlord's broker to claimants, who on each occasion immediately after the sale let it to deft.'s wife under a hiring agreement. On completion of each sale the broker gave claimants an inventory of the goods, & a receipt for the purchase-money. The documents were not registered. Deft. remained in possession of the goods, which were afterwards seized by the sheriff under a writ of *fi. fa.* issued by pltf.:—*Held*: the documents together constituted a bill of sale, & required registration.—*FRENCH v. BOMBERNARD* (1888), 60 L. T. 48; 5 T. L. R. 55, D. C.

Annotations:—*Distd.* *Jones v. Tower Furnishing Co.* (1889), 61 L. T. 84. *Consd.* *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 1.

48. — Sale followed by hire-purchase agreement.—W., a solr., in order to provide funds for the dissolution of a partnership between his brother & Y., bought some of the machinery in Y.'s sawmill for £650, receiving from Y. a written receipt for the money as in full payment for the machinery. On the next day W. & Y. signed an agreement, by which W. let the machinery to Y. at a half-yearly rent of £50, it being agreed that when the half-yearly payments amounted to £1,000 the machinery should revert to Y. absolutely on the payment of a further sum of £5. The machinery remained in Y.'s possession, nameplates being attached declaring W. to be the owner, until Y.'s bkpey., when W. claimed it:—*Held*: there was no document requiring registration, & W. was entitled to the machinery.—*Re YARROW, COLLINS v. WEYMOUTH* (1889), 59 L. J. Q. B. 18; 61 L. T. 642; 38 W. R. 175.

Annotations:—*Reid*. *Re Watson, Ex p. Official Receiver in Bkpey.* (1890), 25 Q. B. D. 27; *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 1.

49. — Oral gift referring to inventory—By husband to wife.—H. by oral gift gave all his furniture to his wife. At the time of the gift he pointed to an inventory attached to a deed reciting the gift but not then executed, saying: "I give you all the goods mentioned in this inventory":—*Held*: though reference must be made to the inventory it did not come within the definition of a bill of sale.—*LOCK v. HEATH* (1892), 8 T. L. R. 295, D. C.

50. — Receipt with inventory on absolute sale—Contemporaneous letting agreement—Consideration for past debt.—A. being indebted to B. & having no property but her furniture, the total amount of the debt & interest was agreed at £900, but no definite arrangement was come to until Feb. 26, when the four following documents were executed: (1) a receipt with inventory attached, wherein A. acknowledged the receipt of £900, agreed purchase price of the furniture & effects set forth in the schedule attached thereto; (2) an agreement for the hiring by A. of the furniture at a rental of £40 *per annum*, with a proviso giving B. power to determine the agreement on giving six months' notice; (3) an agreement releasing the previous loans, which recited that £900 had been set off against the purchase price & that the

ment: "Received £50 11s. for the undermentioned goods," giving an inventory of them, but remained in apparent possession of the goods:—*Held*: as there was no complete &

independent contract proved apart from the document, which was intended to indicate that the son sold the goods to the father, & was not a

mere receipt, it was a bill of sale requiring registration.—*YARNTON v. TAYLOR & YARNTON* (1887), 13 V. L. R.

BILLS OF SALE.

Sect. 3.—Inventories of goods and receipts: Sub-sect. 2. Sects. 4 & 5: Sub-sect. 1.]

furniture had been delivered to B.; (4) a letter signed by B. that A. was to have the right to repurchase the furniture at any time on payment of £900. On the same day B. wrote to A.'s housekeeper authorising her to take possession of the furniture on B.'s behalf, & on Feb. 29 A. handed the housekeeper a chair in the name of the whole of the furniture, & later in the day the housekeeper redelivered the chair to A. under the terms of the hiring agreement. In Apr. A. became bkpt. & A.'s trustee in bkpcy. claimed the furniture as property divisible amongst her creditors. The county ct. judge having found that there had been an oral sale of the furniture & an oral hiring prior to the execution of the four documents, & that they were not necessary to complete B.'s title, which was good apart from them:—*Held*: the finding of fact of the county ct. judge was wrong, & the transaction was carried out by what amounted to a bill of sale.—*Re EALES, Ex p. STEEL*. (1905), 54 W. R. 202; 50 Sol. Jo. 60, D. C.

Annotation:—Refd. Sales Agency v. Elite Theatres, [1917] 2 K. B. 161.

51. — Alleged sale by husband to wife—As security for loans.]—Bkpt., husband of resp., purchased for £950 the furniture in the house of a previous tenant & inhabited the house with his wife & children, the lease of the premises being in his wife's name. The rent, rates & taxes were paid out of money provided by the husband, the wife having a banking account which was fed from the husband's banking account into which he paid large sums for household expenses, the children also contributing to the support of the home. The wife alleged that in Dec., 1914, she advanced her husband £100, that in July, 1915, her husband wanted £350 & that she then agreed to buy the furniture in the house for £600 & allowed her husband to pawn certain articles of jewellery belonging

to her for £350, it being agreed that the £350 & the £100 should be received by the husband on account of the purchase-money. £50 was alleged to have been paid by the sale of the pawnticket of the jewellery, & the remaining £100 was paid by three instalments of £20, £50, & £30 after the act of bkpcy. The wife produced receipts for the loans. The trustee in bkpcy. moved for a declaration that the receipts or some or one of them were or was a bill of sale & void under 1878 & 1882 Acts:—*Held*: the receipts were a security for loans which the wife had made to bkpt. on the security of furniture, & the documents were void as being bills of sale.—*Re LAVEY, Ex p. TRUSTEE*, [1918–19] B. & C. R. 116; *subsequent proceedings*, [1920] 1 K. B. 674.

SECT. 4.—OTHER ASSURANCES.

52. Contract of sale—Verbal contract reduced to writing.]—A document may be within 1854 Act so as to require registration, although made in pursuance of a previous verbal arrangement, if it contains all the terms agreed on, & would of itself pass the property in the goods to which it refers.—*BRANTOM v. GRIFFITHS* (1877), 2 C. P. D. 212; 46 L. J. Q. B. 408; 36 L. T. 4; 41 J. P. 468; 25 W. R. 313, C. A.

Annotations:—Consd. Thomas v. Kelly (1888), 13 App. Cas. 506. *Refd. Re Phillips, Ex p. National Mercantile Bank* (1880), 29 W. R. 227. *Mentd. Re Cross, Ex p. Payne* (1879), 11 Ch. D. 539; *Salter v. Brooks* (1879), De Colyar's County Ct. Cases, 82.

53. — Memorandum in writing required by Statute of Frauds.]—Where a contract for sale of goods within Stat. Frauds, s. 17, is valid solely by virtue of a memorandum in writing, such memorandum is an assurance of personal chattels within 1878 Act.

At a sale of farm produce by auction, W. bought a stack of hay for £40 5s. The auctioneer's clerk signed the name of W. as purchaser in the auctioneer's book, which was also signed by the

PART II. SECT. 4.

52 i. Contract of sale—Of hotel & freehold.]—H. agreed to purchase from deft. a freehold property, including hotel & furniture, for £20,000, & agreed to pay £5,000 cash, to pay the balance by instalments with interest, to give a mtge. over the hotel & land, & to give a bill of sale over the furniture. Subsequently deft. agreed to accept guarantors for the amount of the cash deposit, & to carry out the other terms of the prior agreement, except that instead of a bill of sale being taken over the furniture deft. agreed to let the furniture on hire, so as to obviate the necessity of a bill of sale, & deft. expressly stipulated that the property in the furniture was not to pass to H. Deeds were prepared, including a deed of sale of the hotel & freehold for £20,000, expressly excluding sale of the furniture:—*Held*: the deeds did not require registration. *DANBY v. COLONIAL BANK OF AUSTRALASIA* (1893), 19 V. L. R. 586.—**AUS.**

k. Contract for absolute sale—Contemporaneous verbal agreement for redemption.]—A contract in writing for the absolute sale of goods by debtor to his creditor, if there be a contemporaneous parol understanding between the parties that the vendor may have back the goods on paying what is due, is void unless filed as a bill of sale. The transaction does not come within Act No. 557, s. 15.—*ROSEL v. STEPHENS* (1883), 9 V. L. R. 379.—**AUS.**

l. Sale note—On sale under execution.]—A sale note upon a sale at auction by a bailiff under an execution need not be registered as a bill of sale, though the judgment debtor be left

in possession.—*BARNARD v. MANN* (1876), 2 V. L. R. 140.—**AUS.**

m. — Possession retained by vendor.]—A. executed a written note of sale to B. of chattels, & retained possession of them. The day before A.'s insolvency, B. seized them:—*Held*: as the note was not registered as a bill of sale, the trustee was entitled to the chattels.—*Re SHAW* (1883), 9 V. L. R. 16.—**AUS.**

n. — Chattels leased by purchaser to third party.]—In Jan., 1908, C. owed W. £100, & being unable to pay, sold certain horses, dray & harness to W. in consideration of the discharge of the debt & £5 in cash. A document of sale described as a "sale note" was drawn up & signed by the parties on Jan. 31. The goods remained in the possession of C. until early in Feb., when they were leased by W. to a third party, who took possession of them & paid rent to W. They were subsequently seized while in possession of the third party, under an execution issued against C.:—*Held*: the goods having passed out of the possession of the vendor the document of sale was not invalid because of the non-registration as a bill of sale, whether it was intended to be an absolute bill of sale or a bill of sale by way of security.—*WOODROFFE v. TINDALL* (1908), 10 W. A. L. R. 117.—**AUS.**

o. — Chattels not in apparent possession of vendor.]—A father & son lived in the same house. In 1892 the son purchased of the father a safe, a buggy, & a billiard-table. The contract was embodied in sale notes, which were not registered under 1889

Act. The safe & buggy were kept in the premises where the father & son lived. The son had the key of the safe, & kept his papers in the safe. The buggy was generally known to be the son's property. The billiard-table was kept in a house belonging to the purchaser's mother, & away from the residence of the father. The mother let her house & the billiard-table, with the consent of the son, to a third party on the day on which the father committed an act of bkpcy. In June, 1891, the father became bkpt.:—*Held*: the sale notes came within the term "instrument" in the above Act, & were void as against the official assignee for want of registration.—*SLATTERY (OFFICIAL ASSIGNEE) v. SLATTERY* (1895), 16 N. Z. L. R. 332.—**N.Z.**

p. Bill of sale by sheriff—On sale under execution.]—Under 12 Vict. c. 74 & 13 & 14 Vict. c. 62, a bill of sale of an execution debtor's goods executed by a sheriff to a purchaser, whether pltf. in the execution or not, need not be filed.—*KISSOCK v. JARVIS* (1859), 9 C. P. 156.—**CAN.**

q. Deed of gift of chattels in possession.]—A domiciled resident of Queensland, being about to die, executed in 1899 a deed of gift, voluntarily conveying to his wife & several children in equal shares the whole of his property, which included (*inter alia*) chattels in possession, i.e., household goods, implements & live stock:—*Held*: the deed was intended to take effect as an absolute conveyance, & if ineffective for that purpose could not be made effectual as a declaration of trust, & the assignment of the chattels in possession fell under 1891 Act, &

auctioneer, & contained a copy of the conditions of sale, & specified the lot & the price. No part of the purchase-money was paid, one of the conditions being that the purchaser was to have six months' credit, & the whole of the hay remained on the premises of the vendor & in his apparent possession. The entry in the auctioneer's book was not registered as a bill of sale. The hay was seized in execution under a judgment obtained by creditors of the vendor:—*Held*: as the sale would have been void under Stat. Frauds, s. 17, but for the memorandum of the contract contained in the auctioneer's book, such memorandum was an assurance & a bill of sale within 1878 Act, void as against the execution creditors for want of registration.—*Re ROBERTS, EVANS v. ROBERTS* (1887), 36 Ch. D. 196; 56 L. J. Ch. 952; 57 L. T. 79; 51 J. P. 757; 35 W. R. 681 T. L. R. 678.

54. Agreement for sale—Reserving vendor's lien.]

—Under a provision contained in testator's will, & with the sanction of the ct. in an action for the administration of his estate, A., one of the trustees, entered into an agreement with C., the other trustee, for the purchase of testator's business, the purchase-money to be paid at future date, & A. & C. as the trustees, to be entitled in the meantime to a lien or charge upon the business & effects for the amount of the purchase-money with interest. The agreement was not registered as a bill of sale. A. took possession of the business & effects under the agreement, & subsequently became bkpt., & the purchase-money being still unpaid, C. claimed to enforce the lien against the proceeds of sale of certain chattels, which belonged to the business at the time of the bkpey.: *Held*: the agreement operated as an assignment to A. upon purchase & a regrant to C. of the property purchased & was an assurance of personal chattels within 1878 Act, s. 4, which ought to have been registered.—*COBURN v. COLLINS* (1887), 35 Ch. D. 373; 56 L. J. Ch. 504; 56 L. T. 431; 35 W. R. 610; 3 T. L. R. 419.

Annotations: *Consd. Re Webber, Ex p. Slater* (1891), 61 L. T. 426. *Distd. McEntire v. Crossley*, [1895] A. C. 457; *Mellor's Trustee v. Maas*, [1902] 1 K. B. 137. *Refd. Lord's Trustee v. G. E. Ry. Co.* (1907), 97 L. T. 760.

55. Purported deed of sale—Subsequent lien to secure advances—Title independent of document.]

—L. purchased his brother's goods under a deed of assignment. He afterwards took possession, & repudiated the purchase. It was then agreed that he should have a lien on the goods for his advances:—*Held*: L. had a good title to his lien, independently of the document, which did not require

was ineffectual for lack of registration. *Semble*: the defect might be cured, as to so much only of the chattels as still remained in specie, by registration of the deed under that Act. *ANNING v. ANNING* (1907), 4 C. L. R. 1049.—**AUS.**

r. Assignment to creditor for benefit of two creditors—Repayment of surplus to debtor.—A., being sued by B., & being indebted to C., by arrangement between A., B., & C., in consideration of a further advance of trifling amount from C., & C. forbearing to sue A. for a reasonable time, & also obtaining for A. forbearance from B., executed an assignment to C. of the greater part of his stock-in-trade, in trust to sell & pay B. & C. ratably, & pay over any surplus to A. Immediate possession was given to C.:—*Held*: the assignment was not a bill of sale requiring registration as such.—*COHEN v. MCGEE* (1878), 4 V. L. R. 543.—**AUS.**

54 i. *Agreement for sale—Or hiring lease.*—C., the owner of oxen, delivered

them to H. under an agreement that the latter was to have their use for a year or more for their keep. H., pretending to be the owner of the cattle, executed a bill of sale of them to debt., who permitted H. to remain in possession. H. afterwards returned the cattle to C., who then sold them to pltf.:—*Held*: the arrangement made by C. with H. was not a hiring lease or agreement for sale within 5th R. S., c. 92, s. 3.—*LEWIS v. DENTON* (1886), 7 R. & G. 235; 7 C. L. T. 323.—**CAN.**

54 ii. — *Prior bill of sale.*—J. & M., being unable to pay a debt, delivered to their creditor, pltf., three cows, which were accepted in full satisfaction of the debt. On the same day on which the sale & delivery took place, pltf. took a bill of sale of the cattle: *Held*: assuming the bill of sale to have been given prior to the sale & delivery, as against debt. levying under an execution, pltf. could rely upon the sale & delivery. *Semble*: as the cattle passed by reason of the sale & delivery, it was not necessary

registration as a bill of sale.—*PARKER v. LYON* (1888), 5 T. L. R. 10, C. A.

SECT. 5.—POWERS OF ATTORNEY, AUTHORITIES, OR LICENCES TO TAKE POSSESSION AS SECURITY FOR ANY DEBT.

See 1878 Act, ss. 4, 6.

SUB-SECT. 1.—ATTORNMEN'T CLAUSE IN MORTGAGE.

See 1878 Act, s. 6.

56. *Second mortgage.*—B., being mtgor. in possession, executed a mtge. on Sept. 12, 1866, of the premises to debts. to secure repayment with interest of certain advances to be made by debts. The mtge. was by indenture between B. & debts., but was never executed by debts.; the deed recited the previous mtge., which was in fee, & by it B. conveyed all the premises comprised in the recited mtge. to debts., in fee, upon trust that debts. should, either immediately or at any time, sell them, " & as a further security for the principal & interest for the time being due from B. to debts., B. did thereby attorn & become tenant to debts., their heirs & assigns, as & from the date thereof, of such of the premises thereby conveyed as were in his occupation, for & during the term of ten years, if that security should so long continue, at the yearly rent of £800, to be paid on Oct. 1 the first yearly rent to be payable on Oct. 1. then next, provided that, notwithstanding anything therein contained, & without any notice or demand of possession, it should be lawful for debts., their heirs, exors., administrators or assigns, before or after the execution of the trusts of sale, to enter upon the mortgaged premises, or any part thereof, & to eject B. or any person claiming through him, & to determine the term of ten years, notwithstanding any lease that might have been granted by B." Debts. made the stipulated advances, & B. continued in occupation of the premises, & on Oct. 15, 1866, debts. distrained for the first year's rent:—*Held*: the deed was not a bill of sale.—*MORTON v. WOODS* (1869), L. R. 4 Q. B. 293; 9 B. & S. 632; 38 L. J. Q. B. 81; 17 W. R. 111, Ex. Ch.

Annotations:—*Refd. Re Bowes, Ex p. Jackson* (1880), 14 Ch. D. 725; *Re Knight, Ex p. Voisey* (1882), 52 L. J. Ch. 121; *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373. *Mentd. Burchell v. Clark* (1876), 25 W. R. 334; *Re Kitchin, Ex p. Punnett* (1880), 16 Ch. D. 226; *Re Threlfall, Ex p. Queen's Benefit Bldg. Soc.* (1880), 16 Ch. D. 274; *Hartcup v. Bell* (1883), Cab. & El. 19; *Kearsley v. Philips* (1883), 11 Q. B. D. 621; *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608.

57. Whether licence or authority to take possession of chattels—Excessive rent.]—A co. being

for pltf. to produce the bill of sale.—*KENNEDY v. WHITIE* (1895), 27 N. S. R. 460.—**CAN.**

t. *Agreement to manufacture & deliver goods—Never property of manufacturer.*—M. agreed to manufacture & furnish to the joint account of himself & pltf. staves to be loaded in cars at a railway station by a day named. By the agreement the staves were to be considered at all times, whether marked or not, the property of pltf. as security for advances:—*Held*: under the agreement the staves never were the property of M., & the agreement did not require filing under Chattel Mortgage Act.—*KELSEY v. ROGERS* (1882), 32 C. P. 621.—**CAN.**

a. *Agreement to give possession of goods—At future date on happening of event.*—A contract to give possession of goods at some future date, on the happening of a particular event, is not a bill of sale.—*EMPLOYERS' LIABILITY ASSURANCE CORPN. v. MELBOURNE* (1901), 35 I. L. T. 100.—**IR.**

Sect. 5.—Powers of attorney, authorities, or licences to take possession as security for any debt: Sub-sects. 1, 2, 3 & 4.]

indebted to their bankers on their current account, gave a mtge. whereby they covenanted to surrender the copyhold premises on which the co.'s works were carried on, & the co. by the same mtge. deed attorned & became tenant to the mtgees. from year to year of the premises at the yearly rental of £5,000, to be paid by equal half-yearly instalments. No surrender of the premises was ever made:—*Held*: this was not a bill of sale, not being a licence or authority to take possession of chattels within 1854 Act.—*Re STOCKTON IRON FURNACE Co.* (1879), 10 Ch. D. 335; 48 L. J. Ch. 417; 27 W. R. 433, C. A.

Annotations:—Consd. *Re Bowes, Ex p. Jackson* (1880), 14 Ch. D. 725. **Distd.** *Green v. Marsh*, [1892] 2 Q. B. 330. **Refd.** *Re Knight, Ex p. Voisey* (1882), 21 Ch. D. 442; *Re Willis, Ex p. Kennedy* (1888), 21 Q. B. D. 384; *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.* (1896), 75 L. T. 508. **Mentd.** *Re Bridgewater Engineering Co.* (1879), 12 Ch. D. 181; *Re Crumlin Viaduct Works Co.* (1879), 48 L. J. Ch. 537; *Re Kitchin, Ex p. Punnett* (1880), 16 Ch. D. 226; *Re Betts, Ex p. Harrison* (1881), 18 Ch. D. 127; *Shubbrook v. Tufnell* (1882), 30 W. R. 740; *Re Lewis, Lewis v. Williams* (1886), 31 Ch. D. 623; *Re Gardner, Long v. Gardner* (1894), 71 L. T. 412.

After 1878.]—See Sect. 7, post.

See, further, MORTGAGE.

Annotations:—Apprvd. *Stevens v. Marston* (1890), 60 L. J. Q. B. 192. **Distd.** *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373.

60. —.]—An agreement for the letting of an hotel by debt. to pltf. contained a covenant that the landlord should have the same rights & remedies as landlords ordinarily possessed in cases of rent in arrear against the goods of the tenant for the recovery of any amount due for any liquors sold by him to the tenant, not exceeding £200, over & above any rent due, & should be at liberty to seize & distrain any goods of the tenant in respect of any such debt or amount, & to sell same as landlords were empowered to do for arrears of rent. The agreement had not been registered as a bill of sale. Debt. entered under the covenant upon the demised premises, & distrained in respect of a debt then due to him for liquors supplied to pltf.: *Held*: the covenant amounted to a bill of sale, although there was no existing debt at the time when it was made, as being "a licence to take possession of personal chattels as security for a debt" within 1878 Act, s. 4, & was void for want of registration.—*STEVENS v. MARSTON* (1890), 60 L. J. Q. B. 192; 64 L. T. 274; 55 J. P. 404; 39 W. R. 129; 7 T. L. R. 65, C. A.

Other instruments with power of distress.]—See Sect. 7, post.

SUB-SECT. 2.—BREWER'S LEASE WITH POWER OF DISTRESS.

See 1878 Act, s. 6.

58. For debt due on current account—On goods not on demised premises.]—A brewer's lease contained a licence to the lessor, in case of default being made in payment of such sum of money as should be due & owing to him from the lessee "on the balance of the account current," to take possession of the stock-in-trade & effects of the lessee, whether on the demised premises or elsewhere:

Held: registration was necessary under 1854 Act.—*Re FLAVELL, Ex p. HOPCRAFT* (1865), 14 W. R. 168.

Annotation:—Refd. *Pulbrook v. Ashby* (1887), 56 L. J. Q. B. 376.

59. For default in paying for liquor.]—Pltf. was tenant of a public-house under an agreement whereby he undertook to sell debts, the landlords', beer only. The agreement contained the following proviso: "If, during the tenancy, any sum or sums of money shall be due from the tenant to the landlords in respect of any malt liquors supplied by them to him, & such sum shall remain unpaid for twenty-four hours after a demand in writing, it shall be lawful for the landlords to enter & distrain upon the premises in respect of the amount so due":—*Held*: the agreement constituted a bill of sale, & required registration.—*PULBROOK v. ASHBY & Co.* (1887), 56 L. J. Q. B. 376; 35 W. R. 779.

PART II. SECT. 5, SUB-SECT. 3.

61 i. All materials to belong to landowner.]—F. contracted with debts. to do railway construction work, & it was provided that all the plant, materials, etc. provided by F. for the work should remain, until completion of the work, the property of debts., but that upon completion of the work all of such plant & materials as should not have been used & converted should be delivered up to F.:—*Held*: the contract did not come within Bills of Sale Act so as to require registration.—*CLANCY v. GRAND TRUNK PACIFIC RY. Co.* (1910), 15 B. C. R. 497; 14 W. L. R. 201.—**CAN.**

61 ii. —.]—R. agreed with debts. to get out for them stone for works in progress. To carry out the agreement debts. advanced money, & by the contract between them it was stipulated, "that upon all materials upon which debts. shall have made any advances, debts. shall have & retain a first lien & preference for all money advanced upon same, or under this contract, & same shall become, from the time of their preliminary construction, the absolute property of debts., subject to the right of debts. to reject same, should same be rejected as hereinbefore mentioned, nor shall same, unless afterwards rejected, be removed by R., or appropriated to any other

SUB-SECT. 3.—BUILDING AGREEMENT

See, generally, BUILDING CONTRACTS, ENGINEERS, & ARCHITECTS, post.

61. All materials to belong to landowner—Power to seize on builder making default in building.]—By a building contract, after providing for the erecting of houses, & the granting of leases thereof to the builder as they should be finished, & for advances to be made by A., the owner of the land, to enable B., the builder, to carry on the work, to be repaid before the leases were granted, it was agreed that in case B., his exors., etc., should fail to proceed with the erection & completion of the houses, within the times specified, it should be lawful for A., his heirs, etc., to enter upon & take possession of the whole or any part of the land not leased, with all the buildings & building materials thereon, for his & their own absolute use & benefit:—*Held*: the instrument was not an "assignment, transfer or other assurance of personal chattels," or a "licence to take possession of personal chattels as security for a debt."—*BROWN v. BATEMAN* (1867), L. R. 2 C. P. 272; 36 L. J. C. P. 134; 15 L. T. 658; 15 W. R. 350.

Annotations:—Folld. *Blake v. Izard* (1867), 16 W. R. 108. **Distd.** *Re Steele, Ex p. Conning* (1873), L. R. 16 Eq. 414; *Re McManus, Ex p. Jardine* (1875), 10 Ch. App. 325, n. **Expld.** *Re Harrison, Ex p. Jay* (1880), 14 Ch. D. 19. **Apprvd.** *Re Garrud, Ex p. Newitt* (1881), 16 Ch. D. 522. **Folld.** *Reeves v. Barlow* (1881), 12 Q. B. D. **Distd.**

use than that of the works, but it is distinctly understood that all such materials, as well as tools, instruments, & other things, shall be in the charge & at the risk of R.:—*Held*: the clause must operate in debts.' favour, if at all, as a mtge. or bill of sale, & required registration.—*HOWITT v. GZOWSKI* (1856), 5 Gr. 555.—**CAN.**

61 iii. —.]—A building contract, which provides that "materials brought on the ground or near thereto are to be considered the property of the proprietor," does not require to be registered as a bill of sale.—*TAPPEL v. BODLEY* (1884), 3 N. Z. L. R. 4.—**N.Z.**

Climpson v. Coles (1889), 23 Q. B. D. 465; *Church v. Sage* (1892), 67 L. T. 800. **Refd.** *Re Waugh, Ex p. Dickin* (1876), 4 Ch. D. 527, n.; *Re Standard Manufacturing Co., Ex p. Lowe* (1891), 39 W. R. 369. **Mentd.** *Ilfracombe Ry. Co. v. Poltimore* (1868), 18 L. T. 85; *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345.

62. ———.]—By a building contract it was agreed that all materials brought on the land by the intended lessee should become the property of the intended lessors. The intended lessee entered & commenced building, but obtained no lease:—**Held:** the agreement was not a bill of sale.—**BLAKE v. IZARD** (1867), 16 W. R. 108.

Annotations:—**Apprvd.** *Re Garrud, Ex p. Newitt* (1881), 16 Ch. D. 522. **Folld.** *Reeves v. Barlow* (1884), 12 Q. B. D. 436. **Distd.** *Climpson v. Coles* (1889), 23 Q. B. D. 465; *Church v. Sage* (1892), 67 L. T. 800.

63. ———.]—An agreement, by a clause in an ordinary building contract, that all building & other materials brought by the builder upon the land shall become the property of the landowner, is not a bill of sale within 1878 Act.—**REEVES v. BARLOW** (1884), 12 Q. B. D. 436; 53 L. J. Q. B. 192; 50 L. T. 782; 32 W. R. 672, C. A.

Annotations:—**Consd.** *Re Hall, Ex p. Close* (1884), 14 Q. B. D. 386; *Climpson v. Coles* (1889), 23 Q. B. D. 465. **Distd.** *Church v. Sage* (1892), 67 L. T. 800. **Consd.** *Morris v. Delobel-Flipo*, [1892] 2 Ch. 352. **Refd.** *Joseph v. Lyons* (1884), 51 L. T. 740; *Re Hardwick, Ex p. Hubbard* (1886), 17 Q. B. D. 690; *Re Standard Manufacturing Co.* (1891), 60 L. J. Ch. 292; *Spencer v. Mid. Ry. Co.* (1895), 11 T. L. R. 408. **Mentd.** *Re Walker, Ex p. Barter, Ex p. Black* (1884), 26 Ch. D. 510; *Re Clarke, Coombe v. Carter* (1887), 36 Ch. D. 348; *Re Keen, Ex p. Bristol School Board v. The Trustee* (1902), 86 L. T. 235; *Re Keen & Keen, Ex p. Collins*, [1902] 1 K. B. 555; *Hart v. Porthgair Harbour Co.*, [1903] 1 Ch. 690.

64. ———.]—A building agreement between a landowner & a builder contained a stipulation that the landowner, upon the default of the builder in fulfilling his part of the agreement, might re-enter upon the land & expel the builder, & that on such re-entry all the materials then in & about the premises should be forfeited to & become the property of the landowner “as & for liquidated damages”:—**Held:** such stipulation was not a bill of sale, inasmuch as, though it was a “licence to take possession of personal chattels,” the possession was not to be taken “as security for any debt.”—**Re GARRUD, Ex p. NEWITT** (1881), 16 Ch. D. 522; 51 L. J. Ch. 381; 44 L. T. 5; 29 W. R. 344, C. A.

Annotations:—**Folld.** *Reeves v. Barlow* (1883), 11 Q. B. D. 610. **Consd.** *Climpson v. Coles* (1889), 23 Q. B. D. 465. **Distd.** *Church v. Sage* (1892), 67 L. T. 800. **Mentd.** *Marshall v. Mackintosh* (1898), 78 L. T. 750.

65. Mortgage of land & building materials
Power to enter & seize materials on mortgagor making default in building.]—By a mtge. deed ptlf. assigned to defts. certain land & buildings in course of erection thereon, “& also all bricks, timber, slates, & other building materials which may at any time hereafter be brought by or for the mtgor. into the premises for completing the buildings.” Ptlf. covenanted “that all bricks, timber, etc., which shall be brought upon the premises, etc., shall be considered as immediately attached to &

forming part of the fee simple of & in the same premises, & no part of the bricks, etc., shall be removed from the premises but with the concurrence of the mtgees.” & “that in case the mtgor. shall not proceed with the completion, etc., to the satisfaction of the mtgees., it shall be lawful for the mtgees. to enter upon the premises & to seize & take possession of all bricks, etc., & other building materials, & to complete the said messuages.” The deed further provided that in case of default by the mtgor. it should be lawful for the mtgees. to sell all or any part of the hereditaments or premises, & all bricks, timber, slates, & other materials standing & being thereon, or on any part thereof, either together or in parcels, etc.:—**Held:** inasmuch as it gave a power to sell the building materials, which was independent of the power to enter upon & take possession of the premises, & might be exercised without the latter power being exercised, the deed was an assurance of personal chattels, or a licence to take possession of personal chattels as security for a debt, & was a bill of sale, & was void for want of registration.—

CLIMPSON v. COLES (1889), 23 Q. B. D. 465; 58 L. J. Q. B. 346; 61 L. T. 116; 38 W. R. 110, D. C. **Annotations:**—**Distd.** *Church v. Sage* (1892), 67 L. T. 800. **Refd.** *Re Standard Manufacturing Co.* (1891), 60 L. J. Ch. 292.

66. Mortgage of builder's interest in building agreement—Power to enter & seize materials on builder making default in building.]—A builder assigned, as a security for a loan, a building agreement made between himself & the owner of the land on which the buildings were to be erected, together with all plant & materials on the premises, or to be brought on the premises. There was no express power of seizure or sale in default of payment, but in certain events the mtgee. was to be entitled to take possession of the premises & all plant & materials, & complete:—**Held:** the document assigning the agreement was, as regards the plant & materials, a bill of sale.—**CHURCH v. SAGE** (1892), 67 L. T. 800; 41 W. R. 175; 9 T. L. R. 119; 37 Sol. Jo. 102; 5 R. 140.

Choses in action as subject-matter of bills of Part IV., Sect. 3, post.

SUB-SECT. 4.—HIRE-PURCHASE AGREEMENT.

See, generally, BAILMENT, Vol. III., pp. 92–98.

67. Property not passing till completion of payments—Power of vendor to seize before completion.]—A trader hired of an upholsterer furniture of the value of £65, & an agreement was executed, which provided that £10 should be paid on signing the agreement, & the balance by monthly instalments of £5, & that the hirer should deposit with the upholsterer promissory notes for the total amount of the instalments, by way of collateral security, & without prejudice to the upholsterer's title to the furniture, but if the furniture

PART II. SECT. 5, SUB-SECT. 4.

67 i. Property not passing till completion of payments—Power of vendor to seize before completion.]—C. obtained a piano from P. & S. on hire, with the privilege of purchasing it for \$350, by paying instalments within a certain time. A written agreement, entered into by C. at the time of receiving the piano, provided that it should remain the property of P. & S. until fully paid for, & that in default of any instalment they might resume possession without previous demand:—**Held:** the agreement was not in the nature of a bill of sale, & did not require to be registered.—**Re PYKE** (1873), 9 N. S. R. 342.—**CAN.**

67 ii. ———.]—A piano was sold by ptlfs. to F., under an agreement by which the title to the piano was to remain in ptlfs. until the price was paid by instalments, & ptlfs. had the right to take possession, if F. absconded or became involved, so that the piano became liable to seizure for his debts, or distress for rent. The agreement was not filed in accordance with Bills of Sale Act:—**Held:** as between ptlfs. & F. the agreement was good, notwithstanding the non-compliance with the Act.—**MILNER v. CURRY** (1893), 25 N. S. R. 537. —**CAN.**

67 iii. ———.]—Ptlf. sold to F. a piano for \$300, F. paying a portion of the purchase-money in cash &

giving his promissory notes for the balance. Immediately after the sale & delivery of the piano, F. signed a purchase & hiring agreement, under which, upon completion of the payments to be made by him, he was to become owner of the piano, the title to which, in the meantime, remained in the vendors, & in which it was provided that in the event of F. becoming insolvent, or attempting to sell or part with possession of the piano, all rights of F. should cease & the vendors should be at liberty to retake possession. While about one-half of the purchase-money was still unpaid, F. sold the piano:—**Held:** the agreement, having been taken by way of security, should have been filed under

5. Powers of attorney, authorities, or licences to take possession as security for any debt: Sub-sect. 4.]

should be seized under the power therein-after contained, the notes, or so many of them as should then be current, should be given up on demand & become void. The agreement provided that, in the event of non-payment of any instalment, the upholsterer might seize & retake possession of the furniture & any money already paid to him was to be forfeited, & that on payment of the full sum of £65 the furniture should become the property of the hirer, but till payment of the whole sum it should remain the sole & absolute property of the upholsterer. The hirer, after paying £15, filed a liquidation petition, & afterwards, two instalments being in arrear, the upholsterer took possession of the furniture:—*Held*: as no property in the furniture passed to debtor until payment of all the instalments, the licence given by him to the upholsterer to seize the furniture could not amount to a bill of sale, & no registration was requisite.—*Re ROBERTSON, Ex p. CRAWCOUR* (1878), 9 Ch. D. 419; 47 L. J. Rey. 91; 39 L. T. 2; 26 W. R. 733, C. A.

Annotations: **Folld.** *Re Gelder, Ex p. Whittaker*, [1880] W. N. 171; *Crawcour v. Salter* (1881), 18 Ch. D. 30.

68. ———.]—W. by deed demised to G. certain premises with the fixtures, machinery & apparatus thereon for a period of six years at a rent of £182 10s. *per annum* payable quarterly in advance; the deed contained a covenant that at the expiration of the term, the rents being paid & covenants performed, the fixtures & machinery should belong to the lessee absolutely. W. stated that it was agreed that the fixtures were to become the property of the lessee at the expiration of the term on his regularly paying the rent. G. stated that W. agreed to sell & he, G., agreed to buy the chattels set out in an inventory for £862, to be paid with interest by equal instalments over six years along with the real rent of the premises, the ground rent being only £23 *per annum*; G. produced an invoice which he said was received from W. for the price of the goods & chattels & effects enumerated in the inventory showing him to be indebted to W. in a sum of £806. The rent being unpaid W. put a man into possession & two days later a liquidation petition was filed:—*Held*: 1878 Act had no application.—*Re GELDER, Ex p. SERGEANT*, [1881] W. N. 37, C. A.

69. ———.]—Pltf. let furniture on hire to defts., hotel-keepers, at a fixed sum to be paid by instalments, with a provision that until all the instalments were paid the property should remain

in pltf., & if any instalment should not be paid when due pltf. was to be at liberty to retake possession of his goods & the instalments to be forfeited, but upon all the instalments being paid the furniture to become the property of defts.:—*Held*: the hiring agreement did not operate as a bill of sale.—*CRAWCOUR v. SALTER* (1881), 18 Ch. D. 30; 51 L. J. Ch. 495; 45 L. T. 62; 30 W. R. 21, C. A.

— **Refd.** *Re Parker, Ex p. Turquand* (1885), 14 Q. B. D. 636. **Mentd.** *Re Fowler, Ex p. Brooks* (1883), 23 Ch. D. 261; *Mault v. Halliday* (1897), 46 W. R. 318; *Re Hambrough, Hambrough v. Hambrough* (1909), 79 L. J. Ch. 19; *Chappell v. Harrison* (1910), 103 L. T. 591; *Re Tabor, Ex p. Cork*, [1920] 1 K. B. 808.

70. ———.]—By an agreement in writing the “owners & lessors” of an engine agreed to let, & the “lessee” agreed to hire, the engine at a rent to be paid by instalments amounting in all to £240; upon payment in full the agreement to be at end & the engine to become the property of the lessee, but until payment in full to remain the sole & absolute property of the lessors. It was also agreed that in case of failure to pay any of the instalments, or if the lessee should become bkpt., the lessors might elect either to recover the full balance remaining due, or instead to resume possession of the engine & sell it &, after retaining out of the purchase-money all expenses & the balance remaining due, pay the surplus, if any, to the lessee, provided that if the lessors should see fit to resume possession of the engine without selling, the loss to them occasioned by the lessee’s non-performance of the agreement should be borne by him, & in case of bkpcy. the lessors should be entitled to prove against his estate for that loss as liquidated damages. The lessee paid the first instalment & the engine was placed on his premises. While it was still there he became bkpt., some instalments being overdue. The lessors having taken no steps to recover the balance due or to sell:—*Held*: upon the true construction of the agreement the property in the engine never passed to the lessee, but remained in the lessors, & the transaction was not within Bills of Sale Acts.—*McENTIRE v. CROSSLEY BROTHERS*, [1895] A. C. 457; 64 L. J. P. C. 129; 72 L. T. 731; 2 Mans. 334; 11 R. 207, H. L.

Annotation: **Mentd.** *Hobson v. Gorringe*, [1897] 1 Ch. 182.

71. Previous purchase by vendor part of same transaction.]—Pltf. being applied to for a loan of money by M., bought from the grantee of a bill of sale furniture which M. had assigned to him. The furniture was then let on a hiring agreement containing a power of sale by pltf. to M., who agreed to pay £500 by instalments. The payment of the instalments was guaranteed by deft.:—*Held*: the

R. S. N. S. 1900 (c. 142), s. 8.—*MILLER BROTHERS v. BLAIR* (1905), 37 N. S. R. 293.—CAN.

67 iv. ———.]—A. signed an agreement, stating that he had received a sewing machine of the value of \$65, which pltf. had leased to him for nine months, at the rent of \$6 per month, \$15 being paid in advance at that time, that he would take care of the machine, & not part with the possession of it, & in case he made default in paying the rent, or in the performance of the agreement, that pltf. might take possession of the machine, & he would forfeit any rent paid, & pltf. agreed that if A. paid the rent, they would sell the machine to him for one cent at the expiration of nine months:—*Held*: an agreement for a conditional sale of a chattel, with a lease of it in the meantime at a monthly rent, was not a bill of sale.—*WHEELER & WILSON MANUFACTURING CO. v.*

CHARTERS (1882), 21 N. B. R. 480.—CAN.

67 v. ———.]—Pltf., a manufacturer of safes, agreed to sell a safe to T., paint his name upon it, & send it to him at S. by railway, that it was to be paid for by instalments in two years, but that no title to it was to pass to T. till the whole price was paid, until which time the safe was to be on hire, & on default of any of the payments, pltf. was to be at liberty to retake possession of the safe:—*Held*: the agreement was not a bill of sale requiring registration.—*TRUEMAN v. BAIN* (1885), 25 N. B. R. 298.—CAN.

67 vi. ———.]—A. & Co. sold a piano to B. under the terms of a memorandum in writing, by which B. agreed to pay the purchase-price within twelve months from date, the property in the meantime to remain in A. & Co. A. & Co. failed to register the agreement

as required by R. S. 1900 (c. 142), & B. transferred the piano by chattel mtge. to pltf.:—*Held*: as between A. & Co. & pltf., the agreement entered into between A. & Co. & B., not having been filed, was null & void.—*LARRIERE v. McDONALD* (1906), 39 N. S. R. 24.—CAN.

67 vii. ———.]—By agreement in writing, unregistered, applt. agreed with M. for the hire by M. from him of a piano at a monthly rental, the piano to become the property of the hirer upon completion of a number of monthly payments:—*Held*: the agreement was not a bill of sale requiring registration under 1867 Act.—*JAMES v. OWEN*, 2 J. R. N. S. 111.—N.Z.

67 viii. ———.]—H. agreed to purchase from deft. a freehold property, including hotel & furniture, for £20,000, & agreed to pay £5,000 cash, to pay the balance by instalments with interest, to give a mtge. over the hotel & land,

transaction was not really one of hiring, but the agreement was in effect a bill of sale intended to evade Bills of Sale Acts & could not be enforced.—*BROWN v. BLAINE* (1884), 1 T. L. R. 158.

72. Following verbal sale to vendor.]—In June, 1886, R. sold the furniture in his house for £100 to W., who handed him a cheque for the money, but no receipt was given. Shortly afterwards, by an agreement in writing, W. agreed to let the furniture to R. until July 10 then next, & R. agreed to pay a rent of £100 for the use of it during the term, as follows:—£1, interest, on the signing thereof, £50 on or before June 25 then next, & £50 on or before July 10 then next. On breach of any of the stipulations, W. was to have power to remove & sell the furniture:—*Held*: the agreement was not a bill of sale.—*REDHEAD v. WESTWOOD* (1888), 59 L. T. 293; 4 T. L. R. 671.

Annotations:—*Consd.* *Re Watson, Ex p. Official Receiver in Bankruptcy* (1890), 25 Q. B. D. 27; *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 1. *Refd.* *R. Yarrow, Collins v. Weymouth* (1889), 59 L. J. Q. B. 18.

73. Following genuine sale to vendor—Power of vendor to seize his own chattels.]—Where A., the original owner of goods, sold them to a club, who afterwards let them to A. under a hire-purchase agreement containing a licence in certain events to enter A.'s premises & seize the goods:—*Held*: the words "licence to take possession of personal chattels as security for any debt" did not apply, & the agreement did not require registration.

The words "licence to take possession of personal chattels as security for any debt" mean a licence by the owner of the property to the person who advances money to take possession of the chattels which remain in the custody of the owner. That is not the nature of this transaction, because the only licence which is to be found in the instrument is a licence to the person who is described as the owner to take possession of his own chattels (*FRY, L.J.*).—*UNITED FORTY POUND LOAN CLUB v. BEXTON*, [1891] 1 Q. B. 28, n., D. C.

Annotations:—*Consd.* *Re Watson, Ex p. Official Receiver in Bankruptcy* (1890), 25 Q. B. D. 27; *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 1.

74. Following sale & delivery by purchaser to vendor.]—W. obtained a loan from L. in the following way. She professed to sell him her furniture for £150, he giving her the money & she handing him a chair as a constructive delivery of the goods. On the same day she signed a hire-purchase agreement, which described L. as owner of the goods, & W. as the hirer, & stated that L. agreed to let them to W., for which W. was to pay £200 in five instalments of £40 at intervals of four months, the furniture to become the property of W. on payment of the £200. There was also a power reserved to L. to retake possession of the furniture in case of a breach of the agreement by W. It was

& to give a bill of sale over the furniture. Subsequently debt. agreed to accept guarantors for the amount of the cash deposit, & to carry out the other terms of the prior agreement, except that instead of a bill of sale being taken over the furniture debt. agreed to let the furniture on hire, so as to obviate the necessity of a bill of sale, & debt. expressly stipulated that the property in the furniture was not to pass to H. Deeds were prepared, including a deed of letting & hiring by which H. agreed to hire the furniture from debt., & to pay rent at a rate which exactly corresponded with the payment of the interest provided by the other agreement for the unpaid portion of the purchase-money, & upon the payment of the final instalment the furniture was to become the property of H.:—*Held*: as the property in the furniture remained in debt.,

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& did not pass, and was not intended to pass to H., the deeds did not require registration.—*DANBY v. COLONIAL BANK OF AUSTRALASIA* (1893), 19 V. L. R. 586.—*AUS.*

b. No obligation to deliver particular chattel referred to in agreement.]—S. obtained a piano from M., under an agreement in writing, that S. should pay rental, for the period of thirty months, at the rate of \$10 per month, & that, on completion of the payments agreed to be made, S. should be entitled to receive from M., "one piano, equal in value to the above-named piano, with a receipted bill of sale thereof":—*Held*: 5th R. S. (c. 92), s. 3, was not applicable, there being nothing in the agreement entitling S., at the termination of the period of hiring, to the possession of the particular piano referred to in the agreement, M. being entitled to deliver,

found as a fact by the county ct. judge that W. did not wish to sell the furniture, but only to borrow money on it, & that L. really lent the money on the security of the furniture:—*Held*: the ct. was not prevented by the form of the document from considering the real nature of the transaction, & on the above findings the document was a bill of sale, & required registration.—*Re WATSON, Ex p. OFFICIAL RECEIVER IN BANKRUPTCY* (1890), 25 Q. B. D. 27; 59 L. J. Q. B. 394; 63 L. T. 209; 38 W. R. 567; 6 T. L. R. 332; 7 Morr. 155, C. A. *Annotations*:—*Consd.* *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 638. *Folld.* *Madell v. Thomas*, [1891] 1 Q. B. 230. *Refd.* *Edwards v. Marcus*, [1891] 1 Q. B. 587. *Mentd.* *Re Eastern & Mid. Ry. Co.* (1891), 65 L. T. 668.

75. Following alleged assignment to vendor.]—Pltf. executed an absolute deed of assignment of chattels to debts. & on the same day a hire-purchase agreement, whereby he hired the same chattels back from them. The documents were not registered. In an action for trespass to the goods through the seizure of them by debts., the jury found that the transaction was really one of loan, with security under the disguise of an assignment followed by a hiring:—*Held*: the ct. was not prevented by the forms of the documents from considering the real nature of the transaction, & the documents, not having been registered, were void.—*MADELL v. THOMAS & Co.*, [1891] 1 Q. B. 230; 60 L. J. Q. B. 227; 64 L. T. 9; 39 W. R. 280; 7 T. L. R. 170, C. A.

Annotations:—*Consd.* *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 638. *Refd.* *Edwards v. Marcus*, [1891] 1 Q. B. 587.

76. Following alleged distress by landlord—& sale by landlord's broker to vendor.]—Pltf., being in want of money & in arrear with his rent, applied to debts. for a loan on the security of goods. It was arranged between them that he should get his landlord to put in a friendly distress for the rent, & that debts. should purchase the goods distrained from the broker. A distress was put in, & the goods distrained, which, by agreement between the parties, included the tools of pltf.'s trade, & which were found by the jury to be worth £63, were appraised at £29 5s. Pltf. signed a memorandum requesting the broker to sell the goods at the condemned price to debts., there being an understanding that a hire-purchase agreement should afterwards be made, by which pltf. should be entitled to repurchase the goods on terms to be fixed by such agreement. Debts. thereupon paid to the broker £29 5s. A hire-purchase agreement was subsequently executed, by which debts. purported to let the goods to pltf.'s wife on the terms that certain monthly instalments should be paid by the hirer until the total amount of £50 was paid, & that debts. should have power to seize the goods for default in performance of the terms of the agreement by the hirer. Debts. subsequently

in place thereof, another piano of equal value.—*GUEST v. DIACK* (1897), 29 N. S. R. 504.—*CAN.*

c. — — —.]—Debts. by agreement in writing, leased a piano to M. for forty-four months in consideration of \$350, payable \$10 in cash at the date of the agreement, & the balance in payments of \$8 each month until the whole amount was paid. It was provided by the agreement that if the lessee should at any time within the period of forty-four months from the date of the agreement pay to the lessor the \$350, the lessors would deliver to the lessee one instrument equal in value to that named with a receipted bill therefor:—*Held*: the agreement entered into between debts. & M. was not one that required to be registered.—*CHAPMAN v. McDONALD PIANO CO.* (1917), 51 N. S. R. 70.—*CAN.*

Sect. 5.—Powers of attorney, authorities, or licences to take possession as security for any debt: Sub-sects. 4, 5 & 6.]

seized the goods for such default, & pltf. brought an action in respect of such seizure:—*Held*: (1) the true inference of fact from the arrangement made between the parties & the whole of the circumstances was that the parties really intended that there should be in form a sale of the goods under the distress, but that the beneficial interest in the goods should not pass to defts. until a hire-purchase agreement was executed, & that till then there was a trust in favour of pltf.; (2) in the above circumstances, defts. had not a title to the goods independently of the hire-purchase agreement, but such agreement amounted to a bill of sale, &, not being registered, was void.

In considering the question whether in any particular case Bills of Sale Acts come into operation, it is necessary to bear in mind that the Acts do not avoid transactions but documents. The inquiry must begin with the question whether the document itself that is under discussion is a bill of sale within the definition given by the Acts, for which purpose we must examine it by the light of the circumstances of the case. The next question is whether there is or is not a transaction which may stand at law & equity apart from the document, although the Act would avoid the mere document as a bill of sale if the document stood alone. That second question depends on considerations of law apart from Bills of Sale Acts. In dealing with these questions, we must consider the true nature of the transaction (BOWEN, L.J.).—*BECKETT v. TOWER ASSETS CO.*, [1891] 1 Q. B. 638; 60 L. J. Q. B. 493; 64 L. T. 497; 55 J. P. 438; 39 W. R. 438; 7 T. L. R. 400, C. A.

Annotations:—*Folld.* Mellor's Trustee v. Maas, [1903] 1 K. B. 226. *Consd.* Johnson v. Rees (1915), 84 L. J. K. B. 1276. *Refd.* Saunders v. White, [1902] 1 K. B. 472. *Mentd.* *Re* Eastern & Mid. Ry. Co. (1891), 65 L. T. 668.

77. Following alleged sale to vendor.—In May, 1883, A. & B. mortgaged furniture, horses, & jewellery to C. In Aug. they applied to D., a money-lender, to make them an advance upon a bill of sale of the same goods. D. refused, but said he would purchase the goods, & they were thereupon assigned to him for £1,200, of which £1,000 was paid to C. & £200 retained by A. & B. C.'s mtge. was transferred to D. & an inventory & receipt was signed by A. & B. & given to D., who registered it under 1882 Act as a bill of sale. At the same time D. executed an agreement letting the goods to A. & B. at a rent of £90 a quarter. That agreement was not registered. The goods having been seized by pltf., an execution creditor of A.:—*Held*: there was no real purchase by D., the intention being that the goods should remain in the hands of A. & B., & the goods were not protected from the seizure.—*HOOPER v. KER* (1884), 76 L. T. Jo. 307, C. A.

78. —.]—In Apr., 1900, W. asked D. for a loan of £1,000, & it was arranged that D. should purchase part of the plant of his business for £1,000, & W. should repurchase it under a hire-purchase agreement. In the following July a similar transaction took place, under which W. received £2,000. The hire-purchase agreements contained a licence to seize & sell. On Feb. 6, 1901, W. assigned to deft. co. all his trade assets, including the chattels comprised in the two hire-purchase agreements:—*Held*: the transactions resulting in the hire-purchase agreements were in reality loans, & being unregistered were void owing to the power to seize & sell.—*WHEATLEY'S TRUSTEE v. WHEATLEY (II.) LTD.* (1901), 85 L. T. 491.

Annotation:—*Mentd.* *Re* David & Adlard, *Ex p.* Whinney, [1914] 2 K. B. 694.

79. —.]—M., who had made a contract to buy a hotel & its furniture, agreed with a wine merchant that he should provide £2,000. The wine merchant went to the vendor & paid him £2,000, the vendor giving a receipt for that sum as the purchase-money of the furniture. The same day the wine merchant & M. signed a hire-purchase agreement, by which M. hired the furniture for £2,412 to be paid by instalments, the furniture not to become the property of M. till all the instalments were paid. The purchase was then completed & M. took possession. After paying some of the instalments M. became bkpt.:—*Held*: the circumstances showed that as a matter of fact the sale to the wine merchant was only colourable, & the transaction between him & M. was really a loan upon the security of the hire-purchase agreement, & the agreement not having been registered was void as against M.'s creditors.—*MAAS v. PEPPER*, [1905] A. C. 102; 74 L. J. K. B. 452; 92 L. T. 371; 53 W. R. 513; 21 T. L. R. 301; 12 Mans. 107, H. L.; *affg.* S. C. *sub nom.* MELLOR'S TRUSTEE v. MAAS, [1903] 1 K. B. 226, C. A.

Annotation:—*Consd.* Johnson v. Rees (1915), 84 L. J. K. B. 1276.

80. —.]—S. wished to buy some goods, which were to be offered for sale by auction. He approached B., a money-lender, & asked for a loan to enable him to do so. B. refused. Subsequently B. attended the sale & bought the goods. A hire-purchase agreement, containing a licence to seize, was then entered into between B. & S. in respect of the goods, & the goods were delivered to S. An execution being levied against S., the goods were seized by the execution creditors. B. put in a claim. In interpleader proceedings in the county ct. the judge found that the true inference from the facts was that the transaction between B. & S. was merely a loan upon the security of the hire-purchase agreement, & that the hire-purchase agreement was a bill of sale & void for want of registration:—*Held*: (1) (LUSH, J.) the transaction between B. & S. was a *bonâ fide* hire-purchase; (2) (ATKIN, J.) there was evidence upon which the judge could hold that the transaction was really a loan by B. to S. upon the security of the hire-purchase agreement.—*JOHNSON v. REES* (1915), 84 L. J. K. B. 1276; 113 L. T. 275, D. C.

Assignment of vendor's rights under hire-purchase agreement.—*See* Part IV., Sect. 3,

See, also, Nos. 95, 99, *post*.

SUB-SECT. 5.—LIEN.

See, generally, LIEN.

81. Created by agreement—On goods in transitu at sea—& on bills of lading thereof.—By an agreement between L., a merchant, & W., a manufacturer, for the supply of goods by W. to L., under which L. was to give bills of exchange to W. for the invoice price of all goods supplied to him, it was agreed that L. should ship all goods so supplied to R. of Shanghai, for sale on his account, that the bills of lading for such goods should be sent by L., immediately on receipt to R., to whose order they were to be made out, & that W. should have a lien upon such bills of lading & each shipment of goods in transit outwards, or in the hands of the consignees or any other persons:—*Held*: the agreement, giving to W. a lien upon the bills of lading, etc., was not a bill of sale.—*Re* LOVE, *Ex p.* WATSON (1877), 5 Ch. D. 35; 46 L. J. Bey. 97; 36 L. T. 75; 25 W. R. 489; 3 Asp. M. L. C. C. A.

Annotations :—**Mentd.** *Kendal v. Marshall Stevens* (1883), 11 Q. B. D. 356 ; *Re Isaacs, Ex p. Miles* (1885), 15 Q. B. D. 39 ; *Bethell v. Clark* (1887), 19 Q. B. D. 553.

82. In favour of agent—On goods of principal in agent's hands.—By an agreement in writing between a foreign manufacturer & his agent in E., it was provided that advances made by the agent should "be covered & secured by the stock of goods which shall be in his hands," which the foreign principal bound himself not to let fall below a certain value. The principal terminated the agency & contended that the agreement was a bill of sale & void for want of registration :—*Held* : (1) the agreement gave no power to seize goods, but only to retain possession of goods come to his hands ; (2) when the goods came to the agent's hands he had possession coupled with an agreement which gave him a legal, not an equitable, right, & the agreement was not void as a bill of sale.—*MORRIS v. DELOBBEL-FLIPO*, [1892] 2 Ch. 352 ; 61 L. J. Ch. 518 ; 66 L. T. 320 ; 40 W. R. 492 ; 36 Sol. Jo. 347.

Annotation :—**Refd.** *Lord v. G. E. Ry.*, [1908] 2 K. B. 54.

See, generally, AGENCY, Vol. I., p. 550.

Agreements conferring right in equity to chattels, *See Sect. 6, post*.

83. — In favour of person storing for storage & other charges—On goods stored.—By an agreement in writing defts. gave a licence to pltf. to store goods on their premises, subject to a lien upon them for the sum which pltf. agreed to pay & for the balance of carriage or other charges which might become due from pltf. to defts. Pltf. became indebted to defts. for such charges, & deft. removed the goods from the premises :—*Held* : the agreement was not a bill of sale.—*SPENCER v. MIDLAND RY. CO.* (1895), 11 T. L. R. 512 ; 39 Sol. Jo. 506, C. A.

Annotation :—**Consd.** *Lord v. G. E. Ry.*, [1908] 2 K. B. 54.

84. — In favour of railway company for money due for carriage—On all goods of grantor on company's premises.—A railway co. by a "ledger agreement" opened a credit account with a coal merchant for the carriage of his coal, the co. to have a continual lien upon the coal conveyed on their lines or being at any time on ground rented of the co. for all charges due to them, & to be at liberty to sell & dispose of any of the coal to satisfy the lien, with the right to close the account by giving one day's notice. By separate agreements the co. let to the merchant allotments within the railway yard for the purpose only of stacking & dealing with the coal. The co. had the keys of the yard gates & kept them locked at certain times. The payments being in arrear, the co. closed the account, locked the gates, & detained the coal :—*Held* : (1) the inference of fact from the circumstances was that both parties intended the co.'s right of detainer to be preserved & if necessary enforced against the coal while in the railway yard ; (2) the ledger agreement conferred no licence to take possession of personal chattels or charge or equity thereon & was not a bill of sale.—*GREAT EASTERN RY. v. LORD'S TRUSTEE*, [1909] A. C. 109 ; 78 L. J. K. B. 160 ; 100 L. T. 130 ; 25 T. L. R. 176 ; 16 Mans. 1, H. L. ; *revsq.* *S. C. sub nom. LORD'S TRUSTEE v. GREAT EASTERN RY.*, [1908] 2 K. B. 54, C. A.

Annotation :—**Mentd.** *Tilley v. Bowman*, [1910] 1 K. B. 745.

85. Common Law lien for unpaid purchase-money.—On the sale of certain ironworks to a co. it was agreed that a mtge. should be given to the vendors to secure payment of the purchase-money. No mtge. was given & the purchase was not completed. The co. having gone into liquidation the trade fixtures were claimed by the liquidator :—*Held* : the vendor's lien extended

to trade machinery which was affixed to the freehold, & the lien being given by law, & there being nothing which could be registered, 1878 Act did not apply, & the vendors were entitled to the fixed trade machinery. *Re VULCAN IRONWORKS, LTD.* (1888), 4 T. L. R. 312.

86. — No document signed by alleged grantor.—W., who carried on business with his son, by his will gave his son, whom he also appointed one of his trustees & exors., the option of purchasing at a fixed price W.'s share in the business. The son, after W.'s death, elected to purchase, & paid part of the purchase-money, but before the residue of it was paid became bkpt. The receiver, in an action to administer W.'s estate, claimed to have a charge upon certain stock in the possession of the son for the residue of the purchase-money due to W.'s estate as against the trustee in bkpey. of the son :—*Held* : as there was not any document signed by bkpt. which could be registered as a bill of sale Bills of Sale Acts did not apply.—*Re WEBBER, Ex p. SLATER* (1891), 64 L. T. 426.

Annotation :—**Mentd.** *Re Ginger, Ex p. London & Universal Bank* (1897), 46 W. R. 144.

SUB-SECT. 6. PLEDGE.

87. By handing over invoice & delivery order—Goods bought on credit.—Whatever documents are included in the expression "bill of sale" as defined by Bills of Sale Acts, they must still, by force of 1878 Act, s. 3, be limited to documents "whereby the holder or grantee has power to seize or take possession of any personal chattels comprised in or made subject to such" document ; & the Acts do not include letters of hypothecation accompanying a deposit of goods or pawntickets given by a pawnbroker, or in fact any case where the object & effect of the transaction are immediately to transfer the possession of the chattels from the grantor to the grantee.

A trader, who required an advance of £500, deposited with his bank the invoice of goods bought by him on credit & consigned to him by rail, & gave the bank a delivery order directed to the railway co., requiring the co. to hold the goods to the order of the bank. On arrival of the goods the co. sent the usual advice note to the bank stating that they held the goods to the order of the bank. The £500 was then advanced, & a minute of the transaction, stating the rate of interest on the advance, the terms on which the goods were to be redeemed, etc., was entered in the bank ledger, & was signed by the trader & stamped. Eleven months afterwards the trader became bkpt. :—*Held* : as the effect of the transaction was immediately to transfer the possession of the goods to the bank, the delivery order & minute did not require registration as a bill of sale, & the title of the bank was good as against the trustee in bkpey.—*Re HALL, Ex p. CLOSE* (1884), 14 Q. B. D. 386 ; 51 L. J. Q. B. 43 ; 51 L. T. 795 ; 33 W. R. 228.

Annotations :—**Consd.** *Re Cunningham, Attenborough's Case* (1885), 28 Ch. D. 682 ; *Re Hardwick, Ex p. Hubbard* (1886), 17 Q. B. D. 690. **Expld. & Apprvd.** *Re Townsend, Ex p. Parsons* (1886), 16 Q. B. D. 532. **Consd.** *Dublin City Distillery v. Doherty*, [1911] A. C. 823. **Refd.** *Grigg v. National Guardian Assee.*, [1891] 3 Ch. 206 ; *London & Yorkshire Bank v. White* (1895), 11 T. L. R. 570 ; *Withers v. Berry* (1895), 39 Sol. Jo. 559. **Mentd.** *Re Standard Manufacturing Co.* (1891), 60 L. J. Ch. 292.

88. By handing over delivery order.—Pltf. applied verbally to defts. for a loan, offering as security certain furniture of his then at a warehouse in his name. Defts. made the loan to pltf.,

Sect. 5.—Powers of attorney, authorities, or licences to take possession as security for any debt: Sub-sects. 6 & 7.]

who gave them a promissory note for the amount, & also signed a memorandum by which he agreed to pay interest on the amount of the note if not paid by the stipulated time. On the same day pltf. signed & handed to the warehouseman a delivery order, requesting him to "deliver" to defts. or their order "all property warehoused with you in my name on payment of your charges":—*Held*: the delivery order was not a bill of sale, the whole transaction being one of pledge, & the effect of the delivery order being equivalent to actual possession by defts., the pledgees.—*GRIGG v. NATIONAL GUARDIAN ASSURANCE CO.*, [1891] 3 Ch. 206; 61 L. J. Ch. 11; 64 L. T. 787; 39 W. R. 684.

89. By handing over wharfinger's warrant—Accompanied by memorandum of terms of loan.]—The secretary of a co., acting under proper authority, deposited with A., a pawnbroker, a wharfinger's warrant for four hundred cases of tin plates, which was indorsed to A.'s manager. At the same time the secretary signed a memorandum of charge on behalf of the co., which stated that the goods were to be held as security for £200 & interest, & contained a power of sale:—*Held*: the memorandum was not a bill of sale within 1882 Act. *Seem*: the Act did not apply where possession of goods was given to the lender at the time of the borrowing.—*Re CUNNINGHAM & CO., LTD., ATTENBOROUGH'S CASE* (1885), 28 Ch. D. 682; 54 L. J. Ch. 148; 52 L. T. 214; 33 W. R. 387; 1 T. L. R. 227.

Annotations:—**Expld.** *Re Townsend, Ex p. Parsons* (1886), 16 Q. B. D. 532. **Consd.** *Re Coal Co-op. Soc., G. N. Ry. Co. v. Coal Co-op. Soc.* (1895), 2 Mans. 621; *Dublin City Distillery v. Doherty*, [1914] A. C. 823. **Refd.** *Re Hardwick, Ex p. Hubbard* (1886), 17 Q. B. D. 690.

90. By deposit of goods—Record of transaction—Giving power of sale in case of default.]—Where goods are pledged as security for a loan & delivered to the pledgee, a document signed by the pledgor, recording the transaction & regulating the rights of the pledgee as to the sale of the goods, is not a bill of sale.—*Re HARDWICK, Ex p. HUBBARD* (1886), 17 Q. B. D. 690; 55 L. J. Q. B. 490; 59 L. T. 172, n.; 35 W. R. 2; 2 T. L. R. 904; 3 Morr. 246, C. A.

Annotations:—**Expld.** *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627. **Apld.** *Wilkinson v. Girard* (1891), 7 T. L. R. 266; *Charlesworth v. Mills*, [1892] A. C. 231. **Consd.** *Morris v. Delobel-Flipo*, [1892] 2 Ch. 352; *Ramsay v. Margrett*, [1894] 2 Q. B. 18. **Folld.** *London & Yorkshire Bank v. White* (1895), 11 T. L. R. 570. **Consd.** *Dublin City Distillery v. Doherty*, [1914] A. C. 823. **Refd.** *Newlove v. Shrewsbury* (1888), 21 Q. B. D. 41; *Bowker v. Williamson* (1889), 5 T. L. R. 382; *Grigg v. National Guardian Assoc.*, [1891] 3 Ch. 206; *Spencer v. Mid. Ry. Co.* (1895), 11 T. L. R. 408; *Withers v. Berry* (1895), 39 Sol. Jo. 559; *Saunders v. White*, [1902] 1 K. B. 472; *G. E. Ry. v. Lord's Trustee*, [1909] A. C. 109. **Mentd.** *North Central Waggon Co. v. M., S. & L. Ry. Co.* (1886), 56 L. T. 755; *Hilton v. Tucker* (1888), 39 Ch. D. 669; *Deverges v. Sandeman, Clark*, [1902] 1 Ch. 579.

PART II. SECT. 5, SUB-SECT. 6.

88 i. By handing over delivery warrants.]—A distillery co. gave, as security for advances, warrants making the whiskey therein mentioned deliverable to the holder of such warrant. The name of the holder was entered in the books of the co. opposite the numbers & particulars of the casks of whiskey, which still remained in possession of the co. & were dealt with by them. When they sold the whiskey they cancelled the warrant, & erased the holder's name in their books & substituted another warrant over other whiskey as security to the creditors:—*Held*: if the transaction created a

valid pledge, the warrants were void as not being registered under Irish 1879 Act, s. 4.—*DUBLIN CITY DISTILLERY, LTD. v. DOHERTY*, [1914] A. C. 823; 83 L. J. P. C. 265; 111 L. T. 81; 58 Sol. Jo. 413; 48 I. L. T. 115, H. L.—**IR.**

e. By deposit of horse for pasturage—To be held as security for payment thereof—& of accommodation note.]—A. placed a mare with B. to be pastured at a fixed price per month, for the payment of which it was agreed that B. should be entitled to hold her. Later A. obtained an accommodation note from B. upon the understanding that B. should hold the mare as security

for payment of the note as well as the pasturage, & upon the further express understanding that if B. should be called upon to pay the note, the animal should become his property:—*Held*: the transaction was one of pledge, & did not fall within Chattel Mortgage Act.—*KEELLY v. POLLOCK* (1902), 1 O. W. R. 735.—**CAN.**

91. —.]—Goods were pledged as security for a loan & were delivered to the pledgee, & an agreement was signed recording the transaction & regulating the rights of the pledgee as to the sale of the goods:—*Held*: the agreement was not a bill of sale.—*WILKINSON v. GIRARD FRÈRES* (1891), 7 T. L. R. 266.

92. — With letter containing terms of loan—Prior verbal agreement for loan & deposit.]—Pltf. verbally agreed to advance money to B., the latter agreeing to deposit plate as security for the advance. A letter containing the terms of the loan was given to pltf., the advance was then made, & at the same time pltf. took possession of the plate. The letter was not registered:—*Held*: pltf.'s title did not depend on the letter, the transaction being one of pledge & independent of 1882 Act.—*BOWKER v. WILLIAMSON* (1889), 5 T. L. R. 382, D. C.

93. By handing over key of room containing goods—Subsequent letter authorising lender to retain possession.]—In Nov., 1883, A. agreed to lend B. £2,500 on the security of a valuable collection of prints & engravings. On Nov. 19 A. advanced B. £1,250 on account of the loan, & it was arranged between them that the collection should be stored in a certain room, & on Dec. 21 B. wrote to A.: "the collection was moved in to-day. L. has the key which I place entirely at your disposal." On Dec. 24 A. advanced to B. the balance of the loan, & on Jan. 11, 1884, B. wrote to A.: "You having advanced to me £2,500, I hereby authorise you to retain possession of my collection of engraved prints, now deposited by me in a certain room, the key of which room is at present in your possession or power, & I hereby acknowledge that you are to retain possession of such prints, etc., until the whole of the £2,500, with interest at 5 per cent., has been repaid to you." B. died insolvent, & his administratrix disputed the validity of A.'s security, on the ground that the letter of Jan. 11 constituted a bill of sale, which was void under 1882 Act, ss. 8, 9:—*Held*: the transaction was one of pledge, independent of the letters, & the Act did not apply.—*HILTON v. TUCKER* (1888), 39 Ch. D. 669; 57 L. J. Ch. 973; 59 L. T. 172; 36 W. R. 762; 4 T. L. R. 618.

Refd. *Bowker v. Williamson* (1889), 5 T. L. R. 382. **Mentd.** *Mills v. Charlesworth* (1890), 25 Q. B. D. 669; *Morris v. Delobel-Flipo* (1892), 66 L. T. 382.

SUB-SECT. 7. —OTHER INSTRUMENTS.

94. Instrument reciting prior sale—Purporting to be demise to original vendor—No sale apart from document.]—An instrument reciting a sale of certain chattels by A. to B., of which sale there was no other evidence, purported to be a demise of the chattels by B. to A. at a certain rent payable quarterly, with a proviso entitling B.

for payment of the note as well as the pasturage, & upon the further express understanding that if B. should be called upon to pay the note, the animal should become his property:—*Held*: the transaction was one of pledge, & did not fall within Chattel Mortgage Act.—*KEELLY v. POLLOCK* (1902), 1 O. W. R. 735.—**CAN.**

PART II. SECT. 5, SUB-SECT. 7.

1. Power of attorney—To sell & pay mortgage debts.]—A. executed several chattel mtges. to secure indorsers of his paper, and afterwards a power of attorney to their appointee

to enter & take possession if the rent should be unpaid for ten days after any of the quarterly days of payment, or if execution should issue against the goods of A. :—*Held*: the instrument was a bill of sale requiring registration.—*PHILLIPS v. GIBBINS* (1857), 29 L. T. O. S. 91; 5 W. R. 527. *Annotations*:—*Consd.* *Cochrane v. Matthews* (1878), 10 Ch. D. 80, n.; *North Central Wagon Co. v. M. S. & L. Ry. Co.* (1887), 35 Ch. D. 191.

95. Hiring agreement—Giving owner power to seize.—A trader hired household furniture under a written agreement, whereby he was to pay a weekly rent for the use thereof, & was to insure same, & the owner was empowered to repossess himself of same upon the hirer becoming bkpt. :—*Held*: 1854 Act had no application.—*Re HAWKINS, Ex p. EMERSON* (1871), 11 L. J. Bey. 20; *sub nom.* *EMERSON v. BARNETT, Re HAWKINS*, 20 W. R. 110.

Annotations:—*Mentd.* *Re Couston, Ex p. Watkins* (1873), 8 Ch. App. 523, n.; *Re Jones, Ex p. Lovering* (1874), 30 L. T. 622; *Chappell v. Harrison* (1910), 103 L. T. 594; *Re Tabor, Ex p. Cork*, [1920] 1 K. B. 808.

See, also, Sub-sect. 4, *ante*.

96. Licence to take immediate possession—As security for loan—Possession taken subsequently.—A licence to an auctioneer to take immediate possession of goods, sell same, & repay himself advances out of the proceeds, under which the auctioneer by arrangement delays to take possession for one month, is a bill of sale, & requires registration. —*Re TOWNSEND, Ex p. PARSONS* (1886), 55 L. J. Q. B. 137; 53 L. T. 897; 34 W. R. 329; 2 T. L. R. 253; 3 Morr. 36, C. A.

Annotations:—*Expld.* *Re Hardwick, Ex p. Hubbard* (1886), 17 Q. B. D. 690; *Newlove v. Shrewsbury* (1888), 21 Q. B. D. 11. *Consd.* *Re Yates, Batchelor v. Yates* (1888), 59 L. T. 17; *Mills v. Charlesworth* (1890), 25 Q. B. D. 421; *Grigg v. National Guardian Assee.*, [1891] 3 Ch. 206; *Saunders v. White*, [1902] 1 K. B. 472; *G. E. Ry. v. Lord's Trustee*, [1909] A. C. 109; *Dublin City Distillery v. Doherty*, [1914] A. C. 823. *Refd.* *Furber v. Cobb* (1886), 55 L. J. Q. B. 187; *Pulbrook v. Ashby* (1887), 56 L. J. Q. B. 376; *Morris v. Delobbel-Flipo*, [1892] 2 Ch. 352; *Burchell v. Thompson*, [1920] 2 K. B. 80. *Mentd.* *Re O'Sullivan, Ex p. Baller* (1892), 61 L. J. Q. B. 228.

97. Verbal agreement for auctioneer to pay out sheriff—Possession taken by auctioneer—Subsequent letter authorising auctioneer to hold possession.—The owner of goods seized under a writ of *fi. fa.* verbally agreed with an auctioneer that in consideration of his paying out the sheriff the auctioneer should hold possession of the goods, sell them by auction, & pay the balance, if any, to the owner. The agreement was reduced into writing & the sheriff was paid out, the man in possession remaining in possession for the auctioneer: *Held*: the written agreement was not an assurance or licence to take possession, or in any other respect a bill of sale, as it did not

to sell and pay the mtge. debts:—*Held*: the instrument did not require registration. *PATTERSON v. KINGSLEY* (1878), 25 Gr. 425. —*CAN.*

g. — *To take property in assignment of chattels—Void for want of filing.*—An assignment of chattels, in addition to the conveyance of the property, contained a power of attorney to the assignee to take & hold it, but was void as an assignment, for want of filing:—*Held*: the assignee's right could not be sustained under the power of attorney. —*WILSON v. KERR* (1860), 18 U. C. R. 170. —*CAN.*

h. Sale of growing crops—Giving purchaser power to enter. To take care of crops.—Where growing crops were sold to a purchaser by a written instrument authorising him to enter upon the land for the purpose of taking possession, & of putting a party in

charge of them: *Held*: as the purchaser had acquired no estate in the land, he had not such an actual possession of the crops as dispensed with the necessity of registering the bill of sale.—*SHERIDAN v. MCARTNEY* (1861), 5 L. T. 27; 11 L. C. L. R. 506; 6 Ir. Jur. N. S. 193. —*IR.*

k. Order for chattels—Giving vendor power to sell in certain events—Prior payments to be considered as rent only—Registration necessary.—*KING v. KEENAN & STEVENS & BURNS* (1894), 3 Terr. L. R. 251. —*CAN.*

95 i. Hiring agreement—Giving owner right of re-entry on default.—A contract by deed for the letting & hiring of goods, part of which already belong to the hirer, with a declaration that none of such goods have been sold or belonged to the hirer, & containing a clause of re-entry on default

constitute the auctioneer's title, & did not operate, & was not intended to operate until the goods were actually transferred from sheriff to auctioneer.—*CHARLESWORTH v. MILLS*, [1892] A. C. 231; 61 L. J. Q. B. 830; 66 L. T. 690; 56 J. P. 628; 41 W. R. 129; 8 T. L. R. 484; 36 Sol. Jo. 411, H. L.; *revsq.* *S. C. sub nom.* *MILLS v. CHARLESWORTH* (1890), 25 Q. B. D. 421, C. A.

Annotations:—*Consd.* *Morris v. Delobbel-Flipo*, [1892] 2 Ch. 352; *Ramsay v. Margrett*, [1894] 2 Q. B. 18. *Distd.* *Dublin City Distillery v. Doherty*, [1914] A. C. 823. *Refd.* *Grigg v. National Guardian Assee.*, [1891] 3 Ch. 206; *Withers v. Berry* (1895), 39 Sol. Jo. 559; *Clapham v. Ives* (1904), 91 L. T. 69; *G. E. Ry. v. Lord's Trustee*, [1909] A. C. 109; *Re Lavey, Ex p. Trustee*, [1918-19] B. & C. R. 116.

98. Verbal assignment of goods in hands of auctioneer—As security for overdraft at bank—Subsequent direction to auctioneer to pay proceeds of sale to bank.—Pltf. bank required F., a customer, to find further security for his overdrawn account. He verbally agreed to assign his firm's interest in certain goods sent to auctioneers for sale; afterwards he sent them written notice of the assignment, instructing them to pay over proceeds of sales to pltf. bank:—*Held*: the notice was not a licence to take possession of personal chattels as security for a debt.—*LONDON & YORKSHIRE BANK, LTD. v. WHITE* (1895), 11 T. L. R. 570; 39 Sol. Jo. 708.

99. Agreement for sale—Giving vendor power to resume possession on default.—On a sale of furniture goods were assigned by an instrument which was a bill of sale within 1878 Act, & contained a promise by the purchaser to pay the purchase-money at a future date & a licence to the vendor to resume possession of the goods if the price was not then paid:—*Held*: the instrument under which the purchaser acquired the goods was not a bill of sale within 1882 Act. *STOCKS v. WILSON*, [1913] 2 K. B. 235; 82 L. J. K. B. 598; 108 L. T. 834; 29 T. L. R. 352; 20 Mans. 129.

Annotation:—*Mentd.* *Leslie v. Sheill*, [1914] 3 K. B. 607.

See, also, Sub-sect. 4, *ante*.

100. Deed of gift from husband to wife—Subsequent deed of separation—& lease by wife to husband.—A husband & wife were interested in certain furniture as joint tenants or tenants in common. The husband by deed of gift registered under 1878 Act, s. 10, conveyed all his interest in the furniture to the wife. The deed was not re-registered after the expiration of five years as required by s. 11. Subsequently the husband & wife executed a deed of separation containing a clause by which the wife leased the furniture to the husband:—*Held*: the deed was not a document "whereby the grantee has power to seize or take possession of personal chattels" within

of payment, is a document which requires registration. —*ORIENTAL HOTEL Co., LTD. v. THOMSON* (1879), 5 V. L. R. 485. —*AUS.*

95 ii — *Giving owner power to remove chattels at any time.*—B. made a verbal sale of goods to pltf., who paid him part of the price. Pltf. then executed a lease of the goods to B., who continued in apparent possession thereof. The lease gave pltf. power to remove any part of the goods at any time:—*Held*: the lease was not a document requiring registration.—*ESNOUF v. GURNEY* (1895), 4 B. C. R. 114. —*CAN.*

l. Agreement to supply goods—Giving vendor power to resume possession.—On sale of goods upon credit to a trader, the purchaser covenanted by deed with F., a clerk of the vendors, to buy all his goods from them, &

Sect. 5.—Powers of attorney, authorities, or licences to take possession as security for any debt: Sub-sect. 7. Sect. 6.]

1878 Act, s. 4, as the wife was in possession of all the furniture.—*WITHERS v. BERRY* (1895), 39 Sol. Jo. 559, D. C.

101. Mortgage of land & fixtures—No power to take possession of fixtures apart from land.]—

At the date of a mtge. there was annexed to the land certain trade machinery, which was not expressed to be dealt with by the mtge., or even mentioned therein. The mtge. deed contained a proviso that the powers contained in Conveyancing & Law of Property Act, 1881 (c. 41), s. 19, should be exercisable without serving the notice required by s. 20 of that Act:—*Held*: there was no right in a mtgee. of freehold land to sell fixtures passing by his mtge. in the absence of an express power enabling him to do so, & the mtge. was not an authority or licence to seize or take possession of personal chattels, & Conveyancing & Law of Property Act, 1881, s. 19, did not authorise the mtgee. to sever fixtures & sell them apart from the land.—*Re YATES, BATCHELOR v. YATES* (1888), 38 Ch. D. 112; 57 L. J. Ch. 697; 59 L. T. 47; 36 W. R. 563; 4 T. L. R. 388, C. A.

Annotations:— *Apld.* *Climpson v. Coles* (1889), 23 Q. B. D. 465. *Consd.* *Re Lusty, Ex p. Lusty v. Official Receiver* (1889), 60 L. T. 160. *Apld.* *Re Brooke, Brooke v. Brooke*, [1894] 2 Ch. 600. *Consd.* *Small v. National Provincial Bank of England*, [1894] 1 Ch. 686. *Folld.* *Johns v. Ware* (1899), 68 L. J. Ch. 155. *Refd.* *Stevens v. Marston* (1890), 60 L. J. Q. B. 192. *Mentd.* *West London Syndicate v. I. R. Comrs.*, [1898] 2 Q. B. 507; *Born v. Turner*, [1900] 2 Ch. 211; *Re Rogerstone Brick & Stone Co., Southall v. Wescomb*, [1919] 1 Ch. 110.

When mortgages of freehold or leasehold interests passing or including trade machinery are within Bills of Sale Acts.]—See Part IV., post.

Mortgage of land & building materials thereon.]—See No. 65, ante.

that F. should be at liberty, at any time while such business was carried on, to enter into the place of business & take possession of the goods & premises, & wind up the affairs:—*Held*: this was not such an agreement as required to be registered under Chattel Mortgage Act, to enable the vendors to hold as against subsequent purchasers with notice.—*FISKEN v. RUTHERFORD* (1860), 8 Gr. 9.—**CAN.**

m. — On purchaser's failure to conduct business properly.]— *Ptff.* in 1898 agreed to supply M. & S., dry goods dealers, with goods under an agreement in writing that such goods should remain ptff.'s property, & that, should ptff. at any time consider that the business of M. & S. was not being conducted in a proper way or to ptff.'s satisfaction, ptff. should be "at liberty to take possession of our stock, book debts, & other assets, & dispose of same, & after payment in full of any amount then owing to you by us, whether due or to become due, the balance of the proceeds shall be handed to us." The agreement was not filed under C. S. N. B. 1903 (c. 112):—*Held*: the agreement was not within the above Act.—*GAULT BROTHERS CO. v. MORRELL* (1907), 2 E. L. R. 501; 3 N. B. Eq. Rep. 453.—**CAN.**

n. Transfer of stock-in-trade—Giving grantee power to take possession on default.]—The transfer of a stock of goods from J. to G. concluded: "G. to hold the goods in store, & whatever goods may come in after shall become the property of G. until G.'s claim is paid in full. If I fail to pay any of the above-named notes, G. can take over possession of the business & all stock in the store at

time of me failing to meet or pay above or aforesaid named notes":—*Held*: the document came within the term "bill of sale" in 5th R. S. (c. 92), s. 10, & should have been filed.—*MANCHESTER v. HILLS* (1901), 31 N. S. R. 512.—**CAN.**

o. Letter giving auctioneers sole right to stock bought through them.]— H., who owed appts., stock-auctioneers, £1,171, sent them the following letter: "On looking over my accounts I find I owe you a considerable amount, & as I have two hundred cattle grazing at O. which were bought through you, I am giving you the sole right to them. The amount the cattle cost is between £1,000 & £2,000. I only ask that I be allowed to jockey the cattle off through your firm." There was no evidence to show whether or not it was the custom for stock-dealers to give such letters to auctioneers:—*Held*: the letter was an instrument by way of security within Chattels Transfer Act, 1889, s. 2, & was not within the exceptions (e) or (h) to that sect.—*WILLIAMS & KITTLE v. HARDING (OFFICIAL ASSIGNEE OF)* (1908), 27 N. Z. L. R. 871.—**N.Z.**

101 i. Mortgage of land & fixtures—No power to take possession of fixtures apart from land.]—An instrument conveying an interest in lands, & also fixtures thereon, does not require to be registered under 5th R. S. N. S. c. 92, & there is no distinction in this respect, between fixtures covered by a licensee's or tenant's mtge. & those covered by a mtge. made by the owner of the fee.—*WARNER v. DON* (1896), 26 S. C. R. 388.—**CAN.**

101 ii. —.]—C. took a lease of building ground on which he erected a shop, in which he carried on the

Licence to seize after-acquired chattels.]—See Part VI., Sect. 3, sub-sect. 2, A., post.

Validity of bill of sale executed by attorney.]—See Part V., Sect. 4, post; AGENCY, Vol. I., pp. 274, 278, Nos. 58, 98.

SECT. 6.—AGREEMENTS.

See 1878 Act, s. 4.

102. To assign chattels—Followed by delivery of possession.]—An agreement to assign chattels to a *bonâ fide* creditor, followed by open delivery & possession of same, need not be registered under 1854 Act.—*PIERCY v. HUMPHREYS* (1868), 17 L. T. 463.

103. — Followed by assignment & delivery of possession.]—In 1870, two traders, who carried on business in partnership, agreed, in consideration of past & present advances, that they would, on demand, assign to their father & brother the business then carried on by them together, with the lease of their business premises, which lease was afterwards deposited with the lenders, & also the fixtures & their stock & utensils in trade, & it was provided that if debtors should repay the sum due with interest, then the agreement should be void, but should they be unable to repay the sum due, then a valuation of the premises thereby agreed to be assigned should be taken, & the amount whereby such valuation should exceed the sum then due should be paid by the father & brother of debtors. In 1873, an assignment was made in accordance with the agreement, & the amount whereby the valuation exceeded the sum then due to them was paid by the father & brother to debtors, who expended same in paying certain creditors:—*Held*: the assignment was not an evasion of 1854 Act, inasmuch as possession of the property assigned was given at the same time the

trade of a chemist & druggist, having fitted up the premises with suitable trade fixtures, all of which were admittedly capable of being detached without injury to the freehold. After the annexation of the fixtures C. mortgaged the premises. In the mtge. the parcels were simply described as "building ground" with boundaries, etc., as in the lease, omitting any specific mention of the fixtures:—*Held*: the mtge. did not come within Bills of Sale Acts.—*Re CALVERT*, [1898] 2 L. R. 501.—**IR.**

q. Lien note—(Giving grantee power to resume possession on default.)—The owner of manufactured articles, which were in his possession free from any lien for the unpaid portion of the purchase-money, signed a lien note in favour of debt., the manufacturer, containing a statement that the property in the goods was to remain in debt. until paid for in full, & that on default debt. might enter & retake them. The lien note was not registered under 63 & 64 Vict. c. 31:—*Held*: for want of such registration, the lien note, being an instrument to operate as a mtge. of goods which remained in debtor's possession until his assignment for the benefit of his creditors, was null & void as against his creditors.—*COX v. SCHACK* (1902), 22 C. L. T. 188; 14 Man. L. R. 174.—**CAN.**

—.]—*See, generally, LIEN.*

PART II. SECT. 6.

102 i. To assign chattels—Future crops.]—By a chattel mtge. made in 1893, it was agreed that all the crops of grain which the mtgor. might from time to time grow on the land, until

deed was executed.—*Re COOK, Ex p. IZARD* (1874), 9 Ch. App. 271; 43 L. J. Bey. 31; 30 L. T. 7; 22 W. R. 342, L. J.J.

Annotations :—**Consd.** *Re Hemingway, Ex p. Hauxwell* (1883), 52 L. J. Ch. 737. **Mentd.** *Re Barker, Ex p. Kilner* (1879), 13 Ch. D. 245.

104. — In instrument charging chattels with debt.—A deed, by which debtor covenants that if the debt is not paid on a day named certain chattels shall be charged with it, & that he will, when required, assign them to the creditor as security, requires registration as a bill of sale.—*EDWARDS v. EDWARDS* (1876), 2 Ch. D. 291; 45 L. J. Ch. 391; 34 L. T. 472; 24 W. R. 713, C. A.

Annotations :—**Consd.** *Re Roberts, Evans v. Roberts* (1887), 36 Ch. D. 196; *Re Monolithic Bldg. Co., Tacon v. The Co.*, [1915] 1 Ch. 643. **Refd.** *Re Walden, Ex p. Odell* (1878), 39 L. T. 333; *Salter v. Brooks* (1879), De Colyar's County Ct. Cases, 82. **Mentd.** *Smart v. Flood* (1883), 19 L. T. 167; *Re Standard Manufacturing Co., Ex p. Lowe* (1891), 39 W. R. 369.

105. — After-acquired chattels.—C. & B. being, under an agreement, tenants for a short period of a theatre, with power to renew the tenancy & take a lease, charged the agreement, & the lease to be executed in pursuance thereof, with the payment to N. of £275 by weekly instalments of £10, & interest at the rate of 30 per cent. *per annum*, & covenanted with N. to charge the furniture brought or to be brought into the theatre with the payment of the money thereby secured. The deed was not attested by a solr.:—*Held*: the deed was in fact a bill of sale.—*BAGHOT v. NORMAN* (1880), 41 L. T. 787.

Annotation :—**Refd.** *Crawcour v. Salter* (1881), 45 L. T. 62.

106. To give bill of sale.—An agreement to give a bill of sale need not be registered under 1854 Act.—*Re BROADBENT, Ex p. HOMAN* (1871), L. R. 12 Eq. 598; 36 J. P. 148; *sub nom. BLACKBURN v. HOMAN, Re BROADBENT*, 19 W. R. 1078.

Annotations :—**Refd.** *Re Jeavons, Ex p. Mackay, Ex p. Brown* (1873), 42 L. J. Bey. 68; *Jarvis v. Jarvis* (1893), 63 L. J. Ch. 10. **Mentd.** *Re Fairbrother, Ex p. Harding* (1873), L. R. 15 Eq. 223; *Hollinshead v. Egan*, [1913] A. C. 564.

107. — Parol agreement.—A parol agreement to give a bill of sale does not require registration under 1878 Act, & a bill of sale given in pursuance of such an agreement is not void by reason of the non-registration of the agreement.—*Re HEMINGWAY, Ex p. HAUXWELL* (1883), 23 Ch. D. 626; 52 L. J. Ch. 737; 48 L. T. 742; 31 W. R. 711, C. A.

Annotations :—**Expld.** *Re Jackson & Bassford*, [1906] 2 Ch. 467. **Refd.** *Jarvis v. Jarvis* (1893), 63 L. J. Ch. 10.

108. Relied on as equitable assurance. B. purchased certain patents from J., & agreed to pay J. royalties. At the same time B. lent J. a sum of money, charged on leaseholds, trade fixtures, & chattels, with a proviso that B. might retain half the royalties as a means of repayment, & that if J. became bkpt., otherwise than at the instance of B., B. should be entitled to retain the whole of the royalties in payment, & there was an agreement to execute a bill of sale

of the chattels when required. No bill of sale was registered or executed:—*Held*: the agreement for a bill of sale required registration.—*Re JEAVONS, Ex p. MACKAY, Ex p. BROWN* (1873), 8 Ch. App. 643; 12 L. J. Bey. 68; 28 L. T. 828; 37 J. P. 614; 21 W. R. 664, L. J.J.; *subsequent proceedings* (1874), 9 Ch. App. 304, L. C. & L. J.J.

Annotations :—**Apld.** *Re Steele, Ex p. Conning* (1873), L. R. 16 Eq. 414. **Refd.** *Edwards v. Edwards* (1876), 34 L. T. 472; *Re Walden, Ex p. Odell* (1878), 39 L. T. 333; *Jarvis v. Jarvis* (1893), 63 L. J. Ch. 10. **Mentd.** *Re King, Ex p. King* (1876), 34 L. T. 466; *Branton v. Griffiths* (1877), 36 L. T. 4; *Re Britnor, Ex p. Royle* (1877), 46 L. J. Bey. 85; *Re Thompson, Ex p. Williams* (1877), 7 Ch. D. 138; *Re Garrud, Ex p. Andrew* (1879), 41 L. T. 562, n.; *Re Harrison, Ex p. Jay* (1880), 14 Ch. D. 19.

109. — — ——*Traders, in consideration of goods being supplied to them by brokers on credit, signed a written document addressed to the brokers, by which they undertook & agreed "to hold at your disposal all our stock of soap & raw materials, & from time to time, whenever required by you so to do, to execute a valid & effectual transfer & assurance of same to you, to the intent that out of the premises all claims & demands for the time being owing from us to you may be fully paid & satisfied."* The security was to be a continuing one. The document was never registered, nor was any bill of sale ever executed. Some time afterwards, the traders filed a liquidation petition:—*Held*: the document not having been registered, was void against the trustee under the liquidation.—*Re STEELE, Ex p. CONNING* (1873), L. R. 16 Eq. 114; 42 L. J. Bey. 74; 38 J. P. 86; 21 W. R. 781.

110. — Not followed by execution of bill of sale.—An agreement to give a bill of sale of chattels by way of security for money, not followed by a duly registered bill of sale, must be registered, in order to confer a good title upon the person in whose favour the charge is made.—*JARVIS v. JARVIS* (1893), 63 L. J. Ch. 10; 69 L. T. 412; 9 T. L. R. 631; 37 Sol. Jo. 702; 1 Mans. 199; 8 R. 361.

111. To charge secured debt.—An agreement to assign or charge a debt secured by a mtge. of chattels must be accompanied by the same formalities as are essential to make the original security effective.—*JARVIS v. JARVIS* (1893), 63 L. J. Ch. 10; 69 L. T. 412; 9 T. L. R. 631; 37 Sol. Jo. 702; 1 Mans. 199; 8 R. 361.

112. Letter purporting to transfer chattels.—Debtor on the eve of insolvency being pressed for payment by a creditor, wrote a letter purporting to transfer to him five hundred tons of coals lying at his wharf, the proceeds of which he agreed to hand over to the creditor till his debt was discharged. The letter was registered under 1854 Act:—*Held*: the letter operated as an equitable assignment of the coals.—*Re O'BRIEN, Ex p. MONTAGU* (1876), 1 Ch. D. 554; 31 L. T. 197; 24 W. R. 309, C. A.

Cases conferring right in law & not in equity, see Nos. 63, 82, 90, *ante*.

the whole principal & interest secured by the mtge. should be paid, should be included in the mtge., & that the mtgor. would from time to time, upon request, execute such further mortgage or mtges. of such crops to the intent that such crops should be effectually held as a security for payment of the debt thereby secured:—*Held*: a ct. of equity would enforce the agreement to give the further security & an instrument creating only an equitable charge of such nature upon property not at the time in existence did not, before 57 Vict. c. 1, s. 2, come within R. S. M., 1892 (c. 10), s. 3, so as to require registration to make it opera-

tive as against an execution creditor, & 1894 Act, repealing s. 4 of the earlier Act & substituting a new sub-sect., did not affect a prior existing instrument.—*BANK OF BRITISH NORTH AMERICA v. MCINTOSH* (1897), 11 Man. L. R. 503.—CAN.

102 ii. — "All assets real & personal of every description."—*Trading cos. agreed in writing to mtge. besides certain specified property, "all their assets, real & personal, of every description."* The cos. continued to carry on their respective businesses, & in the ordinary course of disposed of some of their assets,

appropriated the proceeds to their own purposes:—*Held*: (1) the security was a floating security covering future assets; (2) the agreement in writing to mtge. was an instrument within 1889 Act.—*BANK OF NEW ZEALAND v. GUTHRIE (WALTER) & CO., LTD.* (1897), 16 N. Z. L. R. 484.—N.Z.

s. With owner or lessee.—To work mine or shares.—An agreement creating an equitable interest in ore to be mined is not an instrument requiring registration under Bills of Sale Act.—*TRAVES v. FORREST* (1908), 14 B. C. R. 183; 42 S. C. R. 514.—CAN.

SECT. 7.—INSTRUMENTS WITH POWER OF DISTRESS.

See 1878 Act, s. 6.

113. Attornment clause in mortgage.]—A mtge. deed contained a clause, by which for the purpose of securing the punctual payment of the interest, the mtgor. attorned tenant to the mtgee., & the mtgee. had a power of re-entry for default in payment:—*Held*: the attornment clause was not rendered void by 1878 & 1882 Acts.—*HALL v. COMFORT* (1886), 18 Q. B. D. 11; 56 L. J. Q. B. 185; 55 L. T. 550; 35 W. R. 48.

Annotation:—*Consd. Re Willis, Ex p. Kennedy* (1888), 21 Q. B. D. 384.

114. — Mortgagee not having taken possession.]—An attornment clause in a mtge. of land, whereby, by reason of the relation of landlord & tenant thereby created, a power of distress is given to the mtgee. as security for payment of interest in arrear, is a bill of sale within 1878 Act, s. 6, & the proviso thereof applies only to cases in which the mtgee., having previously taken possession of the mortgaged premises, has demised them to the mtgor., & not to a case where the demise is created by the mtge. deed itself.—*Re WILLIS, Ex p. KENNEDY* (1888), 21 Q. B. D. 384; 57 L. J. Q. B. 634; 59 L. T. 749; 36 W. R. 793; 4 T. L. R. 637; *sub nom. Re WILLIS, Ex p. WILLOUGHBY DE FRESBY (LADY)*, 5 Morr. 189, C. A. *Annotations*:—*Consd. Mumford v. Collier* (1890), 25 Q. B. D. 279; *Green v. Marsh*, [1892] 2 Q. B. 330; *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373. *Refd. Stevens v. Marston* (1890), 60 L. J. Q. B. 192.

115. — — —.]—W. mortgaged premises occupied by him. The mtge. deed contained an attornment clause, & a power of distress on non-payment of rent by way of interest on the loan. Subsequently, by letter written to the mtgee., W. acknowledged that he held the mortgaged premises as tenant at a weekly rent slightly in excess of the interest under the mtge., admitted arrears of rent to be due, & undertook to deliver up possession at any time on four weeks' notice: *Held*: the attornment clause, & the letter modifying it, were bills of sale & void for want of registration. —

GREEN v. MARSH, [1892] 2 Q. B. 330; 61 L. J. Q. B. 442; 66 L. T. 480; 56 J. P. 839; 40 W. R. 449; 8 T. L. R. 498; 36 Sol. Jo. 412, C. A.

Annotation:—*Refd. Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.* (1896), 75 L. T. 508.

Relation of landlord & tenant not destroyed.]—*Held*: 1878 Act, s. 6, & 1882 Act, s. 9, did not render void the ordinary attornment clause found in mtges. of real property so as to destroy the relation of landlord & tenant created by it between the mtgee. & mtgor. —*MUMFORD v. COLLIER* (1890), 25 Q. B. D. 279; 59 L. J. Q. B. 552; 38 W. R. 716, D. C.

Annotation:—*Refd. Seoble v. Collins*, [1895] 1 Q. B. 375.

Before 1878.]—See Sect. 5, sub-sect. 1, *ante*.

—*See, generally, MORTGAGE.*

Brewer's lease.]—See Sect. 5, sub-sect. 2, *ante*.

117. Mining lease—Distress for rent—On chattels not on demised premises.]—A mining co. were lessees, from separate lessors, at certain rents & royalties, of two adjoining coal mines A. & B. There was no shaft on mine B., & the co. worked both mines by means of a shaft on mine A. In each of the leases the lessor reserved to himself express power to distrain for rent in arrear, not only upon chattels belonging to the lessees on the demised premises, but also upon chattels belonging to the lessees in or about "any adjoining or neighbouring collieries." In Oct., 1896, the lessors of mine B. levied a distress upon chattels belonging to the lessees on mine A.:—*Held*: having regard to the nature of the demise & the manner in which the minerals were worked, the power to distrain upon chattels belonging to the lessees upon adjoining or neighbouring mines did not constitute the mining lease a bill of sale, so as to require registration under Bills of Sale Acts.—*Re ROUNDWOOD COLLIERY CO., LEE v. ROUNDWOOD COLLIERY CO.*, [1897] 1 Ch. 373; 66 L. J. Ch. 186; 75 L. T. 641; 45 W. R. 324; 13 T. L. R. 175; 41 Sol. Jo. 210, C. A.

Annotation:—*Mentd. Vanner's Electrical Cooking & Heating Appliances v. Thorpe*, [1915] 2 Ch. 404.

See, generally, DISTRESS; LANDLORD & TENANT; MINES, MINERALS & QUARRIES.

Part II Instruments not within the Expression "Bill of Sale."

SECT. 1.—ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See 1878 Act, s. 4.

See, generally, BANKRUPTCY & INSOLVENCY, Vol. V., pp. 1056 et seq.

PART II. SECT. 7.

113 i. Attornment clause in —A tenant executed a mtge. of the premises in favour of plffs., the land. lords, continuing himself in actual possession of the premises: *Held*: the attornment clause & the distress clause in the mtge. created a tenancy at a fixed rent, & the mtge. was not avoided by Chattel Mortgage Act.—*TRUST & LOAN CO. OF CANADA v. LAWRASON* (1882), 10 S. C. R. 679. — CAN.

t. Deed dissolving partnership — Powers of distress & entry—On default of payment of annuity to retiring partner.]—By deed, dated Mar. 6, 1883, made between C. of the one part, & A. of the other part, the partnership theretofore subsisting be-

tween them was dissolved, & C. assigned to A. the premises & the stock-in-trade, goodwill, & chattels, in consideration of an annuity of £400 a year for his life. The deed contained powers of distress & entry to C. in case the annuity should be in arrear, & also a power, after the death of A. in the lifetime of C. that if, at any time after the death of A., the annuity should be in arrear for sixty days, it should be lawful for C. to sell the premises, stock-in-trade, & goodwill of the business, & to pay thereout the debts due on account of the business, including any money due to him on foot of his annuity, & retain half the surplus for his own benefit, & pay the other half to the exors. or administrators of A., & that thereupon the annuity should cease. The deed was

not registered as a bill of sale:—*Held*: the deed of Mar. 6 was a bill of sale within 1879 Act.—*CRANFIELD v. CRANFIELD* (1889), 23 L. R. Ir. 555.—IR.

PART III. SECT. 1.

118 i. For benefit of certain creditors —But no creditor excluded.]—A composition deed was executed by an insolvent for payment of his creditors, which, after reciting that it was intended to be for the benefit of all the creditors named therein, assigned the property of the insolvent to a trustee, upon trust, to pay, ratably & proportionably, "the parties hereto who shall execute these presents, within one calendar month from date hereof":—*Held*: this being an assignment in trust for the benefit of all

PART III.—INSTRUMENTS NOT WITHIN EXPRESSION “BILL OF SALE.”

exception of 1854 Act, so as not to require registration under that Act, although the deed does not appear to be executed by all the creditors.—**GENERAL FURNISHING & UPHOLSTERY Co. v. VENN** (1863), 2 H. & C. 153; 2 New Rep. 177; 32 L. J. Ex. 220; 8 L. T. 432; 9 Jur. N. S. 550; W. R. 756; 159 E. R. 64.

Annotations :—**Expld.** *Clapham v. Atkinson* (1864), 4 B. & S. 730. **Consd.** *Hadley v. Beedom*, [1895] 1 Q. B. 616. **Expld.** *Re Allix, Ex p. Trustee*, [1914] 2 K. B. 77. **Refd.** *R. v. Creese* (1874), L. R. 2 C. C. R. 105; *Boldero v. London & Westminster Loan & Discount Co.* (1879), 5 Ex. D. 47. **Mentd.** *Re Rileys, Harper v. Rileys*, [1903] 2 Ch. 590.

119. ———.]—Deft. having recovered judgment of debt against P., P. executed a composition deed under Bkpey. Act, 1861 (c. 134), s. 192, & made between P. of the first part, pltf. of the second part, & the several persons named in the schedule, etc., being creditors of P., of the third part, whereby P. & pltf. covenanted to pay to each of the parties of the third part, & all other the creditors of P., a composition of 2s. in the pound upon their debts, & P. thereby assigned all his goods & effects to pltf. upon trust to convert same into money & to apply the proceeds in payment of the costs of the trust, & then, in repayment to pltf. of all money paid by him to the creditors in the matter of the composition, & to stand possessed of the surplus, if any, in trust for P. absolutely. The deed contained a release of P. from his debts by the creditors, & a declaration that the deed was intended to operate as a trust deed for the benefit of creditors within the above Act, & to be binding on all the creditors, including non-executing & non-assenting creditors, & that, so soon as the requisite majority had executed or in writing assented to the deed, it was intended that it should be registered under s. 192, in order that P. might obtain the protection provided by s. 198 :—*Held* : although the creditors had only a covenant for the payment of 2s. in the pound, & there was a resulting trust in the surplus for the benefit of debtor, yet nevertheless it was a deed for the benefit of creditors, & did not come within 1854 Act.—**JOHNSON v. OSENTON** (1869), L. R. 4 Exch. 107; 38 L. J. Ex. 76; 19 L. T. 793; 17 W. R. 675.

Annotations :—**Mentd.** *Re Prior, Ex p. Osenton* (1869), 4 Ch. App. 690; *Exchange Bank of Yarmouth v. Blethen* (1885), 33 W. R. 801.

120. ———.]—A firm of traders, being in insolvent circumstances, executed an assign-

ment to trustees of their stock-in-trade, machinery, & other effects, upon trust to sell & divide the proceeds of sale amongst creditors who might execute the assignment, & also, at the trustees' option, amongst creditors who should not execute. The trustees were empowered to make an allowance to debtors, & to return their furniture to them. The trustees also might, in their option, pay debtors the dividends which would otherwise be payable to creditors who should not execute. The trustees were not to be answerable the one for the other, nor for any loss which might happen to the trust estate. The assignment was executed for the purpose of selling the business of debtors as a going concern :—*Held* : it was an assignment for the benefit of creditors within 1854 Act, & did not stand in need of registration.—**BOLDERO v. LONDON & WESTMINSTER LOAN & DISCOUNT Co.** (1879), 5 Ex. D. 47; 42 L. T. 56; 28 W. R. 154.

Annotations :—**Consd.** *Green v. Brand* (1884), Cab. & El. 410; *Maskelyne & Cooke v. Smith*, [1903] 1 K. B. 671.

121. ——— **Provided he assented within given time.**—Debtor assigned all his personal estate to trustees for the benefit of his creditors by a deed registered under Deeds of Arrangement Act, 1887 (c. 57), but not registered as a bill of sale. The deed contained a proviso that no creditor should benefit who did not within three months assent to the deed : *Held* : notwithstanding the proviso, the deed was an assignment for the benefit of the creditors of the person making same, within 1878 Act, s. 4, & did not require to be registered as a bill of sale.—**HADLEY & SON v. BEEDOM**, [1895] 1 Q. B. 616; 64 L. J. Q. B. 240; 72 L. T. 193; 43 W. R. 218; 49 Sol. Jo. 219; 2 Mans. 47; 15 R. 183, D. C.

122. For benefit of certain named creditors only—**With resulting trust to debtor.**—C., being embarrassed, assigned his property to L. & W., for the benefit of certain creditors named, being a selection of C.'s creditors, & then in trust for C. :—*Held* : the assignment was a bill of sale.—**R. v. CREESE** (1871), L. R. 2 C. C. R. 105; 43 L. J. M. C. 51; 29 L. T. 897; 38 J. P. 229; 22 W. R. 375; 12 Cox, C. C. 539, C. C. R.

Annotation :—**Mentd.** *R. v. Humphris*, [1901] 2 K. B. 89.

123. Assignment to surety.—A deed for the benefit of creditors under Bkpey. Act, 1861 (c. 134), whereby debtor, in consideration of the surety's joining him in signing promissory notes

the creditors of the insolvent, did not require registration.—**ASHFORD v. TUTTE** (1857), 7 L. C. L. R. 91; 9 Ir. Jur. 440.—**JR.**

118 ii. ———.]—*Held* : assignments for the benefit of creditors were until 48 Viet. c. 26 within R. S. O. 1877 (c. 119).—**WHITING v. HOVEY** (1886), 13 A. R. 7; *sub nom.* *HOVEY v. WHITING* (1887), 14 S. C. R. 515.—**CAN.**

118 iii. ———.]—*Change of possession.*—Assignment of goods & chattels for benefit of creditors, accompanied by delivery & a continued change of possession. *Qu.* : whether within Bills of Sale Act, 1893.—**DOUGLAS v. SANSOM** (1895), 1 N. B. Eq. Rep. 122.—**CAN.**

118 iv. ———.]—Assignment for the general benefit of creditors must be registered unless there is a sufficient change of possession.—**HEWARD v. MITCHELL** (1851), 10 U. C. R. 35; 11 U. C. R. 625.—**CAN.**

118 v. *S. P. HARRIS & WOODSIDE v. COMMERCIAL BANK OF CANADA* (1858), 16 U. C. R. 437.—**CAN.**

118 vi. *S. P. MAULSON v. JOSEPH* (1858), 8 C. P. 15.—**CAN.**

118 vii. ———.]—*What property may be assigned.*—By a deed of assignment, the trustee was empowered to make payments out of the estate to all the creditors who should execute the deed. All the creditors who chose to sign were enabled to take advantage of the deed :—*Held* : this was an assignment for the benefit of creditors within Act No. 1103, s. 132.

Under a deed of assignment debtor may be allowed to retain possession of part of his property, & it is not necessary that all debtor's property should be assigned to avoid the necessity of registering the deed as a bill of sale.—**BEESTON v. DONALDSON** (1892), 18 V. L. R. 208.—**AUS.**

122 i. For benefit of certain named creditors only.—An assignment of personal property in trust to sell same & apply the proceeds to the payments of debts due certain named creditors of the assignor is a bill of sale within 5th R. S. N. S. c. 92, s. 4.—**ARCHIBALD v. HURLEY** (1890), 18 S. C. R. 116.—**CAN.**

122 ii. ———.]—*Preferential assignment.*—A preferential assignment is not an “assignment for the general benefit of all the creditors,” within 3rd R. S.,

c. 119, s. 6.—**BL.** *v. SAWYER* (1865), 2 Old. 1.—**CAN.**

122 iii. ———.]—*Subject to trust in favour of all creditors.*—Though an assignment contains preferences in favour of certain creditors, yet if it includes, subject to such preferences, a trust in favour of all the assignor's creditors, it is “an assignment for the general benefit of creditors” under 5th R. S. N. S. c. 92, s. 10, & does not require an affidavit of *bona fides*.—**KIRK v. CHISHOLM** (1896), 26 S. C. R. 111.—**CAN.**

a. For benefit of all creditors—Further preferential assignments.—*W. McG., O. McG., & N. L.*, by deeds of assignment (A., B. & C.) assigned to pltf. all their real & personal estate in trust for creditors. The assignment A. was made for the general benefit of creditors, & the assignments B. & C. for the benefit of certain preferred creditors, the residue only, if any, being assigned for the benefit of creditors generally. Bearing even date with the assignments, the assignors executed separate bills of sale (D., E. & F.) to pltf. subject to the trusts contained in the deeds of assignment.

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for the agreed composition, & covenanting with the creditors to pay them such composition, assigns all his property to the surety absolutely, is not a deed requiring to be registered under 1854 Act, s. 1.—*BEEVOR v. SAVAGE* (1867), 16 L. T. 358.

Assignments void under 13 Eliz. c. 5.]—See FRAUDULENT & VOIDABLE CONVEYANCES.

SECT. 2.—MARRIAGE SETTLEMENTS.

See 1878 Act, s. 4.

124. Post-nuptial settlements & assignments—Not within exception.]—A post-nuptial settlement, made in consideration of natural love & affection, is not a marriage settlement within the exception in 1851 Act, s. 7.—*FOWLER v. FOSTER* (1859), 28 L. J. Q. B. 210; 32 L. T. O. S. 293; 5 Jur. N. S. 99.

Annotation:—Consd. Ashton v. Blackshaw (1870), L. R. 9 Eq. 510.

125. ———.]—A married woman gave up to her husband £500, held upon trust for her separate use, upon the understanding that the husband would settle his furniture upon her for her separate use. The husband assigned the furniture to a trustee to hold for the use & benefit of his wife, & the property remained in the joint possession of husband & wife. The assignment was not registered under 1854 Act:—*Held*: the assignment operated as a bill of sale & came within the Act.—*ASHTON v. BLACKSHAW* (1870), L. R. 9 Eq. 510; 39 L. J. Ch. 205; 22 L. T. 197; 34 J. P. 453; 18 W. R. 307.

Annotations:—Consd. & Expld. Re Fairbrother, Ex p. Harding (1873), L. R. 15 Eq. 223. *Expld. Wright v. Redgrave* (1879), 11 Ch. D. 24. *Expld. & Apprvd. Crawcour v. Salter* (1881), 18 Ch. D. 30. *Consd. Casson v. Churchley* (1884), 53 L. J. Q. B. 335. *Refd. Hollinshead v. Egan*, [1913] A. C. 564. *Mentd. Re Broadbent, Ex p. Homan* (1871), L. R. 12 Eq. 598.

126. ——— Unless made in pursuance of ante-nuptial agreement.]—A post-nuptial settlement in pursuance of an ante-nuptial agreement is a marriage settlement within the exception in 1878 Act, s. 4.—*COURCHER v. BARDILL* (1883), 27 Sol. Jo. 276, C. A.

Annotation:—Apld. Re Reis, Ex p. Clough, [1901] 2 K. B. 769.

127. ———.]—In 1879 R. by his marriage settlement covenanted to transfer all his after-acquired property, except business assets, to the trustees of the settlement upon trusts for the benefit of his wife & children, & afterwards, in pursuance of a notice served on him by the trustees of his marriage settlement, he transferred to them by two deeds his house & furniture:—*Held*: the deed of assignment of the furniture, being executed in pursuance of the covenant in the settlement & being in the nature of a further assurance, was a marriage settlement within the exception in 1878 Act, s. 4, & did not require registration as a bill of sale.—*Re REIS, Ex p. CLOUGH*, [1901] 2 K. B. 769; 73 L. J. K. B. 929; 91 L. T. 592; 53 W. R. 122; 11 Mans. 229;

None of the deeds of assignment were filed; the bills of sale were filed, but were not accompanied with affidavits under 1883 Act, c. 11, s. 1. Deft., as sheriff, levied on the property included in the bills of sale & assignments:—*Held*: (1) the assignments referred to in the bills of sale E. & F. were not required to be filed as part of the instrument of transfer; (2) neither the bills of sale nor assignments required to be accompanied with the

affidavit provided for in 1883 Acts, c. 11, s. 1, that enactment only applying to bills of sale for securing debts or advances; (3) the assignment A. did not require to be filed, as it was an assignment for the general benefit of creditors; (4) the assignments B. & C. not being in the nature of defeasances, which are required to be filed, & the bills of sale E. & F. being absolute conveyances, & fully expressing all that was material to their character

sub nom. Re REIS, Ex p. SAMUEL, 20 T. L. R. 547, C. A.; *affd.*, *sub nom. CLOUGH v. SAMUEL*, [1905] A. C. 442, H. L.

Annotations:—Refd. Re Magnus, Ex p. Salaman, [1910] 2 K. B. 1049. *Mentd. Re Hart, Ex p. Green*, [1912] 3 K. B. 6; *Re Midgley* (1913), 108 L. T. 45; *Re Lind, Industrials Finance Syndicate v. Lind* (1915), 84 L. J. Ch. 884.

128. ——— Apparent possession of husband.]—A wife, who had separate estate, agreed to purchase from her husband some furniture & other personal chattels belonging to him, which were in the house in which she lived with him. She stipulated that a receipt for the purchase-money should be given to her, & instructed her solr. to draw the receipt. After the purchase-money had been paid to the husband he signed a receipt which the wife's solr. had prepared. The document acknowledged the receipt from the wife of the agreed sum, as the purchase-money "for all my furniture, plate, etc., which I hereby acknowledge are now absolutely her property." There was no formal delivery of the goods by the husband to the wife, but they remained, as they had previously been, in the house in which the husband & the wife were living together. She subsequently sent part of the goods to her own bankers, & the remainder were afterwards taken in execution by a judgment creditor of her husband. In an interpleader issue between the wife & the execution creditor:—*Held*: the wife had a sufficient possession of the goods to take the case out of 1878 Act, for the situation of the goods being consistent with their being in the possession of either the husband or the wife, the law would attribute the possession to the wife who had the legal title.—*RAMSAY v. MARGRETT*, [1891] 2 Q. B. 18; 63 L. J. Q. B. 513; 70 L. T. 788; 10 T. L. R. 355; 1 Mans. 181; 9 R. 107, C. A.

Annotations:—Apld. Clapham v. Ives (1904), 91 L. T. 69. *Distd. Re Reis, Ex p. Clough*, [1901] 1 K. B. 451. *Refd. Re Satterthwaite, Ex p. Trustee* (1895), 2 Mans. 52; *Withers v. Berry* (1895), 39 Sol. Jo. 559; *Re Lacey, Ex p. Trustee*, [1918-19] B. & C. R. 116. *Mentd. Re Magnus, Ex p. Salaman* (1910), 80 L. J. K. B. 71; *Rogers, Eungblut v. Martin* (1910), 103 L. T. 527.

129. Ante-nuptial settlement of after-acquired property—Within exception.]—Under the trusts of an ante-nuptial settlement all household goods, etc., were assigned to the wife & all after-acquired property of a similar kind was to be subject to the same trusts:—*Held*: 1854 Act did not require the settlement to be registered.—*ANON.* (1875), Bitt. Prac. Cas. 19.

Inclusion of after-acquired property in bills of sale generally, *see* Part V., Sect. 2, sub-sect. 4, & Part VI., Sect. 3, sub-sect. 2, A., *post*.

130. Informal ante-nuptial agreement—Within exception.]—A memorandum of agreement for a marriage settlement, although informal & not under seal, is a marriage settlement within the exception of 1878 Act, s. 4, & is not a bill of sale.—*WENMAN v. LYON & Co.*, [1891] 1 Q. B. 634; 60 L. J. Q. B. 223; 64 L. T. 88; 39 W. R. 301; *sub nom. LYON v. WENMAN*, 7 T. L. R. 219; *affd.*, [1891] 2 Q. B. 192, C. A.

Annotation:—Consd. Re Reis, Ex p. Clough, [1904] 2 K. B. 769.

See, also, No. 42, *ante*, No. 673, *post*.

as such, the Act in reference to filing was substantially complied with; (5) assignment A. was good without filing, & D. was only auxiliary to A.—*DURKEE v. FLINT* (1886), 7 R. & G. 487; 8 C. L. T. 19.—*CAN.*

b. Assignment under Collection Act—Not subject to Bills of Sale Act.]—FARLINGER v. INGRAHAM (1906), 38 N. S. R. 467.—*CAN.*

3.—TRANSFERS OF SHIPS.

See 1878 Act, s. 4.

See, generally, SHIPPING & NAVIGATION.

131. Unfinished ship.]—In Aug., 1874, A., having overdrawn his account with his bankers, offered to give them a security over a ship, which he was then building. Two months later, A.'s account being still largely overdrawn, the bankers requested him to give them the promised security, & he deposited with them the builder's certificate of the ship, which was still unfinished, & the following day they put a man in possession:—*Held*: the deposit of the builder's certificate was a good equitable mtge. of all A.'s property & interest in the ship, & although the ship was unfinished, registration under 1854 Act was not necessary.—*Re* SOFTLEY, *Ex p.* HODGKIN (1875), L. R. 20 Eq. 746; *sub nom.* *Re* SOFTLEY, *Ex p.* WINTER, 44 L. J. Bey. 107; 33 L. T. 62; 24 W. R. 68.

Annotations:—*Refd.* *Re* Ellis, *Ex p.* Thoday (1876), 34 L. T. 261. *Mentd.* *Re* Wincham Shipbuilding Boiler & Salt Co. (1878), 26 W. R. 588; *Bulfeel & Colmore v. Parker & Bulfeel's Trustee in Bkpey.* (1916), 32 T. L. R. 661.

132. Ship not registered under Merchant Shipping Act, 1854 (c. 104).]—A ship built in order to be sold to a foreigner & to be delivered to him at a foreign port, was assigned by her builder to pltf. for a valuable consideration, under an agreement, which was not in the form of a bill of sale given by the above Act. The assignment was not registered, either under that Act or under 1854 Act. At the time of the assignment the vessel had been completely built & had been tried:—*Held*: the assignment fell within the proviso in 1854 Act, s. 7.—*UNION BANK OF LONDON v. LENANTON* (1878), 3 C. P. D. 243; 47 L. J. Q. B. 409; 38 L. T. 698; 3 Asp. M. L. C. 600, C. A.

Annotation:—*Folld. Gapp v. Bond* (1887), 19 Q. B. D. 200.

133. Dumb barge propelled by oars—Mortgage thereof.]—A dumb barge propelled by oars, plying on the river Thames & carrying goods, wares, & merchandise, without passengers, is a vessel within the exception in 1878 & 1882 Acts.—*GAPP v. BOND* (1887), 19 Q. B. D. 200; 56 L. J. Q. B. 438; 57 L. T. 137; 35 W. R. 683; 3 T. L. R. 621, C. A.

Annotations:—*Refd.* *Re* Yarrow, *Collins v. Weymouth* (1889), 59 L. J. Q. B. 18; *Re* Watson, *Ex p.* Official Receiver in Bkpey. (1890), 25 Q. B. D. 27; *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 1.

134. Articles passing as part of mortgaged ship—Within exception.]—A mtge. of a ship passes to the mtgee. under the word "ship" articles necessary to the navigation of the ship or to the prosecution of the adventure, which were on board at the date of the mtge., & articles brought on board in substitution for them subsequently to the mtge., & need not be registered under Bills of Sale Acts.—*COLTMAN v. CHAMBERLAIN* (1890), 25 Q. B. D. 328; 59 L. J. Q. B. 563; 39 W. R. 12; 6 T. L. R. 359, D. C.

PART III. SECT. 3.

134 i. Articles passing as part of mortgaged ship—Ship registered—Exemption from registry.]—*Held*: the furniture, glass, crockery, table linen, beds, etc., on board a steamboat used for carrying passengers, passed under a mtge. of the vessel with all her apparel, furniture, etc., as part of the vessel; & the mtge., being of a registered vessel, was exempt from registry under Chattel Mortgage Act.—*PATTON v. FOY* (1860), 9 C. P. 512.—*CAN.*

PART III. SECT. 4.

c. Sale of stock-in-trade en bloc.]
—Defts questioned the validity of a

bill of sale to pltf., on a number of grounds, one of pltf.'s replies to which was that Bills of Sale Act did not apply, as this was a transfer of goods in the ordinary course of business, excluded from the operation of the Act:—*Held*: the words "transfer of goods in the ordinary course of business," were wide enough to include the sale of a stock-in-trade *en bloc*.—*GREENBURG v. LAENZ* (1905), 12 B. C. R. 395.—*CAN.*

d. Agreement to deliver goods for sale—As security for advances.]—A "working agreement," by which the owner of a sugar estate borrows money of a merchant for the expenses of getting the crop & making the sugar,

SECT. 4.—TRANSFERS IN ORDINARY COURSE OF BUSINESS.

See 1878 Act, s. 4; 1890 Act, s. 1; 1891 Act, s. 1.

135. Letter of hypothecation by warehouseman—As security for advance.]—A., being a factor & warehouse keeper, by letter of hypothecation pledged to B. certain wools to secure a sum of money. No delivery of the warrants for the wools was made, but a promise to deliver them on the following morning was added at the foot of the letter. After being pressed daily to deliver the warrants, A. absconded. B. thereupon obtained from A.'s clerk, the keys of the warehouses & possession of the wools. A. was a few days afterwards adjudicated bkpt.:—*Held*: the letter created a good equitable charge, & did not require registration under 1854 Act.—*Re* SLAEE, *Ex p.* NORTH WESTERN BANK (1872), L. R. 15 Eq. 69; 42 L. J. Bey. 6; 27 L. T. 461; 21 W. R. 69.

Annotations:—*Distd.* *Re* Steele, *Ex p.* Conning (1873), L. R. 16 Eq. 414. *Consd.* *Re* Hamilton Young, *Ex p.* Carter, [1905] 2 K. B. 772. *Refd.* *Reeves v. Barlow* (1883), 11 Q. B. D. 610; *Re* Hall, *Ex p.* Close (1884), 14 Q. B. D. 386.

See, also, Part II., Sect. 2, *ante*, & No. 140, *post*.

136. Agreement to give bill of sale—As security for price of goods supplied by broker.]—*Re* STEELE, *Ex p.* CONNING, No. 109, *ante*.

—*See, further*, Part II., Sect. 6, *ante*.

137. Pledge by trader of stock bought on credit—As security for advance.]—*Semble*: a pledge by a trader of stock-in-trade which he has bought on credit, & not paid for, is not a "transfer in the ordinary course of business of his trade or calling," within the exception contained in 1878 Act, s. 4.—*Re* HALL, *Ex p.* CLOSE (1884), 14 Q. B. D. 51; 51 L. J. Q. B. 43; 51 L. T. 795; 33 W. R. 228.

Annotations:—*Consd.* *Re* Cunningham, *Attenborough's Case* (1885), 28 Ch. D. 682; *Re* Hardwick, *Ex p.* Hubbard (1886), 17 Q. B. D. 690; *Re* Townsend, *Ex p.* Parsons (1886), 16 Q. B. D. 532; *Dublin City Distillery v. Doherty*, [1914] A. C. 823. *Refd.* *Grigg v. National Guardian Assoc.*, [1891] 3 Ch. 206; *London & Yorkshire Bank v. White* (1895), 11 T. L. R. 570; *Withers v. Berry* (1895), 39 Sol. Jo. 559. *Mentd.* *Re* Standard Manufacturing Co. (1891), 60 L. J. Ch. 292.

See, also, Part II., Sect. 5, sub-sect. 6, *ante*.

138. Letter of lien by trader with receipts from person in possession attached—As security for advance by bank—Course of dealing.]—Bankers from time to time made advances to traders to enable them to purchase goods for shipment to the East. The course of business was for the traders to send the goods to bleachers to be bleached, & afterwards they were returned to the traders or sent to packers to be packed for shipment, & on the occasion of each advance the traders sent the bank a letter of lien accompanied by the bleachers' receipts for the goods. The letter, which was in printed form, was in the following term: "We beg to advise having drawn a cheque on you for £—, which amount please place to the debit of our loan account, as

upon an agreement to deliver to him the sugar when made to sell on commission, & to retain his debt out of the proceeds, cannot be considered as a "transfer of goods in the ordinary course of business" so as to be exempt from the necessity of registration as a bill of sale under Trinidad Ordinance No. 15 of 1884.—*TENNANT v. HOWATSON* (1888), 13 A. C. 489; 57 L. J. P. C. 110; 58 L. T. 616, P. C.—*WEST INDIES*.

e. Deed giving bank lien on goods held by third party—As security for advances.]—*Power to sell goods on default—Ordinary course of dealing.]*—*ANT BANKING CO. OF LONDON v. SPOTTEN* (1877), 11 L. R. Eq. 586.—*IR.*

Sect. 4.—Transfers in ordinary course of

a loan on the security of goods in course of preparation for shipment to the East. As security for this advance we hold on your account & under lien to you the under-mentioned goods in the hands of [here followed a list of goods & names of bleachers] as per their receipt inclosed. These goods when ready will be shipped to Calcutta, & the bills of lading duly indorsed will be handed to you, & we then undertake to repay the above advance": *Qu.*: whether the letters of lien were "transfers of goods in the ordinary course of a trade or calling" within the exceptions in 1878 Act, s. 4.—*Re HAMILTON YOUNG & Co., Ex p. CARTER*, [1905] 2 K. B. 772; 74 L. J. K. B. 905; 93 L. T. 591; 54 W. R. 260; 21 T. L. R. 757; 12 Mans. 365, C. A.

SECT. 5. BILLS OF SALE OF GOODS IN FOREIGN PARTS OR AT SEA AND OTHER DOCUMENTS OF TITLE.

See 1878 Act, s. 4; 1890 Act, s. 1; 1891 Act, s. 1.

139. "Foreign parts" includes—Scotland.]—

A bill of sale of personal chattels situate in Scotland, though made in England & by a domiciled Englishman, need not be registered under 1854 Act.—*COOTE v. JECKS* (1872), L. R. 13 Eq. 597; 41 L. J. Ch. 599.

Annotation:—**Mentd.** *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354.

140. Letter of hypothecation of goods in transit.]—T. applied to his bankers for an advance as against certain goods, which had been consigned to him & were then at sea, he depositing with them the indorsed bills of lading. Before making the advance the bankers required him to sign a letter of hypothecation, by which he under-

took to hold the goods in trust for the bankers, & to hand over to them the proceeds, "as & when received" to the amount of the advance:—*Held*: the goods not having arrived at the date of the execution of the hypothecation note, it came within the exception as to "goods at sea" contained in 1878 Act.—*R. v. TOWNSHEND* (1881), 15 Cox, C. C. 466.

See, also, Part II., Sect. 2, & No. 135, *ante*.

141. Letter of lien by trader with receipts from person in possession attached—As security for advance by bank—Course of business.]—Debtors purchased goods in England for shipment to India upon the orders of a firm there. The goods had to be sent to bleachers to be prepared, & for the purpose of paying for them debtors obtained advances from a bank, to whom they gave letters of lien stating that the advances were loans on the security of the goods in preparation for shipment to the East, & that as security for the advance debtors held the goods then in the hands of the bleachers on the bank's account & under lien to them. The bleachers' receipts for the goods were inclosed with the letters of lien:—*Held*: the letters of lien came within the exceptions in 1878 Act, s. 1, as being documents "used in the ordinary course of business as proof of the possession or control of goods," & were not bills of sale.—*Re HAMILTON YOUNG & Co., Ex p. CARTER*, [1905] 2 K. B. 772; 71 L. J. K. B. 905; 93 L. T. 591; 54 W. R. 260; 21 T. L. R. 757; 12 Mans. 365, C. A.

SECT. 6. —DEBENTURES.

See 1882 Act, s. 17.

See, generally, COMPANIES.

142. Application of Bills of Sale Acts - Debenture.]—A co. issued debentures, which were a first

PART III. SECT. 5.

f. Bill made & registered in England—Chattels in Ireland.]—A bill of sale dated Apr. 10, 1879, was made in England between two persons domiciled & resident there. Part of the chattels assigned were temporarily in Ireland—the rest in England; & the instrument was duly registered in England, though not in Ireland, as a bill of sale. An English creditor of the grantor obtained a judgment in England against him, & having enrolled it in Ireland, took in execution the chattels in Ireland which had been assigned:—*Held*: the bill of sale was valid against the execution creditor. *BROOKES v. HARRISON* (1880), 6 L. R. Ir. 85, 332.—**IR.**

g. Delivery warrants Advances on security of manufactured goods.]—Pltf. advanced moneys to the co. on the security of their manufactured whiskey lying in the bonded warehouse of the co. as follows: On the occasion of each advance the name of pltf. was entered in the co.'s stock-book opposite the particulars of whiskey intended to be pledged, and a delivery warrant & invoice, each containing particulars of such whiskey, were delivered to pltf.:—*Held*: (1) the warrants did not require registration as bills of sale under Companies Act, 1900, s. 14, & Bills of Sale (Ireland) Act, 1879, s. 4; (2) the warrants came within the class of documents excluded from Bills of Sale (Ireland) Act, 1879, s. 4, as being "documents used in the ordinary course of business as proof of the possession or control of goods."—*DONNELLY v. KENNEDY*, [1912] 1 I. R. 319, C. A.—**IR.**

h. Shipping receipt Indorsed to bank as security for advance.]—C. & Son, bought oats from persons who shipped

them to Toronto consigned to their (the sellers') own order, or to the order of some bank other than pltf.s., sending the shipping receipt with draft for the price of the oats attached to C. & Son at Toronto. The latter then took the shipping receipt to pltf.s., who advanced the money thereon to pay the draft, returning the shipping receipt to C. & Son, for the purpose of obtaining the oats from the carriers, after taking from C. & Son a receipt in these words: "Received in trust from the D. Bank bill of lading for . . . bushels oats, & I hereby undertake to sell the property specified for the bank & collect the proceeds of sales thereof, & deposit same with the bank, in Toronto, to the credit of same, I hereby acknowledging myself to be bailee of the property for the bank." C. & Son received the oats from the carriers & warehoused them, taking warehouse receipts in their own name, which they indorsed to pltf.s., who then gave up the bailee receipt:—*Held*: Chattel Mortgage Act could have no application, for when the oats first came into the possession of C. & Son, they came charged with or subject to pltf.s.' title.—*DOMINION BANK v. DAVIDSON* (1885), 12 A. R. 90.—**CAN.**

k. Security receipt under Bank Act.]—A condition of a policy was that "if the subject of insurance be personal property, & be or become encumbered by a chattel mtge." it should be void:—*Held*: a security receipt under Bank Act given to a bank for advances was not a chattel mtge. within this condition.—*GUIMOND v. FIDELITY PHOENIX FIRE INSURANCE Co.* (1912), 47 S. C. R. 216.—**CAN.**

l. Agreement by bank to permit debtor to take goods out of bond—For

*of sale—Goods held as security for advances.]—*P. carried on business in London, Melbourne, & elsewhere as a bookseller. Pltf., a bank, advanced money to P. to enable him to carry on his business, & to import goods. To secure the advances pltf. received from P. the bills of lading of consignments of books, the bills of lading being indorsed absolutely to it. The consignments on reaching Melbourne were placed in bond, & the parties agreed under seal that when P. required, for the purposes of his trade, any of the books so consigned, he was to apply to pltf., & on giving an acknowledgment, to receive the bill of lading relating to such books, & obtain the books from the bond. In pursuance of the arrangement he obtained certain books from the bond, took them to his place of business, & disposed of them there in the usual course of business. At the date of P.'s bkpy. some of the books thus obtained from the bond were on his business premises for sale in the usual course of his business. On that date pltf., as owner under the indorsed bills of lading & as P.'s principal, seized these books. P.'s debt to pltf. at the time exceeded the value of the books seized. Deflt. claimed them as part of the bkpt.'s estate:—*Held*: the circumstances in which P. obtained possession of the goods seized did not constitute that transaction a bill of sale within Instruments Act, 1890.—*FEDERAL BANK OF AUSTRALIA, LTD. v. WHITE (TRUSTEE)* (1895), 21 V. L. 451.—**AUS.**

PART III. SECT. 6.

142 i. Application of Bills of Acts—Debenture.]—Debentures of an Incorporated Co., creating a charge on the co.'s undertaking & business & all

charge upon its plant & stock-in-trade. The co. was ordered to be wound-up, & the official liquidator sold the plant & stock-in-trade, & claimed to be entitled to retain the proceeds as against a holder of debentures of the co., on the ground that the debentures had not been registered under the above Act, & that they were void under 1878 Act, s. 8, against the liquidator of the co.:—*Held*: the Act had nothing to do with the winding up of companies, & the debentures retained their priority, although not registered under the Act.—*Re ASPHALTIC WOOD PAVEMENT CO., LTD.* (1883), 49 L. T. 159; 32 W. R. 16.

Annotation:—*Reid*. *Ross v. Army & Navy Hotel Co.* (1886), 34 Ch. D. 43.

See, further, Part VI., post.

143. ———.]—Debentures were issued by a co. to secure £500, together with interest thereon at the rate of £7 per cent. *per annum*, by which the co. charged with such payment all its uncalled capital, sheds, plants, machinery, stock-in-trade, timber, cut & uncut, & effects, & all its property both present & future:—*Held*: the debentures did not come within 1882 Act, s. 17.—*WELSTED & CO., LTD. v. SWANSEA BANK, LTD.* (1889), 5 T. L. R. 332.

Annotations:—*Apprvd.* *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627. *Reid*. *G. N. Ry. Co. v. Coal Co-op. Soc.*, [1896] 1 Ch. 187.

144. ———.]—1878 Act does not apply to a debenture of an incorporated co.—*READ JOANNON* (1890), 25 Q. B. D. 300; 59 L. J. Q. B. 544; 63 L. T. 387; 38 W. R. 734; 2 Meg. 275; *sub nom.* *REID v. JOANNON*, 6 T. L. R. 407, D. C.

Annotations:—*Consd.* *G. N. Ry. Co. v. Coal Co-op. Soc.*, [1896] 1 Ch. 187. *Folld.* *Clark v. Balm, Hill*, [1908] 1 K. B. 667. *Reid*. *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627. *Mentd.* *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*, [1914] 3 K. B. 772.

145. ———.]—**Bill of sale given by company.**—Bills of sale given by joint stock companies are within 1882 Act.—*Re CUNNINGHAM & Co., LTD., ATTENBOROUGH'S CASE* (1885), 28 Ch. D. 682; 54 L. J. Ch. 448; 52 L. T. 214; 33 W. R. 387; 1 T. L. R. 227.

its property present & future, including all its uncalled capital, are not bills of sale within Bills of Sale Act, & need not be registered thereunder.—*CAMPBELL v. HARRISON* (1903), 3 S. R. N.S.W. 432.—**AUS.**

142 ii. ———.]—A "first mtge. debenture" was given by a co. for money advanced specifically charging the assets of the co. with payment of the amount.—*Held*: not to be within Bills of Sale Ordinance.—*FOSTER v. INTERNATIONAL TYPESETTING MACHINE CO.*, [1919] 2 W. W. R. 652; 47 D. L. R. 329.—**CAN.**

142 iii. ———.]—At a meeting of the provisional directors of a joint stock co. incorporated under Ontario Companies Act, a by-law was passed, authorising the directors from time to time to borrow money upon the credit of the co., to issue bonds or debentures of the co. for the amounts borrowed, & to pledge the real or personal property, rights & powers, of the co., to secure such bonds or debentures:—*Held*: the debentures issued were not mtges. or conveyances intended to operate as mtges. of goods & chattels of an incorporated co., within Bills of Sale & Chattel Mortgage Act.—*JOHNSTON v. WADE* (1908), 17 O. L. R. 372; 11 O. W. R. 578; 12 O. W. R. 951.—**CAN.**

145 i. ———.]—**Bill of sale given by company.**—A limited hotel co. executed a bill of sale in 1873 to creditors, who were also mtgees. of the hotel premises, of all the furniture & effects "which now are or hereafter shall be in the hotel, & which effects now on the

premises are set forth in the schedule hereto." The bill of sale was registered after the passing of Bills of Sale (Ireland) Act, 1879, pursuant to the provisions thereof. In 1894, an order having been made to wind up the co., a summons was taken out by the liquidator to obtain the opinion of the ct. whether the bill of sale was valid though not re-registered:—*Held*: the bill of sale being a security given by a limited co. was not within Bills of Sale Acts.—*Re ROYAL MARINE HOTEL CO., KINGSTOWN (LTD.)*, [1895] 1 L. R. 368.—**IR.**

n. Application of Instruments Act—Debenture.—A trading co. issued debentures by which it charged with all payments of principal & interest "all its property whatsoever & where-soever both present & future;" the charge was to be a floating security, but so that the co. should not be at liberty to create any mtge. or charge in priority to the debentures. The principal moneys secured were to become payable if default were made in payment of interest or in case an effective resolution be passed for the winding-up of the co. The co. went into liquidation & the debenture holders claimed the proceeds of the sale of certain chattels & fixtures; the liquidator resisted the claim on the ground that the debentures were bills of sale & were void for non-registration under Instruments Act, 1890:—*Held*: the debentures were not void for such non-registration.—*BANK OF VICTORIA, LTD. v. LANGLANDS FOUNDRY CO., LTD.* (1898), 24 V. L. R. 230.—**AUS.**

Annotations:—*Consd.* *G. N. Ry. Co. v. Coal Co-op. Soc.*, [1896] 1 Ch. 187; *Dublin City Distillery v. Doherty*, [1911] A. C. 823. *Reid*. *Re Hardwick, Ex p. Hubbard* (1886), 17 Q. B. D. 690; *Re Townsend, Ex p. Parsons* (1886), 16 Q. B. D. 532.

See, now, Companies (Consolidation) Act, 1908 (c. 69), s. 93 (1) (c).

146. ———.]—**Transfer of charge as security.**—Although a charge upon chattels by an incorporated co. for the registration of which a statutory provision has been made by Companies (Consolidation) Act, 1845 (c. 16), s. 45, or Companies Act, 1862 (c. 89), s. 43, is not a bill of sale within 1878 Act, yet a transfer of such a charge as a security for a debt due from the mtgee. is not valid as a charge on either the chattels or the debt, unless the formalities of Bills of Sale Acts are observed.—*JARVIS v. JARVIS* (1893), 63 L. J. Ch. 10; 69 L. T. 412; 9 T. L. R. 631; 37 Sol. Jo. 702; 1 Mans. 199; 8 R. 361.

147. Extent of exception.—The effect of 1882 Act, s. 17, is to render it unnecessary that a debenture of an incorporated co. should be registered as a bill of sale.—*READ v. JOANNON* (1890), 25 Q. B. D. 300; 59 L. J. Q. B. 544; 63 L. T. 387; 38 W. R. 734. *Meg.* 275; *sub nom.* *REID v. JOANNON*, 6 T. L. R. 407.

Annotations:—*Apprvd.* *Re Standard Manufacturing Co-op. Co.*, [1891] 1 Ch. 627. *Consd.* *G. N. Ry. Co. v. Coal Co-op. Soc.*, [1896] 1 Ch. 187. *Folld.* *Clark v. Balm, Hill*, [1908] 1 K. B. 667. *Mentd.* *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*, [1914] 3 K. B. 772.

148. ———.]—The exception in 1882 Act, s. 17, applies to the debentures of any incorporated co.—*Re STANDARD MANUFACTURING CO.*, [1891] 1 Ch. 627; 60 L. J. Ch. 292; 64 L. T. 487; 39 W. R. 369; 7 T. L. R. 282; 2 Meg. 418, C. A.

Annotations:—*Distd.* *G. N. Ry. Co. v. Coal Co-op. Soc.*, [1896] 1 Ch. 187. *Consd.* *Clark v. Balm, Hill*, [1908] 1 K. B. 667. *Reid*. *Jarvis v. Jarvis* (1893), 69 L. T. 412; *Richards v. Kidderminster Overseers*, *Richards v. Kidderminster Corpn.*, [1896] 2 Ch. 212; *Re Roundwood Colliery Co.*, *Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373; *National Provincial Bank of England v. United Electric Theatres*, [1916] 1 Ch. 132. *Mentd.* *Re Opera*, [1891] 3 Ch. 260; *Robson v. Smith*, [1895] 2 Ch. 118; *Taunton v. Warwickshire*, [1895] 1 Ch. 734; *Davey v. Williamson*, [1898] 2 Q. B. 194; *Duck v. Tower Galvanizing Co.*,

o. ———.]—**Bill of Sale given by Corporation.**—A bill of sale given by a corp. does not require registration under Instruments Act, 1890, Part vi.—*Re EGLESTON* (1902), 28 V. L. R. 111.—**AUS.**

149 i. Extent of exception—Registration required by other Acts—Companies Acts—British Company incorporated in England.—Chattels Transfer Act, 1889, s. 2, par. (f) which excludes from the operation of that Act debentures issued by any co. or other corporate body, applies to debentures issued by a British co. incorporated in England under Imperial Joint-stock Companies Acts, 1862 to 1890, notwithstanding that it has not, within the colony, a register of its mtges. such as a co. incorporated under Companies Act, 1882 (New Zealand), is directed to keep. The debentures of such a co. do not therefore require registration under the Chattels Transfer Act, 1889.—*GEOHEGAN v. GREYMOUTH-POINT ELIZABETH RY. & COAL CO., LTD.* (1898), 16 N. Z. L. R. 749.—**N.Z.**

149 ii. ———.]—A debenture issued by an English Co. is valid in the Colony without the necessity of registration in the Colony as a bill of sale.—*BRAITHWAITE v. M'ARTHUR, LTD.* (1898), 19 N. S. W. Eq. 158.—**AUS.**

149 iii. ———.]—The debentures of a foreign co. carrying on business in Western Australia require registration under Bills of Sales Act, 1879.—*TRANSPORT TRADING & AGENCY CO. OF WESTERN AUSTRALIA, LTD. v. SMITH* (1906), 8 W. A. L. R. 33.—**AUS.**

[1901] 2 K. B. 314; Simultaneous Colour Printing Syndicate v. Foweraker, [1901] 1 K. B. 771; *Re* London Pressed Hinge Co., Campbell v. London Pressed Hinge Co., [1905] 1 Ch. 576; Evans v. Rival Granite Quarries, [1910] 2 K. B. 979.

149. — Registration required by other Acts — Companies Acts.—The mtges. or charges of any incorporated co., for the registration of which provision has been made by Companies Clauses Consolidation Act, 1845 (c. 16), or Companies Act, 1862 (c. 89), are not subject to registration under 1878 Act, & debentures issued by a limited co., incorporated under Companies Acts, 1862 and 1867 (c. 131), which charge all the floating real & personal property of the co., do not require registration under 1882 Act.—*Re* STANDARD MANUFACTURING CO., [1891] 1 Ch. 627; 60 L. J. Ch. 292; 64 L. T. 487; 39 W. R. 369; 7 T. L. R. 282; 2 Meg. 418, C. A.

Annotations:—**Folld.** Richards v. Kidderminster Overseers, Richards v. Kidderminster Corp., [1896] 2 Ch. 212. **Refd.** Jarvis v. Jarvis (1893), 69 L. T. 412; G. N. Ry. Co. v. Coal Co-op. Soc., [1896] 1 Ch. 187; *Re* Roundwood Colliery Co., Lee v. Roundwood Colliery Co., [1897] 1 Ch. 373; Davey v. Williamson, [1898] 2 Q. B. 194; Duck v. Tower Galvanizing Co., [1901] 2 K. B. 314; Clark v. Balm, Hill, [1908] 1 K. B. 667; National Provincial Bank of England v. United Electric Theatres, [1916] 1 Ch. 132. **Mentd.** *Re* Opera, [1891] 3 Ch. 260; Robson v. Smith, [1895] 2 Ch. 118; Taunton v. Warwickshire, [1895] 1 Ch. 734; Simultaneous Colour Printing Syndicate v. Foweraker, [1901] 1 K. B. 771; *Re* London Pressed Hinge Co., Campbell v. London Pressed Hinge Co., [1905] 1 Ch. 576; Evans v. Rival Granite Quarries, [1910] 2 K. B. 979.

150. — — — — —.—A deed of charge on the assets of a co. registered under Companies Act, 1862 (c. 89), to cover debentures is not a bill of sale within 1882 Act, s. 14.—**RICHARDS v. KIDDERMINSTER OVERSEERS, RICHARDS v. KIDDERMINSTER CORPN.**, [1896] 2 Ch. 212; 65 L. J. Ch. 502; 74 L. T. 483; 41 W. R. 505; 12 T. L. R. 340; 4 Mans. 169.

Annotations:—**Mentd.** *Re* Marriage Neave, North of England Trustee, Debenture & Assets Corp., v. Marriage Neave, [1896] 2 Ch. 663; National Provincial Bank v. United Electric Theatres (1915), 85 L. J. Ch. 106.

151. — — — — — Guernsey companies Acts.—The exception in 1882 Act, s. 17, applies to the debentures of an incorporated co. which is registered in Guernsey, & debentures issued by a limited co. incorporated under the Guernsey co. law, which charge all the undertaking & property of the co., do not require registration under Bills of Sale Acts.—**CLARK v. BALM, HILL & CO.**, [1908] 1 K. B. 667; 77 L. J. K. B. 369; 15 Mans. 42.

152. — — — — — Debenture & covering deed.—Defts. borrowed £1,500 by the issue of fifteen mtge. debentures, & to secure further the money so borrowed, they assigned all their plant, machinery, stock-in-trade, etc., to A. as trustee for the debenture holders. The assignment was registered as a bill of sale, but was not in the form required by 1882 Act. The form of the debenture was an undertaking by the co. to pay the bearer £100 subject to the conditions indorsed thereon, one of which was that the holders of the

debentures were entitled *pari passu* to the benefit of the assignment to A.:—**Held**: neither the debenture nor the assignment were within 1882 Act, s. 17.—**BROCKLEHURST v. RAILWAY PRINTING & PUBLISHING CO.**, [1884] W. N. 70; 28 Sol. Jo. 358; Bitt. Rep. in Ch. 117.

Annotations:—**Consd.** Ross v. Army & Navy Hotel Co. (1886), 34 Ch. D. 43. **Folld.** Jenkinson v. Brandley Mining Co. (1887), 35 W. R. 834. **Consd.** Topham v. Greenside Glazed Fire-Brick Co. (1887), 37 Ch. D. 281; Richards v. Kidderminster Overseers, Richards v. Kidderminster Corp., [1896] 2 Ch. 212. **Refd.** *Re* Standard Manufacturing Co., [1891] 1 Ch. 627.

153. — — — — —.—Debentures were issued by a co. under its common seal with a condition annexed that the holders of debenture bonds of that issue were entitled *pari passu* "to the benefit of an indenture dated Nov. 24, 1883, whereby, subject to a sum of £— & interest secured on mtge., the freehold buildings & premises of the co. & all the machinery, fittings, fixtures, & furniture of the co. in & about the premises, & any other machinery, fittings, fixtures, & furniture that may be substituted therefor during the continuance of the security effected by the indenture are expressed to be vested in trustees to secure payment of all money payable on such debenture bonds." The covering deed of Nov., 1883, purported to be a conveyance & assignment of the hereditaments, fixtures, & chattels in terms rather larger than those used in the condition; the future chattels being not only those substituted for existing chattels, but also any brought upon the premises in addition thereto. The deed was not registered under 1882 Act:—**Held**: assuming the covering deed to be void for want of registration under Bills of Sale Acts, the intention to give the debenture holders a valid charge, within 1882 Act, s. 17, on the property comprised in that deed, was manifest on the face of the debentures, read in conjunction with the annexed condition, & amounted to an equitable contract which would be carried into effect to give a charge upon all the property of the co., & the chattels intended to be charged with the money due on the original debentures were subject to an equitable charge in favour of the holders of those debentures.

ROSS v. ARMY & NAVY HOTEL CO. (1886), 34 Ch. D. 43; 55 L. J. Ch. 697; 55 L. T. 172; 35 W. R. 40; 2 T. L. R. 907, C. A.

Annotations:—**Distd.** Jenkinson v. Brandley Mining Co. (1887), 17 Q. B. D. 568. **Consd.** Levy v. Abercorris Slate & Slab Co. (1887), 37 Ch. D. 260; Topham v. Greenside Glazed Fire-Brick Co. (1887), 37 Ch. D. 281; G. N. Ry. Co. v. Coal Co-op. Soc., [1896] 1 Ch. 187. **Refd.** Richards v. Kidderminster Overseers, Richards v. Kidderminster Corp., [1896] 2 Ch. 212. **Mentd.** *Re* Queensland Land & Coal Co., Davis v. Martin, [1894] 3 Ch. 181; *Re* Bireham (1895), 61 L. J. Ch. 768; Brown, Shipley v. I. R. Comrs., [1895] 2 Q. B. 598; *Re* Johnston Foreign Patents Co., *Re* Johnston's Die Press Co., *Re* Johnstonia Co., J. P. Trust v. The Co. (1904), 91 L. T. 121; *Re* Fireproof Doors, Umney v. The Co., [1916] 2 Ch. 142.

154. — — — — — Covering deed.—Debentures were issued by a limited co., each debenture containing a clause that the repayment was secured by an indenture of mtge. made between the co. & certain

152 i. — — — — — Debenture & covering deed.—Where debentures of a co. state on their face that the holders of them will be entitled to the benefit of & be subject to, the provisions contained in a trust deed for payment of the principal moneys interest payable under the debentures, & such particulars of the trust deed are given as are sufficient to identify it, the trust deed is incorporated in & made part of each debenture, & is protected as part of each debenture. It does not therefore require registration under Chattels Transfer Act,

1889, any more than the debentures themselves.—**GEORGHEGAN v. GREY-MOUTH-POINT ELIZABETH RY. & COAL CO., LTD.** (1898), 16 N. Z. L. R. 749.—**N.Z.**

152 ii. — — — — —.—A trust deed executed for the purpose of securing the future purchasers of debentures of a co. & creating a floating charge upon all the assets of the co. is not, so far as the rights of the debenture holders to priority over the ordinary creditors depend upon the floating charge, invalid, by reason of the fact

that the trust deed was not registered as a chattel mtge. in accordance with Bills of Sale Ordinance.—**CAPITAL TRUST CORPN. v. YELLOW HEAD PASS COAL & COKE CO., JOHNSON & BOON, LTD. v. CAPITAL TRUST CORPN.** (1916), 34 W. L. R. 982; 10 W. W. R. 1192.

r. Agreement in writing to mortgage given by joint-stock companies—Of all real & personal Certain cos. agreed in writing to mtge., besides certain specified property, "all their assets, real & personal, of

persons as trustees for the debenture holders. The mtge. deed was not identified in the debentures by its date or by any further particulars of its contents, & the debentures themselves did not affect to pass any of the co.'s property to the holder. The deed itself, which was of even date with the debentures, was an ordinary deed of mtge., purporting to convey all the land, plant, machinery, fixtures, etc., of the co. to the mtgees.; it contained no trust for the benefit of the debenture holders. It was not registered as a bill of sale:—*Held*: the mtge. deed was void for want of registration.—*JENKINSON v. BRANDLEY MINING Co.* (1887), 19 Q. B. D. 568; 35 W. R. 834; 3 T. L. R. 832, D. C.

Annotations:—*Consd.* *Topham v. Greenside Glazed Fire-Brick Co.* (1887), 37 Ch. D. 281; *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627. *Refd.* *Read v. Joannon* (1890), 25 Q. B. D. 300.

155. — Memorandum of agreement.—A memorandum of agreement between a co. & the several persons named in the schedule thereto, called the lenders, whereby the co. covenanted to pay, on a day named, to each of the lenders the sum advanced by him, with interest, & as security for the payment thereof, charged therewith all its undertaking, property, estate, & effects of every kind:—*Held*: to be a debenture in the ordinary acceptance of the term, & within 1882 Act, s. 17.—*EDMONDS v. BLAINA FURNACES CO., BEESLEY v. BLAINA FURNACES CO.* (1887), 36 Ch. D. 215; 56 L. J. Ch. 815; 57 L. T. 139; 35 W. R. 798.

Annotations:—*Consd.* *Topham v. Greenside Glazed Fire-Brick Co.* (1887), 37 Ch. D. 281. *Apprvd.* *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627. *Consd.* *Richards v. Kidderminster Overseers, Richards v. Kidderminster Corpn.*, [1896] 2 Ch. 212. *Refd.* *Levy v. Abercorris Slate & Slab Co.* (1887), 37 Ch. D. 260; *G. N. Ry. Co. v. Coal Co-op. Soc.*, [1896] 1 Ch. 187.

156. — Document creating & acknowledging debt.—An agreement between a co. of the one part & a lender of the other part, whereby the co. agreed to pay the lender £600 with interest, & charged certain hereditaments with repayment of the £600 & interest, & further agreed with the lender that they would at any time during the continuance of the security at the request of the lender execute a legal mtge., & further agreed to issue debentures of the co. to the extent of £600 secured over all the capital stock, goods, chattels, & effects of the co., including uncalled capital, both present & future:—*Held*: to be in effect a debenture, & within the saving of 1882 Act, s. 17.

Any document which either creates a debt or acknowledges it, is a "debenture."—*LEVY v.*

ABERCORRIS SLATE & SLAB CO. (1887), 37 Ch. D. 260; 57 L. J. Ch. 202; 58 L. T. 218; 36 W. R. 411; 4 T. L. R. 34.

Annotations:—*Apprvd.* *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627. *Consd.* *Richards v. Kidderminster Overseers, Richards v. Kidderminster Corpn.*, [1896] 2 Ch. 212. *Refd.* *G. N. Ry. Co. v. Coal Co-op. Soc.*, [1896] 1 Ch. 187; *Clark v. Balm, Hill*, [1908] 1 K. B. 667. *Mentd.* *Re Queensland Land & Coal Co.*, *Davis v. Martin*, [1894] 3 Ch. 181; *City of London Brewery Co. v. I. R. Comrs.*, [1899] 1 Q. B. 121; *Re Perth Electric Tramways, Lyons v. Tramways Syndicate & Perth Electric Tramways*, [1906] 2 Ch. 216.

157. — Memorandum of deposit.—A brick-making co. deposited their title-deeds to certain beds of coal & fire-clay with their bankers, together with a memorandum, which stated that the deposit was made to secure to the bankers "payment of all sums of money which we are now, or at any time hereafter may be, indebted to you, whether on current account for principal, interest, commission, & charges, or on any other account whatsoever; & in consideration of the advances now made to us, & of our account being continued, we undertake to execute, when thereunto requested, a proper mtge., with immediate power of sale, or such further security as may be necessary for the purpose of effectually transferring to any person or persons whom you may designate for that purpose, the legal estate in the property to which this security relates." The memorandum did not contain any acknowledgment of any specific debt, nor any covenant or agreement by the co. for payment, except so far as the same was implied in the agreement to execute a legal mtge. of the property. *Seemle*: the memorandum was not a "debenture" within 1882 Act, s. 17.—*TOPHAM v. GREENSIDE GLAZED FIRE-BRICK CO.* (1887), 37 Ch. D. 281; 57 L. J. Ch. 583; 58 L. T. 271; 36 W. R. 461.

158. — Industrial society debenture.—Debentures issued by a society under Industrial & Provident Societies Acts, & charging the society's personal chattels by way of security for the payment of money, are not exempted by 1882 Act, s. 17, from the statutory requirements in respect of bills of sale.—*GREAT NORTHERN RY. CO. v. COAL CO-OPERATIVE SOCIETY*, [1896] 1 Ch. 187; 65 L. J. Ch. 214; 73 L. T. 443; 44 W. R. 252; 12 T. L. R. 30; 10 Sol. Jo. 52; *sub nom. R. COAL CO-OPERATIVE SOCIETY, GREAT NORTHERN RY. CO. v. COAL CO-OPERATIVE SOCIETY*, 2 Mans.

Annotation *Refd.* *Clark v. Balm, Hill*, [1908] 1 K. B. 667.

Part IV. Subject-Matter of Bills of Sale Personal Chattels."

See 1878 Act, s. 4.

SECT. 1.—IN GENERAL.

159. Fixtures—Personal chattels only for purposes of Act—Not for all purposes.—1854 Act

every description." The cos. continued to carry on their respective businesses, & in the ordinary course of business disposed of some of their assets, & appropriated the proceeds to their own purposes:—*Held*: (1) the agreement in writing to mtge. was an instrument within Chattels Transfer Act, 1889, & did not come within the exceptions of s. 2 (f), excluding "debentures & interest, coupons issued by any co. or incorporated body, &

secured upon the capital stock or chattels of such co. or corporate body;" (2) securities given by joint-stock cos. come within Chattels Transfer Act, 1889, as well as those given by individuals; (3) the security was over "chattels" within Chattels Transfer Act, 1889, & did not come within the exemption to the deflation of chattels of "negotiable instruments, shares, or interests in the capital or property of any corporate body."—*BANK OF NEW*

declares, by the interpretation clause, fixtures to be "personal chattels," but makes them so only for particular purposes, such as are therein described, & not for all purposes & in all circumstances whatever (LORD SELBORNE).—*MEUX v.*

ZEALAND v. GUTHRIE (WALTER) & CO., LTD. (1897), 16 N. Z. L. R. 484.—N.Z.

PART IV. SECT. 1.

s. *Fixtures—Meaning of—In 5th R. S. N. S. c. 92, s. 10.*—*WARNER v. DON* (1896), 26 S. C. R. 388.—CAN.

t. *Movable goods—12 Viet. c. 74 applicable only to mortgages of.*—*FRAZER v. LAZIER* (1852), 9 U. C. R. 679.—CAN.

Sect. 1.—In general. Sects. 2, 3 & 4: Sub-sect. 1.]

JACOBS (1875), L. R. 7 H. L. 481; 44 L. J. Ch. 481 32 L. T. 171; 39 J. P. 324; 23 W. R. 526, H. L.; *reversg.* S. C. *sub nom.* MEUX v. ALLEN (1874), W. N. 16.

Annotations:— **Refd.** *Paine v. Matthews* (1885), 53 L. T. 872; *Thomas v. Kelly* (1888), 60 L. T. 114. **Mentd.** *Bain v. Brand* (1876), 1 App. Cas. 762; *Re Eslick, Ex p. Alexander* (1876), 4 Ch. D. 503; *Cross v. Barnes* (1877), 46 L. J. Q. B. 479; *Re Trethowan, Ex p. Tweedy* (1877), 5 Ch. D. 559; *Sanders v. Davis* (1885), 15 Q. B. D. 218; *Topham v. Greenside Glazed Fire Brick Co.* (1887), 37 Ch. D. 281; *Gough v. Wood*, [1894] 1 Q. B. 713; *Ellis v. Glover & Hobson*, [1908] 1 K. B. 388; *Re Rogerstone Brick & Stone Co., Southall v. Wescomb*, [1919] 1 Ch. 110.

—.]—*See, further, Sect. 4, post.*

160. After-acquired chattels.]—The schedule to a bill of sale described the chattels as “21 milch cows” on a farm belonging to the grantor, “& all goods, chattels, & effects in or upon the premises belonging to” the grantor. After the execution of the bill of sale the grantor sold several of the cows referred to in the bill of sale & bought others:—*Held*: as the bill of sale contained no covenant, either express or implied, affecting after-acquired property, it did not extend to any of the stock brought on to the farm after the date of the bill of sale.—*CARPENTER v. DEEN* (1889), 23 Q. B. D. 566; 61 L. T. 860; 5 T. L. R. 647, C. A.

Annotations:— **Apld.** *Davies v. Jenkins*, [1900] 1 Q. B. 133. **Refd.** *Davidson v. Carlton Bank*, [1893] 1 Q. B. 82. **Mentd.** *Edwards v. Marston* (1890), 64 L. T. 97; *Hickley v. Greenwood* (1890), 25 Q. B. D. 277; *Edwards v. Marcus*, [1894] 1 Q. B. 587; *Ellis v. Wright* (1897), 76 L. T. 522; *Oakes v. Green* (1907), 23 T. L. R. 560.

—.]—*See, generally, Part V., Sect. 2, sub-sect. 4, & Part VI., Sect. 3, sub-sect. 2, A., post.*

161. Chattel interest in real estate—Tillages & tenant right valuation.]—*COCHRANE v. FENTWISTLE*, No. 299,

See, further, Part V., Sect. 2, sub-sect. 4, post.

162. Title deeds—No intention to create charge on land.]—By a bill of sale the mtgor. assigned to the mtgee. as security for an advance “the chattels & things” specifically described in the schedule thereto “& now being in & about the dwelling-house & premises known as the Lion Hotel, Farningham.” The schedule contained a list of articles about the premises, & it concluded with the following item: “Assignment dated Jan. 21, 1902” (the parties being stated) “of lease dated Nov. 13, 1891, of the Lion Hotel & all the muniments of title referred to in the assignment”:—*Held*: the bill of sale did not create a charge upon the leasehold interest, & it was made in accordance with the statutory form.

Although title deeds savour of realty & are the symbols of the land to which they relate in the hands of the owner, yet it is quite possible for the

owner to sever the title deeds from the land & to deal with them as so many pieces of paper & pledge them accordingly; & in that case they come within the description in 1878 Act, s. 4, of “articles capable of complete transfer by delivery” (*ROMER, L.J.*).—*SWANLEY COAL CO. v. DENTON*, [1906] 2 K. B. 873; 75 L. J. K. B. 1009; 95 L. T. 659; 22 T. L. R. 766; 50 Sol. Jo. 707; 13 Mans. 353, C. A.

SECT. 2.—ARTICLES CAPABLE OF COMPLETE TRANSFER BY DELIVERY.

See 1878 Act, s. 4.

163. Growing crops.]—*BRANTOM v. GRIFFITS*, No. 190, *post.*

164. —.]—*Re CROSS, Ex p. PAYNE*, No. 191, *post.*

—.]—*See, further, Sect. 4, post.*

165. Title deeds.]—*SWANLEY COAL CO. v. DENTON*, No. 162, *ante.*

Future or after-acquired chattels.]—*See* Nos. 293-298, *post.*

SECT. 3.—CHoses IN ACTION.

See 1878 Act, s. 4.

166. Share in partnership.]—B., as trustee & exor. of his father's will, became entitled to one half share in a distillery business lately carried on in partnership between his father & another. In pursuance of a provision in the will, B. continued the partnership business, & afterwards purchased the interest of the beneficiaries under the will, & executed mtges. to secure the purchase-money, by one of which, dated Sept., 1872, B. assigned all his beneficial interest under his father's will as a security for payment of the money due, & by the same deed charged all his share & interest in the distillery partnership, & in the goodwill of the business, with the repayment of the money due. New articles of partnership were then entered into between B. & the old partner, in which the former appeared as the owner of one half the business:—*Held*: as between B.'s trustee in bkpey. & the mtgee., the mtge. of B.'s share & interest in the partnership was a charge upon a chose in action, & as such, was not affected by 1854 Act.—*Re BAINBRIDGE, Ex p. FLETCHER* (1878), 8 Ch. D. 218; 47 L. J. Bey. 70; 38 L. T. 229; 26 W. R. 439.

Annotations:— **Mentd.** *Colonial Bank v. Whinney* (1885), 30 Ch. D. 261; *Re Webber, Ex p. Slater* (1891), 64 L. T. 426.

167. Rights of vendor under hire-purchase agreement.]—D. & Co., who had hired out furniture

his rights in the properties to applts., “& also all & singular the sheep, cattle, chattels & effects which are now, or may at any time during the continuance of this security be upon or belonging to the stations.” Resp. subsequently conveyed his equity of redemption in the properties to applts. in identical language:—*Held*: the right of the taxpayer under the certificates to a return of the taxes paid by him was a personal right in the nature of a chose in action & did not pass in a conveyance of an equity of redemption under the words “chattels & effects upon or belonging to the stations.”—*GOLDSBROUGH MOET & CO., LTD. v. TOLSON* (1909), 10 C. L. R. 470.—**AUS.**

167 i. Rights of vendor under hire-purchase agreement.]—J., a furniture warehouseman, in the ordinary course of his business sold goods under time

PART IV. SECT. 2.

a. Whether capable of transfer by delivery—Goods in customs warehouse.]

Certain goods assigned belonged to the assignor, but were lying in the customs warehouse subject to duties, no change of possession having taken place & no compliance being shown with the formalities required by Customs Act, 1847:—*Held*: the Act requiring registration did not apply to such goods, as they were not capable of delivery.—*HARRIS & WOODSIDE v. COMMERCIAL BANK OF CANADA* (1858), 16 U. C. R. 437.—**CAN.**

b. — Plant & materials provided by contractor under building contract.]—By a contract between defts. & F., whereby F. agreed to perform works for defts., one of the terms of the contract was that all the plant, materials, etc., provided by F. for the work was to become, & until com-

pletion of the work be, the property of defts. for the purpose of the works, but, upon completion of the work, such plant, materials, etc., as should not have been used and converted, should be delivered up to F.:—*Held*: that at the time of the execution of the contract the plant, materials, etc., could not then be articles capable of complete transfer & delivery, & it was only a bill of sale of such articles that was required to be registered.—*CLANCEY v. GRAND TRUNK PACIFIC RY. CO.* (1910), 14 W. L. R. 201.—**CAN.**

PART IV. SECT. 3.

c. Right to return of taxes under Meat & Dairy Produce Encouragement Acts.]—Resp., the holder of certain grazing properties, paid taxes under the above Acts, & received certificates therefor. By mtge. deeds he assigned

to customers under six hiring agreements, were indebted to P. on bills, one of which had become due. P. refused to supply D. & Co. with goods until security was given, & they assigned to P. all money due & hereafter becoming due to them in respect of the hiring agreements & all rights & remedies to which D. & Co. were entitled:—*Held*: as the assignment gave to P. merely a chose in action, it was not a bill of sale.—*Re DAVIS & Co., Ex p. RAWLINGS* (1888), 22 Q. B. D. 193 — W. R. 203; 5 T. L. R. 119, C. A.

Annotation:—*Mentd.* *Wilmut v. Alton*, [1897] 1 Q. B. 17.

168. —.]—By one & the same deed the owner of a piano assigned, by way of security for money, the piano, & also the benefit of a hire-purchase agreement into which he had entered respecting it:—*Held*: the assignment of the agreement was severable from that of the piano, & the deed was not void *in toto* under Bills of Sale Acts for non-registration, or because it was not in the statutory form.—*Re ISAACSON, Ex p. MASON*, [1895] 1 Q. B. 333; 64 L. J. Q. B. 191; 71 L. T. 812; 43 W. R. 278; 11 T. L. R. 101; 39 Sol. Jo. 169; 2 Mans. 11; 14 R. 41, C. A.

See, further, Part VII., Sect. 3, *post*.

Whether hire-purchase agreement is a bill of sale, *see* Part II., Sect. 5, sub-sect. 4, *ante*.

Interest of builder under building contract.—*See* Part II., Sect. 5, sub-sect. 3, *ante*.

169. Reversionary interest in chattels subject to life estate.—Testator by his will gave to his wife the right of possession & enjoyment of all his pictures during her life, & subject thereto bequeathed all his pictures to his son, T., for his absolute use & benefit. Testator died, & on Mar. 28, 1881, T. executed a mtge., by which he assigned as mtgor. & beneficial owner all his share & interest under his father's will in the sums of money, hereditaments, & premises devised & bequeathed thereby expectant upon the decease of his mother:—*Held*: T.'s interest in the pictures was a chose in action, & the assignment was excepted from the operation of Bills of Sale Acts.—*Re TRITTON, Ex p. SINGLETON* (1889), 61 L. T. 301; 5 T. L. R. 687; 6 Morr. 250.

Annotation:—*Folld.* *Re Thynne, Thynne v. Grey*, [1911] 1 Ch. 282.

170. —.]—Where chattels are settled as heirlooms, either by a direct gift to one for life with remainder to another, or by an assurance or bequest upon trust for one for life with remainder to another, the interest of the reversioner in the chattels, whether legal or equitable, is a chose in action within the exception in 1878 Act, s. 4, & a mtge. by the reversioner of his legal or equitable reversion in the chattels is exempt from the

operation of Bills of Sale Acts & does not require registration under those Acts.—*Re THYNNE, THYNNE v. GREY*, [1911] 1 Ch. 282; 80 L. J. Ch. 205; 104 L. T. 19; 18 Mans. 34.

171. Secured debt—Secured by unregistered mortgage of chattels.—An assignment of or charge on a debt secured by a mtge. of personal chattels must be accompanied by the same formalities as are essential to make the original security effective.—*JARVIS v. JARVIS* (1893), 63 L. J. Ch. 10; 69 L. T. 412; 9 T. L. R. 631; 37 Sol. Jo. 702; 1 Mans. 199; 8 R. 361.

SECT. 4.—FIXTURES AND GROWING CROPS AND TIMBER.

SUB-SECT. 1.—FIXTURES BEFORE 1878.

What are fixtures.—*See* LANDLORD & TENANT.

Trade machinery after 1878.—*See* Sect. 5, *post*.

172. Fixtures assigned with land—Whether within Act.—A mtge. of trade fixtures, together with the freehold, by the owner of the freehold, does not require to be registered as a bill of sale under 1851 Act.

The owners in fee of land constructed a mill thereon, with machinery, mill-gear & other works, partly fixed to the soil, & partly not, & then mortgaged the freehold, mill, machinery, etc., & fixtures, etc.:—*Held*: as the whole freehold was mortgaged, & the machinery passed as being attached thereto, the above Act had no application.—*MATHER v. FRASER* (1856), 2 K. & J. 536; 25 L. J. Ch. 361; 27 L. T. O. S. 41; 2 Jur. N. S. 900; 4 W. R. 387; 69 E. R. 895.

Annotations:—*Consd. & Folld.* *Re Brooke, Ex p. Scott* (1857), 29 L. T. O. S. 314. *Consd.* *Begbie v. Fenwick, Fenwick v. Begbie* (1871), 8 Ch. App. 1075, n.; *Re Yates, Batchelder v. Yates* (1888), 38 Ch. D. 112. *Refd.* *Waterfall v. Penistone* (1856), 6 E. & B. 876; *Boyd v. Shorrocks* (1867), L. R. 5 Eq. 72; *Hawtry v. Butlin* (1873), L. R. 8 Q. B. 290; *Meux v. Jacobs* (1875), L. R. 7 H. L. 481; *Re Armytage, Ex p. Moore & Robinson's Banking Co.* (1880), 14 Ch. D. 379; *Re Rogerstone Brick & Stone Co., Southall v. Wescomb*, [1919] 1 Ch. 110. *Mentd.* *Metropolitan Counties, etc., Soc. v. Brown* (1859), 26 Beav. 154; *Walmsley v. Milne* (1859), 7 C. B. N. S. 115; *Haley v. Hammersley* (1861), 3 De G. F. & J. 587; *Cullwick v. Swindell* (1866), L. R. 3 Eq. 219; *Re Patent Peat Co.* (1867), 17 L. T. 69; *Clinic v. Wood* (1868), L. R. 3 Exch. 257; *Longbottom v. Berry* (1869), L. R. 5 Q. B. 123; *Re Richards, Ex p. Astbury, Ex p. Lloyd's Banking Co.* (1869), 1 Ch. App. 630; *Holland v. Hodgson* (1872), L. R. 7 C. P. 328; *Cross v. Barnes* (1877), 46 L. J. Q. B. 479; *Southport & West Lancashire Banking Co. v. Thompson* (1887), 57 L. J. Ch. 114; *Gough v. Wood*, [1891] 1 Q. B. 713; *Huddersfield Banking Co. v. Lister* (1895), 72 L. T. 703; *Hobson v. Gorrington*, [1897] 1 Ch. 182; *Reynolds v. Ashby*, [1904] A. C. 466; *Re Chesterfield's S. E.*, [1911] 1 Ch. 237; *Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97.

payment agreements. In consideration of advances made by M., J., in pursuance of a written contract not registered under Book Debts Act, 1896, deposited with M. certain time payment agreements as security therefor, which were to remain the property of M., until the full amount of the advances & interest thereon had been repaid, & it was further provided that if any of the time payment agreements should be fully paid up by the hirer, J., should replace same with others of equivalent value:—*Held*: the contract was an equitable assignment of the debts due to J. under the time payment agreements, & was void for want of registration.—*Re JONES* (1906), V. L. R. 432. **AUS.**

d. Rights of purchaser under hire-purchase agreement.—The purchaser of a piano under a hire receipt by which, on his completing certain payments on account, the property was to pass to him, but in the mean-

while to remain in the vendors, before he had paid the required sum, agreed with his wife that she should purchase his interest & pay the balance due to the vendors. There was no bill of sale registered, nor such change of possession as required by R. S. O. c. 118:—*Held*: the transaction was invalid, as against execution creditors, and was not within s. 41 (1).—*EBY v. McTAVISH* (1900), 22 C. L. T. Occ. N. 376; 32 O. R. 187.—**CAN.**

e. Book debts.—K., having become security for repayment by H. of \$600, an agreement in writing was entered into that in consideration thereof H. did assign to K. "all his right & claim to the goods & stock-in-trade in the store of H. to an amount sufficient to reimburse K. whatever he may pay in consequence of becoming such surety as aforesaid, & should there not be stock enough for that purpose in the store at such time, the balance after deducting the value of

the stock, shall be made up of the book debts then on the books of H.":—*Held*: so far as the book debts were concerned, registration was unnecessary.—*KITCHING v. HICKS* (1884), 6 O. R. 739.—**CAN.**

f. —.]—Book debts are not within R. S. O. 1887 (c. 125), & 55 Viet. c. 26, & a transfer of them does not require registration.—*THIBAudeau v. PAUL* (1894), 26 O. R. 385.—**CAN.**

g. —.]—Book debts are not within R. S. O. 1897 (c. 148), & a transfer of them does not require registration.—*NATIONAL TRUST Co. v. TRUSTS & GUARANTEE Co.* (1912), 26 O. L. R. 279. **CAN.**

PART IV. SECT. 4, SUB-SECT. 1.

172 i. Fixtures assigned with land—Whether within Act.—C., the lessee of premises on which a cloth mill was erected, demised, by way of mtge., the premises, including the mill & all

4.—*Fixtures and growing crops and timber:*

173. — — — — —.]—A mtge. of leasehold property with the fixtures thereon, being trade fixtures, as per inventory, need not be registered under 1854 Act.—*Re BROOKE, Ex p. SCOTT* (1857), 29 L. T. O. S. 314.

174. — — — — —.]—Looms put up by the lessee of a cotton mill for his convenience during the existence of his term, & fastened to the floor by nails driven through the loom feet into wooden plugs fitted into the floor, are, though easily movable without injury to the freehold, fixtures which will pass under an assignment of "the mill, fixed machinery, & hereditaments, with all looms & other machinery, fixed or movable," without the necessity of registering the assignment as an assignment of chattels under 1854 Act.—*BOYD v. SHORROCK* (1867), L. R. 5 Eq. 72; 37 L. J. Ch. 144; 17 L. T. 197; 32 J. P. 211; 16 W. R. 102.

*Annotations:—*Consd. *Begbie v. Fenwick, Fenwick v. Begbie* (1871), 8 Ch. App. 1075, n.; *Holland v. Hodgson* (1872), L. R. 7 C. P. 328. *Dbtd.* *Hawtry v. Butlin* (1873), L. R. 8 Q. B. 290; *Re Wilde, Ex p. Daglish* (1873), 8 Ch. App. 1072. *Refd.* *Re Trethowan, Ex p. Tweedy* (1877), 5 Ch. D. 559; *Re Rogerstone Brick & Stone Co., Southall v. Wescomb*, [1919] 1 Ch. 110. *Mentd.* *Chidley v. West Ham Churchwardens* (1874), 32 L. T. 486.

175. — — — — —.]—Pltf. & B. agreed that B., on payment of £1,000 premium & putting up fittings to the value of £500, should have a lease from pltf. of certain premises, & that pltf. should advance £1,000, to be secured by the premises so fitted up. B. entered, put up the fittings, & continued in possession, but nothing more was done. The agreement was not registered as a bill of sale: *Held*: the case was not within 1854 Act.—*TEBB v. HODGE* (1869), L. R. 5 C. P. 73; 39 L. J. C. P. 56; 21 L. T. 499, Ex. Ch.

*Annotation:—**Mentd.* *Parish v. Poole* (1884), 53 L. T. 35.

176. — — — — —.]—A., the owner in fee of a mill occupied by him as a worsted mill, mortgaged the mill & all fixtures which then were, or at any time thereafter should be set up & affixed to the premises, in fee to pltf. The mtge. deed was not registered as a bill of sale, & A., who continued in possession, assigned all his estate & effects to defts. as trustees for the benefit of his creditors:—*Held*: as the deed was not registered under 1854 Act, it was void, as against defts., so far as it was a transfer of fixtures as such.—*HOLLAND v. HODGSON* (1872), L. R. 7 C. P. 328; 41 L. J. C. P. 146; 26 L. T. 709; 20 W. R. 990, Ex. Ch.

*Annotations:—**Refd.* *Hawtry v. Butlin* (1873), L. R. 8 Q. B. 290; *Re Armytage, Ex p. Moore & Robinson's Banking Co.* (1880), 14 Ch. D. 379; *Re Yates, Batchelor v. Yates* (1888), 59 L. T. 47. *Mentd.* *Chidley v. West Ham Churchwardens* (1874), 32 L. T. 486; *Cross v. Barnes* (1877), 46 L. J. Q. B. 479; *Southport & West Lancashire Banking Co. v. Thompson* (1887), 37 Ch. D. 64; *Re Rose, Ex p. Linnell* (1888), 4 T. L. R. 255; *Gough v. Wood*, [1894] 1 Q. B. 713; *Bulkeley v. Lyne Stephens, Re Lyne Stephens, Lyne Stephens v. Lubbock* (1895), 11 T. L. R. 564; *Huddersfield Banking Co. v. Lister* (1895), 72 L. T. 703; *Hobson v. Gorringe*, [1897] 1 Ch. 182; *Re De Falbe, Ward v. Taylor*, [1901] 1 Ch. 523; *Monti v. Barnes*, [1901] 1 K. B. 205; *Reynolds v. Ashby*, [1904] A. C. 466; *Crossley v. Lee*, [1908] 1 K. B. 86; *Re Chesterfield's S. E.*, [1911] 1 Ch. 237.

the fixtures, erections, & to mtgees., for all the residue of the term, with power to the mtgees., in case of default, "absolutely to sell the premises or any part thereof, either altogether or in parcels." The mtge. was not registered under Irish 1854 Act, & the mtgor. remained in the apparent possession of the premises. A carding machine, a billy, a mule, a tucking machine, a steam engine & fly-wheel were actually affixed to the mill building as part of the machinery for working the mill, for the proper working of which the use of them was

necessary, but they could be unfastened & removed without injury to the building, & the first four of them had not been affixed to the building at the time of the mtge., but had been afterwards substituted by the mtgor. for others which had been there previously. A steam winch was bolted by six bolts to a stone of one ton weight, which lay upon the floor, & could be removed from or together with the stone. The articles were claimed by the mtgees.:—*Held*: (1) the articles attached by the mtgor. to the mill building after the date of the mtge. passed thereby,

177. — — — — —.]—A. was the lessee of a public-house. On obtaining, in 1869, from M. a loan of £800, he deposited the lease with M., together with a memorandum reciting that it was deposited as security for the loan, & for any money that might become due to M. for goods sold, & for the expense of "insuring the premises & the fixtures & fittings therein" from fire, & the memorandum also contained an undertaking to execute, when required, a legal mtge. In Apr., 1873, A. borrowed a sum of £55 from J., & gave J. a bill of sale of the fixtures & fittings:—*Held*: the equitable mtge. effected in 1869 passed the fixtures & fittings, & did not require registration under 1854 Act to give effect as to them.—*MEUX v. JACOBS* (1875), L. R. 7 II. L. 481; 44 L. J. Ch. 481; 32 L. T. 171; 39 J. P. 324; 23 W. R. 526, H. L.; *revsq.* S. C. *sub nom.* *MEUX v. ALLEN*, [1874] W. N. 16.

*Annotations:—**Expld.* *Re Eslick, Ex p. Alexander* (1876), 4 Ch. D. 503. *Expld. & Distd.* *Re Trethowan, Ex p. Tweedy* (1877), 5 Ch. D. 559. *Consd.* *Paine v. Matthews* (1885), 53 L. T. 872. *Refd.* *Topham v. Greenside Glazed Fire Brick Co.* (1887), 37 Ch. D. 281; *Thomas v. Kelly* (1888), 60 L. T. 111; *Mentd.* *Bain v. Brand* (1876), 1 App. Cas. 762; *Cross v. Barnes* (1877), 46 L. J. Q. B. 479; *Sanders v. Davis* (1885), 15 Q. B. D. 218; *Gough v. Wood*, [1894] 1 Q. B. 713; *Ellis v. Glover & Hobson*, [1908] 1 K. B. 388; *Re Rogerstone Brick & Stone Co., Southall v. Wescomb*, [1919] 1 Ch. 110.

178. — — — — —.]—A shipbuilding yard & works held under a lease for 999 years were assigned to debtor, to hold as to the leasehold premises for the residue of the term, & as to the machinery & tenant's fixtures absolutely. The recitals stated the purchase money to be £2,000 for the leasehold premises & £500 for the tenant's fixtures. Debtor borrowed the purchase money from his bankers, & deposited with them as security the indentures of lease & assignment, without any memorandum. He afterwards erected considerable new machinery, & carried on business on the premises till he became bkpt., having incurred a further debt to his bankers:—*Held*: tenant's fixtures could not be assigned by the leaseholder so as to defeat the claim of the trustee, except by compliance with 1854 Act.—*Re TRETHOWAN, Ex p. TWEEDY* (1877), 5 Ch. D. 559; 46 L. J. Bey. 13; 36 L. T. 70; 41 J. P. 596; 25 W. R. 399.

179. — — — — —.]—*Re ARMYTAGE, Ex p. MOORE & ROBINSON'S BANKING Co., No. 193, post.*

180. — — — — —.]—The owner of a manufactory mortgaged to pltf. his freehold premises, with the plant, engines, & fixed machinery, including certain leather belts therein specially described. The belts passed over wheels or pulleys, & were used to impart motion to the fixed machinery which formed part of the freehold. When passed over the pulleys they were laced together. They could be slipped off the pulleys when desired, & then they hung loose, but they could not be removed from the machinery without being unlaced:—*Held*: the belts formed an essential part of the fixed machinery, & they passed like that machinery under a mtge. of the realty, & the deed conveying them to pltf. did not require registration under 1854 Act.—*SHEFFIELD & SOUTH YORKSHIRE PER-*

as well as all the other articles; (2) the mtge. deed gave no power to sever & sell the fixtures separately from the mill buildings, & so far as it operated as a mtge. of the first five articles, as the building was included in the demise, the deed did not require registration under the Act, but the deed, so far as it operated as an assignment of the steam winch, required registration, & so far, being unregistered, was void as against the execution creditor.—*HUSH CIVIL SERVICE BUILDING SOCIETY v. MAHONY* (1876), 10 L. L. T. 153.—*IR.*

MANENT BENEFIT BUILDING SOCIETY *v.* HARRISON (1884), 15 Q. B. D. 358; 54 L. J. Q. B. 15; 51 L. T. 649; 33 W. R. 144; 1 T. L. R. 61, C. A.

Annotation:—*Distd. Re Rose, Ex p. Linnell* (1888), 4 T. L. R. 255.

Trade machinery after 1878, *see* Sect. 5, *post*.

181. Assignment of land—Fixtures assigned by separate words—Whether within Act.—The freehold of a mill was mortgaged by J. to M., & for further security, J. afterwards assigned to M. certain machinery then upon the premises. By indenture of Sept. 14, 1853, J. assigned to deft., subject to the mtge., the equity of redemption of the mill & all the machinery included in the assignment to M., & also certain other machinery that had been subsequently erected & fixed in the mill. By another indenture of Aug. 14, 1854, J. sold & assigned to deft., to secure a further advance of £500, certain machinery then on the premises, & set forth in a schedule to the deed, & which did not include any of the machinery assigned by the deed of Sept. 14, 1853, & also further charged with the £500 the equity of redemption in the premises before charged to deft. The machinery assigned by the latter deed was affixed to the premises only for the purposes of trade, & the deed of sale treated them as machinery which J. had a right to sell distinct from the land. The deed of Aug. 14 had not been filed as required by 1854 Act. J. became bkpt., deft. at the time having taken possession of the said machinery:—*Held*: the machinery assigned by the deed of Aug. 14, 1854 was personal chattels within 1854 Act, s. 7, & the deed itself was a bill of sale, as it created a primary charge on the machinery distinct from the land, & the deed, not having been filed as required by s. 1, was inoperative.—*WATERE v. PENISTONE* (1856), 6 E. & B. 876; 26 L. J. Q. B. 100; 27 L. T. O. S. 252; 3 Jur. N. S. 15; 4 W. R. 726; 119 E. R. 1090.

Annotations:—*Consd. Re Brooke, Ex p. Scott* (1857), 29 L. T. O. S. 314; *Walmsley v.* (1859), 7 C. B. N. S. 115; *Cullwick v. Swindell* L. R. 3 Eq. 249; *Re Ex p. Moore & Robinson's Banking Co.* (1880), 42 L. T. 443. *Refd. Re Pollack, Ex p. Schroder* (1857), 29 L. T. O. S. 185; *Re Bevan, Ex p. Law Reversionary Interest Soc. Trustees* (1858), 30 L. T. O. S. 327; *Re Frevey* (1866), 14 L. T. 193; *Re Fenwick, Fenwick v. Begbie* (1871), 8 Ch. App. 1075, n. *Mentd. Turner v. Cameron* (1870), L. R. 5 Q. B.

182. ————*]*—S. demised a leasehold manufactory to a mtgee. for the residue of the term on which he held it, & by a second part of the same indenture, he assigned all the steam-engines & other trade fixtures to the mtgee. absolutely, subject to the proviso for redemption therein contained:—*Held*: the mtge. of the trade fixtures required to be registered as a bill of sale.—*BEGGIE v. FENWICK, FENWICK v. BEGGIE* (1871), 8 Ch. App. 1075, n.; 24 L. T. 58; 19 W. R. 402; *reversd.* on other grounds, 25 L. T. 441, L. J.

Annotations:—*Follid. Hawtry v. Butlin* (1873), 1 R. 8 Q. B. 290; *Re Wilde, Ex p. Daglish* (1873), 8 Ch. App. 1072. *Refd. Re Joyce, Ex p. Barclay* (1874), 9 Ch. App. 576; *Meux v. Jacobs* (1875), L. R. 7 H. L. 481; *Re Trethowan, Ex p. Tweedy* (1877), 5 Ch. D. 559.

183. ————*]*—A lessee for years demised by indenture of mtge. certain buildings used as an iron factory for the residue of the term, except the last two days, & by the same indenture he also assigned all the machinery, plant, fixtures, implements, utensils, & effects, then or thereafter to be fixed to or used in or about the buildings, subject to redemption on payment of the mtge. money & interest:—*Held*: the indenture, being an assignment of fixtures, was an assignment of personal chattels within 1854 Act, & required registration.—*HAWTRY v. BUTLIN* (1873), L. R. 8 Q. B. 290; 42 L. J. Q. B. 163; 28 L. T. 532; 21 W. R. 633.

Annotations:—*Follid. Re Wilde, Ex p. Daglish* (1873), 8 Ch. App. 1072. *Consd. Southport & West Lancashire Banking Co. v. Thompson* (1887), 37 Ch. D. 64. *Refd. Re Joyce, Ex p. Barclay* (1874), 9 Ch. App. 576; *Meux v. Jacobs* (1875), 44 L. J. Ch. 481; *Re Trethowan, Ex p. Tweedy* (1877), 5 Ch. D. 559.

184. ————*]*—A mtge. of leasehold property, & by a separate operative part of all, & all manner of mill-gear, millwright work, plant of wheelwright's shop, fixed & movable machinery & plant then being, or which at any time thereafter during the subsistence of the security should be thereon, is, unless registered, null & void under 1854 Act, s. 1.

The first [point to be decided] is, whether the mtge. ought or ought not to have been registered under the Act, so far as relates to the trade fixtures assigned to the mtgees., together with the mtgor.'s interest in the premises. So far as relates to them, the mtge. required to be registered (*MATHEW, J.*).—*PAINE v. MATTHEWS* (1885), 53 L. T. 872, D. C.

Annotation:—*Mentd. Hadley v. Beedom*, [1895] 1 Q. B. 646.

185. ————*]*—**Power of sale of fixtures apart from land—Whether within Act.**—W., a lessee for years, demised by way of mtge. a cotton mill & all the steam-engines, mill-gear, & fixed & movable machinery to B., to hold, as to the mill & such machinery as was of the nature of fixtures, for the residue of the term except the last two days, & as to the movable machinery & other articles absolutely. The deed contained a power of sale by the mtgee. of the mill & machinery, & as to the machinery fixed & movable either with the mill or separately:—*Held*: the deed so far as it operated as a mtge. of trade fixtures, required registration under 1854 Act, & the fact of the building & the trade fixtures being included in the same demise made no difference.—*Re WILDE, Ex p. DAGLISH* (1873), 8 Ch. App. 1072; 42 L. J. Bcy. 102; 29 L. T. 168; 21 W. R. 893, L. J.

Annotations:—*Consd. Re Joyce, Ex p. Barclay* (1874), 9 Ch. App. 576. *Appld. Re Eslick, Ex p. Alexander* (1876), 4 Ch. D. 503. *Consd. Re Trethowan, Ex p. Tweedy* (1877), 5 Ch. D. 559. *Follid. Paine v. Matthews* (1885), 53 L. T. 872. *Consd. Re Yates, Batchelder v. Yates* (1888), 38 Ch. D. 112. *Follid. Johns v. Ware*, [1899] 1 Ch. 359. *Refd. Meux v. Jacobs* (1875), L. R. 7 H. L. 481. *Mentd. Re Jeavons, Ex p. Brown* (1874), 9 Ch. App. 304; *West London Syndicate v. L. R. Comrs.*, [1898] 2 Q. B. 507.

186. ————*]*—A lease of a piece of land was granted to a trader, he covenanting to build upon it a steam saw-mill, messuages, or dwelling-houses, & at the end of the term to yield up to the lessor the land, buildings, & fixtures, except the steam saw-mill, machinery, fixtures, & things connected therewith, which it was agreed the lessee might remove. The lessee afterwards mortgaged the property, the mtge. deed assigning the land, together with the steam saw-mills & buildings thereon, & the steam-engines, boilers, fixed & movable machinery, plant, implements, & utensils fixed to, placed upon, or used in or about the ground, hereditaments, saw-mills, & buildings, to hold the hereditaments, & such of the machinery, plant, etc., as were in the nature of landlord's fixtures, to the mtgee. for the residue of the term, & as to such of the machinery & premises as were in the nature of tenant's or trade fixtures to the mtgee. absolutely, subject to redemption. The deed contained a power for the mtgee. in default of payment of the mtge. money, to sell the premises, or any part or parts thereof, either together or in parcels. The deed was not registered under 1854 Act:—*Held*: the effect of the deed was to authorise the mtgee. to sever the trade fixtures from the premises, & to deal with them separately, & the deed not having been registered under the Act, was void *quâ* the trade fixtures as against the trustee in the mtgor.'s liquidation.—

Sect. 4. — Pictures and growing crops and timber: Sub-sects. 1, 2 & 3.]

Re ESICK, p. ALEXANDER (1876), 4 Ch. D. 503; 46 L. J. Bcy. 30; 35 L. T. 914; 25 W. R. 260.

187. — — — — — —When there is a mtge. of leasehold property & fixtures with a power of sale, 1854 Act applies not only where the power of sale authorises the mtgee. to sell the fixtures separately from the leasehold property, but also where there is a separate assignment of the fixtures. —*Re REED, Ex p. BROWN (1878), 9 Ch. D. 389; 48 L. J. Bcy. 10; 39 L. T. 338; 27 W. R. 219, C. A. Annotation: —Folld. Paine v. Matthews (1885), 53 L. T. 872*

188. — — — — — —By an indenture of mtge. freehold premises, together with the trade fixtures thereon, were conveyed by the owner of the premises to mtgees, & the indenture contained an express power to sell any of the trade fixtures: —*Held*: the power to sell the fixtures separately from the land was a bill of sale within 1854 Act, & the deed was void as to the trade fixtures, not having been registered. —*JOHNS v. WARE, [1899] 1 Ch. 359; 68 L. J. Ch. 155; 80 L. T. 112; 47 W. R. 202; 6 Mans. 38.*

189. — — — — — No power of sale of fixtures apart from land—*Whether within Act.*—J., the lessee of a public-house & two cottages, who was bound by the covenants of his lease to deliver up at the expiration of the term, all fixtures, except trade fixtures, demised by way of mtge. the public-house & premises, including all the tenant's fixtures, to a mtgee. for all the residue of the term except the last three days. The deed contained a power to the mtgee., in case of default, to sell the premises or any part thereof, either together or in parcels, & either for the term thereby granted or for the original term, with a declaration that in case of a sale the mtgor. should hold the last three days of the term in trust for the purchaser: —*Held*: the mtge. deed gave no power to the mtgee. to sell or take possession of the fixtures separately from the buildings, & it did not require to be registered under 1854 Act. —*Re JOYCE, Ex p. BARCLAY (1874), 9 Ch. App. 576; 43 L. J. Bcy. 137; 30 L. T. 479; 38 J. P. 708; 22 W. R. 608, L. J.*

Annotations: —Expld. & Distd. Re Eslick, Ex p. Alexander (1876), 4 Ch. D. 503. Consd. Re Yates, Batchelor v. Yates (1888), 38 Ch. D. 112; Johns v. Ware, [1899] 1 Ch. 359. Refd. Re Trethowan, Ex p. Tweedy (1877), 5 Ch. D. 559; Re Reed, Ex p. Brown (1878), 27 W. R. 219;

PART IV. SECT. 4, SUB-SECT. 2.

190 i. Personal chattels.—Growing crops are goods & chattels within Irish 1854 Act, being capable of complete transfer by delivery. —*SHERIDAN v. MCARTNEY (1861), 5 L. T. 27; 11 L. C. L. R. 506; 13 Ir. Jur. 193.—IR.*

k. Logs—Whether passing.—Pltf. claimed to be owner of logs under a bill of sale from his father, who was tenant in common with deft. of the land on which they were cut. Pltf. relied on an agreement which, he contended, was made between the workmen of both parties & agreed to by deft. to the effect that whatever logs each of the parties "fixed" they were respectively to retain. Deft. & his son denied that he ever had made or sanctioned any such agreement: —*Held*: deft.'s right to the logs cut on the land by his labourers could not be affected by an agreement between the workmen, & pltf. derived no title under the bill of sale. —*MITCHELL v. LANTZ (1869), 7 N. S. R. 518.—CAN.*

PART IV. SECT. 4, SUB-SECT. 3.

193 i. Whether separately assigned—Mortgage of lands "together with" present & future machinery.—H. gave a mtge. to R. to secure a past debt &

future advances, in which it was recited that security was to be given "by the lands hereinafter mentioned, & also by the machinery hereinafter mentioned," & which proceeded to mtge. the lands, "together with the machinery & foundry apparatus now in use & that may in future be used in the brick & frame buildings situate on the lots, used as a machine shop & a foundry downstairs & as a printing office upstairs, the machinery being composed of one printing press, etc., together with all the machinery now in or that may hereafter be put in the premises." In the proviso in the mtge. the property was described as "lands & chattels." The mtge. was not filed as a chattel mtge., nor was there change of possession: —*Held*: the mtge. was good without registration as a chattel mtge., so far as it was a mtge. upon property brought upon the premises after its date. —*ROBINSON v. COOK (1884), 6 O. R. 590.—CAN.*

1. — — — — — "Machinery." —Where an agreement relating to chattels referred to the chattels generally as the machinery mentioned in the schedule, & the schedule comprised articles, some of which were, & others which were not, machinery in the

West London Syndicate v. L. R. Comrs., [1898] 2 Q. B. 507.

Priority between mortgagee of land & grantee of bill of sale.—*See MORTGAGE.*

SUB-SECT. 2.—GROWING CROPS AND TIMBER BEFORE 1878.

190. Not personal chattels.—Growing crops: —*Held*: not personal chattels within 1854 Act, s. 1. —*BRANTOM v. GRIFFITHS (1877), 2 C. P. D. 212; L. J. Q. B. 408; 36 L. T. 4; 41 J. P. 468; 25 W. R. 313, C. A.*

Annotations: —Distd. Re Phillips, Ex p. National Mercantile Bank (1880), 29 W. R. 227. Consd. Thomas v. Kelly (1888), 13 App. Cas. 506. Refd. Re Cross, Ex p. Payne (1879), 11 Ch. D. 539. Mentd. Salter v. Brooks (1879), De Colyar's County Ct. Cases 82.

191. — — — — — —A bill of sale of growing crops does not require registration under 1854 Act. —*Re Cross, Ex p. PAYNE (1879), 11 Ch. D. 539; 40 L. T. 563; 27 W. R. 808, C. A.*

Annotations: —Mentd. Lyons v. Tucker (1881), 6 Q. B. D. 660; Re Emery, Ex p. Chief Official Receiver (1888), 37 W. R. 21; Sanguinetti v. Stuckey's Banking Co., [1895] 1 Ch. 176.

192. — — — — — Until severed. —Although growing crops are not personal chattels within 1854 Act, as soon as the crops are severed they become personal chattels, & are not protected against a trustee in bkpy. by an assignment not registered as a bill of sale. —*Re PHILLIPS, Ex p. NATIONAL MERCANTILE BANK (1880), 16 Ch. D. 101; 50 L. J. Ch. 231; 44 L. T. 265; 29 W. R. 227, C. A.*

See, now, 1878 Act, s. 4.

SUB-SECT. 3.—FIXTURES (OTHER THAN TRADE MACHINERY) AND GROWING CROPS AND TIMBER AFTER 1878.

See 1878 Act, ss. 4, 7.

193. Whether separately assigned—Mortgage of quarry "together with" fixtures.—By a deed of mtge. of a freehold stone quarry the quarry was granted "together with" the mills, buildings, steam engines, motive power, plant, fixed & movable machinery, apparatus, rails, sleepers, implements, fittings & fixtures of every description then or at any time thereafter fixed to, or placed upon the hereditaments, all in the same witnessing part. The mtge. was executed after the passing of 1878 Act but before Jan. 1, 1879,

ordinary sense, the ct. being of opinion that such was the intention of the parties, construed the term as including the articles of the latter class. —*VER-YARD v. SEELIGSON (1907), 9 W. A. L. R. 113.—AUS.*

m. — — — — — Assignment of letting, grazing & mowing—*Growing crops not assigned as chattels.*—M., who was possessed of a farm, signed an agreement, whereby in consideration of pltf. paying for M. £200, she assigned to pltf. as security therefor, the authority to let & manage her farm for grazing, meadow, or other purpose, & out of the proceeds of such letting, to retain such sums to liquidate the above or any other sum advanced to M. or paid by pltf. on her account, & M. appointed pltf. her auctioneer & salesman to dispose of same at such time & place as he thought best, & to retain the sums advanced out of the proceeds, together with commission & expenses, & hand M. the balance, the agreement to be irrevocable: —*Held*: the above agreement was an equitable mtge. of the land, & conferred upon pltf. a specific interest in the crops on the farm, & in the purchase money thereof when sold. —*COONAN v. O'CONNOR, [1903] 1 L. R. 449.—IR.*

when that Act came into operation. At the date of the mtge. there was a tramway in the quarry, & there was also a steam crane cramped on to large stones & kept in position by two guys:—*Held*: the tramway & crane were fixtures, & the mtge. did not require registration either under 1854 or under 1878 Act in order to give the mtgee. the right to retain the tramways & crane as part of his security as against a liquidation trustee. *Observations on the meaning & object of 1878 Act, s. 7.*—*Re ARMYTAGH, Ex p. MOORE & ROBINSON'S BANKING CO.* (1880), 14 Ch. D. 379; 49 L. J. Bcy. 60; 42 L. T. 443; 28 W. R. 924.

194. — Growing crops assigned along with other chattels.—A bill of sale by one of its operative clauses assigned all the crops growing, or which should thereafter be growing, on the grantor's farmlands & also all horses, carts, etc., which were, or should thereafter be, in, upon or about the same farm:—*Held*: the crops were separately assigned as there was no assignment of the land.—*ROBERTS v. ROBERTS* (1884), 13 Q. B. D. 791; 53 L. J. Q. B. 313; 50 L. T. 351; 32 W. R. 605, C. A.

Annotations:—*Mentd.* Bouchette v. Attenborough (1887), 3 T. L. R. 813; Witt v. Banner (1887), 20 Q. B. D. 114; Kelly v. Kellond (1888), 20 Q. B. D. 569; Mayer & Fulda v. Mindlevich (1888), 59 L. T. 400; Thomas v. Kelly (1888), 13 App. Cas. 506; Carpenter v. Deen (1889), 23 Q. B. D. 566; Davies v. Jenkins (1899), 48 W. R. 286.

195. — Building materials—Assignment of land & all building materials thereon.—By a mtge. deed pltf. assigned to defts. certain land & buildings in course of erection thereon, “& also all bricks, timber, slates, & other building materials which may at any time hereafter be brought by or for the mtgor. into the premises for completing the buildings.” Pltf. covenanted “that all bricks, timber, etc., which shall be brought upon the premises, etc., shall be considered as immediately attached to & forming part of the fee simple of & in the same premises, & no part of the bricks, etc., shall be removed from the premises but with the concurrence of the mtgees.” & “that in case the mtgor shall not proceed with the completion, etc., to the satisfaction of the mtgees., it shall be lawful for the mtgees. to enter upon the premises & seize & take possession of all bricks, etc., & other building materials, & to complete the messuages.”

n. (Growing crops.)—A mtge. covered growing crops:—*Held*: such crops being incapable of delivery or change of possession without change of occupation of the land, the mtge. as to them was not within Chattel Mortgage Act.—*HAMILTON v. HARRISON* (1881), 46 U. C. R. 127.—**CAN.**

o. ——A mtgees. under a mtge. of land on Oct. 6, 1880, distrained crops produced from the land after Nov. 1, 1879. The crops were claimed under a chattel mtge. given on May 31, 1880, of such crops, which had been just sown:—*Held*: the growing crops passed by the chattel mortgage.—*LAING v. ONTARIO LOAN & SAVINGS CO.* (1881), 46 U. C. R. 114.—**CAN.**

Priority as between mtgee. of land & grantee of bill of sale generally, see MORTGAGE

p. ——(Growing grass.)—A bill of sale of growing grass does not require to be filed under Bills of Sale Act while the grass is growing.—*EASTERN CANADA SAVINGS & LOAN CO. v. CURRY* (1896), 28 N. S. R. 323.—**CAN.**

q. ——A chattel mtge. covering growing crops does not come within R. S. M., p. 10, so as to need filing to preserve its validity.—*CLIFFORD v. LOGAN* (1891), 9 Man. L. R. 423.—**CAN.**

r. ——*SMITH v. THIESEN* (1910),

15 W. L. R. 709; 20 Man. L. R. 120.—**CAN.**

s. ——A sale of growing crops is not within Bills of Sale Ordinance. *McMILLAN v. PIERCE* (1917), 3 W. W. R. 611; 37 D. L. R. 242.—**CAN.**

t. — Mistake as to locality.—M., owning parts of lots 13 & 14 in the second concession of M., gave a chattel mtge. of certain crops, grain, hay, etc., described as “now being on the premises situate on the north-east half of lot 14 in the second concession, & north half of lot 14 in the concession of M.”—*Held*: crops & hay upon lot 13 could not pass.—*GRASS v. AUSTIN* (1882), 7 A. R. 511.—**CAN.**

a. — Chattel mortgage on part of crop—Number of bushels mortgaged unable to be identified.—A chattel mtge. on portion of a crop of grain is void, where it is impossible to identify the particular number of bushels mortgaged.—*LITTLE v. MAGLE* (1914), 29 W. L. R. 596; 7 W. W. R. 224.—**CAN.**

b. — Chattel mortgage of, permitted by 1916 Act (c. 37), s. 22 (b).—*DE LAVAL DAIRY SUPPLY CO. LTD. v. NICHOL* (1918), 2 W. W. R. 1017; 11 Sask. L. R. 295; 42 D. L. R. 713.—**CAN.**

The deed further provided that in case of default by the mtgor. it should be lawful for the mtgees. to sell all or any part of the hereditaments or premises, & all bricks, timber, slates, & other materials standing & being thereon, or on any part thereof, either together or in parcels, etc.:—*Held*: the deed was a bill of sale, & void for want of registration in respect of the personal chattels comprised therein.—*CLIMPSON v. COLES* (1889), 23 Q. B. D. 465; 58 L. J. Q. B. 316; 61 L. T. 116; 38 W. R. 110, D. C.

Annotations:—*Dbtd.* *Re Standard Manufacturing Co.* (1891), 60 L. J. Ch. 292. *Consd.* *Church v. Sage* (1892), 67 L. T. 800.

196. — Mortgage of leasehold & fixtures.—No power in mortgage to remove fixtures—Except against lessor at end of term.—A co. having a lease of a brickfield issued debentures creating a floating charge & prohibiting the creation of any mtge. to have priority. Any debenture holder was empowered to appoint a receiver with power to make arrangements in the debenture holders' interests. The co. requiring money, the debenture holders agreed to the creation of a mtge. of the lease to have priority of the debentures. By that mtge. the co. assigned the premises comprised in the lease with erections & plant then or thereafter thereon, so far as legal without registration as a bill of sale, for the residue of the term. The business not succeeding, the mtgee., being also a debenture holder, appointed a receiver for the debenture holders, who eventually had to close down the works, & an arrangement was entered into between the mtgee., a solr., & the receiver for the receiver to offer the loose & fixed plant together for sale, the proceeds of the former to go to the debenture holders & those of the latter to the mtgee.:—*Held*: the right, which the mtge. carried, of the mtgee. to remove the fixtures as against the co.'s lessor at the end of the lease did not render the mtge. obnoxious to Bills of Sale Acts.—*Re ROGERSTONE BRICK & STONE CO., SOUTHALL v. WESCOMB*, [1919] 1 Ch. 110 88 L. J. Ch. 49; 120 L. T. 33, C. A.

197. Future growing crops.—B., the tenant of a farm, by bill of sale made in Sept., 1880, assigned to pltf. his stock-in-trade & effects on

c. ——A bill of sale of crops actually growing at the date of its execution is void for want of registration under Trinidad Ordinance, No. 15 of 1884.—*TENNANT v. HOWATSON* (1888), 13 App. Cas. 189; 57 L. J. P. C. 110; 58 L. T. 616, P. C.—**WEST INDIES.**

197 i. Future growing crops.—A chattel mtge. covering crops to be grown does not come within R. S. M., c. 10, so as to need filing to preserve its validity.—*CLIFFORD v. LOGAN* (1894), 9 Man. L. R. 423.—**CAN.**

197 ii. ——Crops to be grown may be covered by a chattel mtge., & a chattel mtge. of “crops which may be sown during the currency of this mtge.” covers crops sown after the mtge. falls due but remains unpaid.—*CANADA PERMANENT LOAN & SAVINGS CO. v. TODD* (1895), 22 A. R. 515.—**CAN.**

197 iii. ——*SMITH v. THIESEN* (1910), 15 W. L. R. 709; 20 Man. L. R. 120.—**CAN.**

197 iv. ——J., the owner of land, being desirous of putting in a crop, & needing money, applied to W., who gave him \$400 in cash upon the agreement that W. was to get in return one-third of the grain, but was to bear no other expenses in connection with the crop, & as between the two of them J. was to be liable for all debts:—*Held*:

Sect. 4.—Fixtures and growing crops and timber:
Sub-sect. 3. Sect. 5. Part V. Sect. 1: Sub-sect. 1.]

the farm, together with all the growing & other crops "which at any time thereafter should be in or about same or any other premises" of B.:—*Held*: the description in the bill of sale of the future crops on the farm was sufficiently specific to make a valid assignment of them in equity.—*CLEMENTS v. MATTHEWS* (1883), 11 Q. B. D. 808; 52 L. J. Q. B. 772, C. A.

Annotations:—Expld. Re Clarke, Coombe v. Carter (1887), 36 Ch. D. 348. *Consd. Tailby v. Official Receiver* (1888), 13 App. Cas. 523. *Refd. Joseph v. Lyons* (1884), 15 Q. B. D. 280; *Reeves v. Barlow* (1884), 12 Q. B. D. 436.

Machinery before 1878.]—See cases in sub-sect. 1, ante.

Priority between mortgagee of land & grantee of bill of sale.]—See MORTGAGE.

SECT. 5.—TRADE MACHINERY.

See 1878 Act, ss. 4, 5.

198. Machinery excluded from statutory definition—Not personal chattels for any purpose—Even though not assigned with land.]—The effect of 1878 Act, s. 5, is that the articles which are thereby excluded from the definition of "trade machinery" therein contained are not "personal chattels" within the Act for any purpose whatever, & any assignment of such articles does not require registration under the Act; & this applies to such articles even though they are not actually affixed to the land with which they are assigned, but, by virtue of an easement, to other land belonging to a stranger.

A brick-making co. deposited their title deeds to certain beds of coal & fire-clay with their bankers, together with a memorandum of deposit. The co. were not the owners of the surface of the land under which the beds of coal & fire-clay lay, but they had the right to use the surface for the purpose of working the minerals, & they had erected on the surface certain trade machinery of the kind excluded by s. 5:—*Held*: the assignment of the trade machinery did not require registration.—*TOPHAM v. GREENSIDE GLAZED FIRE BRICK CO.* (1887), 37 Ch. D. 281; 57 L. J. Ch. 583; 58 L. T. 274; 36 W. R. 464.

the transaction was a sale by J. to W. of a third interest in the crop to come into existence in the future, & Bills of Sale Act, ss. 9, 15, did not apply.—*INTERNATIONAL HARVESTER CO. v. JACOBSEN & WEITZER* (1915), 32 W. L. R. 332; 9 W. W. R. 87; 24 D. L. R. 632; 34 W. L. R. 879; 10 W. W. R. 955.—**CAN.**

197 v. — Lease of land on crop-payment plan.]—A. let to B. a farm on which grain had been grown by an indenture reserving as rent "the share or portion of the whole crop which shall be grown upon the demised premises as hereinafter set forth," & the lease provided that the lessor might retain from the share of the crop that was to be delivered to the lessee a sufficient amount to cover taxes, & to repay advances & other indebtedness, that the lessee immediately after threshing should deliver the whole crop, excepting hay, in the name of the lessor, at an elevator to be named by the lessor, that all crops of grain grown upon the premises should be & remain the absolute property of the lessor until all covenants, conditions, provisos, & agreements therein contained should have been fully kept, performed & satisfied, & that the lessor should deliver to the lessee two-thirds of the proceeds of the crop to be stored

in the elevator, less any sum retained for taxes, advances, indebtedness or guaranties previously mentioned.—*Held*: the lessor's lien or charge was void under R. S. M. 1902 (c. 11), s. 39, as being a charge upon crops to be grown in the future.—*CAMPBELL v. MCKINNON* (1903), 23 C. L. T. 234; 14 Man. L. R. 421.—**CAN.**

197 vi. — —.]—A lease of land upon the crop-payment plan is not void under Act, R. S. M., c. 17, s. 33.—*TENNANT v. RHINELAND* (1918), 1 W. W. R. 70; 38 D. L. R. 271.—**CAN.**

197 vii. — — Assignment of.]—By a lease L. demised land to G. for five years at a yearly rent of half the grain grown on the premises, excepting that grown on forty acres, which was to be G.'s property. Afterwards L. assigned G.'s lease, but although the land was covered by the assignment, the parties only intended that the rent reserved & the benefit of the covenants in the lease should pass:—*Held*: the assignment was valid under Bills of Sale Ordinance, but all grain grown on the demised land belonged to G. until it was divided, or delivered under the terms of the lease.—*ROBINSON v. LOTT* (1909), 9 W. L. R. 684; 2 Sask. L. R. 150; *reversd.* 11 W. L. R. 59; 2 Sask. L. R. 276.—**CAN.**

Annotation:—Mentd. Re Standard Manufacturing Co. (1891), 60 L. J. Ch. 292.

199. Agreement for security over premises & goods thereon—Except such articles as should require registration—Trade machinery not included.]

—A banking co. entered into an agreement to sell certain paper-mills & machinery to the L. co. for £20,000 to be paid by instalments. By clause 2 of the agreement it was provided that upon payment of the first two instalments the bank should convey the premises to the co. upon their executing a mtge. for the balance of the purchase-money, & that the mtge. should contain a clause enabling the bank, in case the business of the co. should be suspended, to re-enter & take possession of the premises, & of everything which should have been built or placed thereon, & which should not require registration within 1878 Act, & to hold same for their own use & benefit absolutely, but without prejudice to the liability of the co. for the unpaid balance of the purchase-money. The agreement was not registered as a bill of sale:—*Held*: the agreement to mtge. did not extend to any property which required registration under Bills of Sale Acts, & the trade machinery was not included in the security.—*Re LONDON & LANCASHIRE PAPER MILLS CO.* (1888), 58 L. T. 798; 4 T. L. R. 312.

200. Mortgage of land—No power to sell machinery apart from land—Whether within Act.]

—The owner of land & buildings which he used for the purposes of his business, & in which there was fixed machinery belonging to him, being trade machinery within 1878 Act, mortgaged them in fee without any general words or any reference to fixtures or machinery. By the mtge. deed it was agreed that the powers in Conveyancing & Law of Property Act, 1881 (c. 11), s. 19, should be exercisable without such notice as required by the Act:—*Held*: (1) the mtge. was not an assignment of the trade machinery since the trade machinery only passed by virtue of being affixed to the freehold; (2) the power of sale did not authorise the mtgee. to sell the trade machinery apart from the freehold; (3) the instrument was not a bill of sale, & gave a valid security on the trade machinery.—*Re YATES, BATCHELDER v. YATES* (1888), 38 Ch. D. 112; 57 L. J. Ch. 697; 59 L. T. 47; 36 W. R. 563; 4 T. L. R. 388, C. A.

Annotations:—Consd. Climpson v. Coles (1889), 23 Q. B. D.

197 viii. — Sale of land on crop-payment plan.]—Deft. was in possession of land under an agreement of sales, made in 1909, by which the purchase-money was to be paid to the vendor by the delivery to him of one-half of the crop grown upon the land each year, & it was further agreed that all crops to be grown on the land, to the extent of one-half, should, until the principal & interest were fully paid & satisfied, be and remain the property of the vendor:—*Held*: (1) Bills of Sale Act, s. 17, made the clause in the agreement by which the crops, to the extent of one-half, were to be the property of the vendor, invalid; (2) the whole property in the crop was vested in deft. until the grain was divided & the vendor's share set apart for him.—*KIDD & CLEMENT v. DOCHERTY* (1914), 27 W. L. R. 636; 16 D. L. R. 525; 7 Sask. L. R. 137.—**CAN.**

197 ix. — Assignment of lease including interest in.]—Bills of Sale Ordinance, c. 43, C. O., 15, applies an assignment of a lease of land, where the assignment includes the lessee's interest in the crop to be raised thereon during the term.—*McKILLIP & CO. v. ROYAL BANK OF CANADA*, [1918] 2 W. W. R. 100; 40 D. L. R. 556.—**CAN.**

Sect. 1.—Consideration : Sub-sects. 1 & 2, A.]

one had been paid & the remainder had not become payable when the bill of sale was given. The consideration paid for the promissory note was £10 only. £16 8s. was paid to the grantors upon the execution of the bill of sale: *Held*: the bill of sale was void as being given in consideration of a sum under £30. — *DARLOW v. BLAND*, [1897] 1 Q. B. 125; 66 L. J. Q. B. 157; 75 L. T. 537; 45 W. R. 177; 13 T. L. R. 108, C. A.

Annotation:—*Consd.* *London & Provinces Discount Co. v. Jones* (1913), 109 L. T. 742.

205. — Part retained by grantee.]—Pltf. applied to debt. for a loan of £15, offering as security a bill of sale on his furniture. Debt. pointed out that the bill of sale would be void if given for a consideration under £30, & proposed to lend that amount, with a stipulation that £15 should be repaid on demand & £15 by instalments. Pltf. agreed to the terms of the loan, & on the execution of a bill of sale, received £30. Immediately after pltf. had received the £30 debt., at the suggestion of pltf., demanded repayment of the £15, which pltf. then paid:—*Held*: in the absence of evidence that the transaction was a sham, the bill of sale was valid.—*DAVIS v. USHER* (1881), 12 Q. B. D. 490; 53 L. J. Q. B. 422; 51 L. T. 297; 32 W. R. 832, D. C.

206. — —.]—A bill of sale was given in consideration of £27 18s. paid to the grantor & of £2 2s. paid by the grantee to his solr. with the grantor's consent towards the legal expenses of the transaction:—*Held*: the bill was not void, as

being given in consideration of a sum under £30.—*LONDON & PROVINCES DISCOUNT Co. v. JONES*, [1914] 1 K. B. 147; 83 L. J. K. B. 403; 109 L. T. 712; 30 T. L. R. 60; 58 Sol. Jo. 83; 21 Mans. 18, D. C.

Sec, further, cases in Sub-sect. 2, A. & C. (b), post.

SUB-SECT. 2.—STATEMENT OF CONSIDERATION.

See 1878 Act, s. 8; 1882 Act, s. 8.

A. Must be Complete.**207. Collateral agreement.—Not to register bill.**

—A bill of sale was expressed to be made in consideration of £242 advanced by the grantee to the grantors, & the grantors agreed to repay the advance, together with £100 by way of interest & bonus, in certain instalments. There was a verbal agreement by the grantee not to register the bill of sale, in consequence of which he charged a larger bonus for the advance than he would otherwise have done:—*Held*: the agreement not to register was a mere collateral agreement, & not part of the consideration for the bill of sale, & it was unnecessary to state it in the deed. — *Re STOREY, Ex p. POPPLEWELL* (1882), 21 Ch. D. 73; 52 L. J. Ch. 39; 47 L. T. 274; 31 W. R. 35, C. A.

Annotations:—*Mentd.* *Blalberg v. Beckett* (1886), 18 Q. B. D. 96; *Brandon Hill v. Lane* (1914), 81 L. J. K. B. 317.

208. — Inconsistent with Act—In promissory note—Avoidance of bill.]—Where a bill of sale, proper in its terms, is accompanied by another

PART V. SECT. 1, SUB-SECT. 2.

o. Collateral agreement.—To give bill of sale.]—A collateral agreement entered into between the same parties at the time of the making of an agreement to give a bill of sale need not be referred to in the bill of sale if in fact it did not form one of the terms on which it was given.—*DANBY v. AUSTRALIAN FINANCIAL AGENCY & GUARANTEE CO., LTD.* (1891), 17 V. L. R. 481.—AUS.****

p. — Agreement entered into on day after execution of mortgage.]—R. agreed to sell his business to M. for cash. M. being unable to pay the entire sum in cash, gave a chattel mtge. to R. as security for the balance, reciting an existing indebtedness to the amount of the balance. On the day after the execution of the chattel mtge., a formal agreement was entered into by R. & M., providing for the future giving of a chattel mtge. to secure the unpaid balance:—*Held*: the true consideration had been stated in the chattel mtge., & that the subsequent agreement could not affect the matter.—*RUSSELL v. QUAKER OATS Co.* (1915), 32 W. L. R. 953; 9 W. W. R. 617; 25 D. L. R. 82; 8 Sask. L. R. 399.—CAN.****

q. — Separate declaration of trust—Consideration nominal.]—A bill of sale (registered) for the consideration of 5s., with a separate declaration of trust referred to & forming part of the instrument (not registered) is invalid: the conveyance registered must show the true & full consideration for which it is given.—*ARNOLD v. ROBERTSON* (1858), 8 C. P. 147.—CAN.****

r. — Providing for payment of advances secured by mortgage.]—A mtge. purported to secure \$1,600, acknowledged to have been paid by the mtgees., the property mortgaged being 2,500 logs, & the proviso for redemption being on payment of \$1,600, at 7 per cent., on or before Sept. 1, or by delivering lumber of first & second classes, as agreed between

the parties, to that value. The agreement, which was of even date, declared that in consideration of the \$1,600 then paid & advanced to the mtgors., by pltf., "which sum is collaterally secured to the parties by chattel mtge. bearing even date herewith," etc., the mtgors. agreed to deliver to pltf. all the first & second class lumber made at their mill on or before Oct. 1 then next; & pltf. agreed to pay at the prices named, "or, if the advance now made is not exhausted, to allow them for the lumber so delivered at rates aforesaid." The affidavit of the mtgees. was in the usual form under Chattel Mortgage Act, s. 2: *Held*: the mtge. was one within Chattel Mortgage Act, ss. 1 & 2, & not s. 5, & it was not open to objection for not truly showing the real transaction between the parties.—*BEECHER v. AUSTIN* (1871), 21 C. P. 334. **CAN.**

s. — Not affecting consideration.]—By an agreement under seal contemporaneous with the mtge. the mtgor. agreed that he would, for three years from that time, give his whole time & attention in looking after the cattle & horses, & the mtgee. agreed to allow the mtgor. to sell a number, sufficient to pay running expenses of the ranch:—*Held*: this agreement did not affect the consideration for the chattel mtge. which was correctly stated as \$3,000 the purchase price of the cattle.—*GRAVELEY v. SPRINGER* (1898), 3 Terr. L. R. 120. **CAN.**

t. What must be stated—Amount of indebtedness.]—The mtge. did not state the amount of the indebtedness:—*Held*: void as against pltf., the amount of indebtedness existing or created by the mtge. not being mentioned therein.—*STEVENS v. BARFOOT* (1886), 9 O. R. 692; 13 A. R. 366. **CAN.**

a. — Bill subject to condition.]—A bill of sale given subject to a condition not appearing therein is void as against creditors. *DOLL v. HART* (1890), 2 B. C. R. 32.—CAN.****

b. — Actual consideration—Not

*mere legal effect.]—In a bill of sale made under Chattel Securities Acts, 1880, the actual consideration ought to be stated & not its mere legal effect.—*Re BLOOMFIELD* (1885), 3 N. Z. L. R. C. A. 177.—**N.Z.***

c. Sufficiency of statement—Grantor taking over indebtedness of third party.]—If a bill of sale shows on its face that the consideration for giving it was that the grantor should take over the business & stock & the indebtedness of a third party who was under obligations to the grantor, it is not necessary that it should further state that such third party was to be released from his debt. *DANBY v. AUSTRALIAN FINANCIAL AGENCY & GUARANTEE CO., LTD.* (1891), 17 V. L. R. 481. **AUS.**

d. — Natural love & affection, etc. Prior agreement to take over liability.]—A husband transferred to his wife certain furniture by a deed of gift, which recited the consideration as "natural love & affection, & also for divers other good causes & considerations." It had been previously agreed that in consideration of this transfer the wife should take over a liability of £100 due by the husband:—*Held*: the consideration was not truly stated as required by Bills of Sale Act, 1891, s. 4. *Re HOURIGAN, Ex p. KENNA*, [1903] S. R. Q. 117.—AUS.****

e. — Bill to secure past advances.]—Where a bill of sale was given to secure past advances only, it was not necessary under Chattel Securities Act Amendment Act, 1883, s. 4, to set out each advance separately so long as the language of the deed was such as to express that the security was for a past advance.—*Re McMASTER, Ex p. MURRAY, ROBERTS & Co.* (1887), 5 N. Z. L. R. 444.—N.Z.****

f. — Present & past advances distinguished.]—It was sufficient under Chattel Securities Act, 1883, s. 4, if a bill of sale distinguished the total respective amounts of present & past advances, & it was not necessary to set out how each was made up of

document, *e.g.*, a promissory note, which contains terms not allowed by 1882 Act, & the whole of the conditions of the transaction are gathered from the joint effect of the two documents, the bill of sale is void. — *SIMPSON v. CHARING CROSS BANK* (1886), 34 W. R. 568, D. C.

Annotations:—*Appld.* *Sharp v. McHenry, Sharp v. Brown* (1887), 38 Ch. D. 427. *Refd.* *Counsell v. London & Westminster Loan & Discount Co.* (1887), 4 T. L. R. 2.

209. — Providing for compound interest—Avoidance of bill.]—Under 1882 Act, s. 8, a bill of sale is void unless it “truly sets forth the consideration for which it was given,” *i.e.*, it must show, on the face of it, the true agreement between the parties, & must not be dependent for its real effect upon some other instrument.

Where M. agreed in writing to execute in favour of S. certain instruments, including a bill of sale, as securities for a debt, the agreement providing for payment of compound interest, & M. executed a bill of sale, which did not explain the real nature or extent of the agreement, & contained only such part of it as could properly be embodied in a bill of sale:—*Held*: the bill of sale was void.—*SHARP v. McHENRY, SHARP v. BROWN* (1887), 38 Ch. D. 427; 57 L. J. Ch. 961; 57 L. T. 606; 3 T. L. R. 817.

Annotations:—*Refd.* *Tuck v. Southern Counties Deposit Bank* (1889), 42 Ch. D. 171. *Mentd.* *Re McHenry, Ex p. McDermott* (1888), 21 Q. B. D. 580; *Barron v. Potter*, [1915] 3 K. B. 593; *Burchell v. Thompson*, [1920] 2 K. B. 80.

See, also, No. 280, *post*.

210. — Smaller present payment—To represent larger future liability.]—The consideration for a bill of sale was stated to be £7,575, thereby

admitted by the grantor to be due. At the time the grantor was only indebted to the grantee on two bills of exchange for £8,300 then current:—*Held*: assuming it was agreed at the time that the £8,300 due *in futuro* should be taken as between the parties to be represented by £7,575, the bill of sale was void, the consideration for which it was given not being truly stated.—*COCHRANE v. MOORE* (1890), 25 Q. B. D. 57; 59 L. J. Q. B. 377; 63 L. T. 153; 54 J. P. 804; 38 W. R. 588; 6 T. L. R. 296, C. A.

Annotations:—*Folld.* *Darlow v. Bland*, [1897] 1 Q. B. 125. *Mentd.* *Re Patrick, Bills v. Tatham* (1890), 60 L. J. Ch. 111; *Re Alderson, Alderson v. Peel* (1891), 61 L. T. 645; *Kilpin v. Ratley*, [1892] 1 Q. B. 582; *Rawlinson v. Mort* (1905), 93 L. T. 555; *Re Wasserberg, Union of London & Smiths Bank v. Wasserberg*, [1915] 1 Ch. 195; *Valier v. Wright & Bull* (1917), 33 T. L. R. 366; *Re Stoneham, Stoneham v. Stoneham*, [1919] 1 Ch. 149.

211. Second bill given—In substitution for invalid bill.]—In Nov., 1887, plffs. gave to defts. a bill of sale on certain scheduled furniture, & on all other chattels & things which might thereafter at any time during the continuance of the security thereby created be substituted therefor, or which might thereafter be brought on the premises. In Feb., 1888, the Ct. of Appeal decided that a bill of sale purporting to assign chattels other than those described in the schedule was void under 1882 Act, & defts. took immediate steps to have their bills of sale put in proper form, & several persons, including plffs., who had given bills of sale in the invalid form were summoned to defts.’ business premises. Plffs. were not informed of the decision of the Ct. of Appeal, but were told that they must renew their bill of sale, which they

money advanced or goods supplied.—*Re DEVERY* (1887), 6 N. Z. L. R. 97.—N.Z.

g. — Evidence.]—Upon appeal from an order summarily determining, in favour of plff., an interpleader in respect of a horse seized by a sheriff under plff.’s execution, & claimed by the bargainee in the bill of sale:—*Held*: the bill of sale sufficiently expressed the consideration, & upon the evidence on affidavit, the determination should have been in favour of claimant.—*IRELAND v. ANDERSON* (1911), 29 W. L. R. 329; 20 D. L. R. 961.—CAN.

h. Mortgage to secure against indorsements—Liability extended to renewals & future indorsements—Liability not set out in affidavit.]—In a chattel mtge. to secure plff., the mtgee., against certain notes on which he was an indorser, the notes were set out, & were all payable within the year; but in the recital the mtge. was stated to be executed not only as security against these notes, but also against any note or notes thereafter to be indorsed by plff. for the mtgor.’s accommodation by way of renewal of the said recited note, or otherwise howsoever. The proviso was, for the payment of the said notes, & all & every other note or notes which might thereafter be indorsed by the mtgor. for plff. by way of renewal of the aforesaid note, or otherwise; & the covenant was to pay the said note, & all future & other promissory notes which the said mtgee. should thereafter indorse for the accommodation of the mtgor.:—*Held*: the mtge. was invalid, in consequence of the affidavit of *bona fides* not stating the amount of the liability intended to be created & covered; for the covenant showed that it was intended as a security against the notes specified, & any other notes which might be indorsed, & the affidavits stated that it was executed to secure against the payment of such liability.

Another mtge., subsequently given,

contained nearly all the notes referred to in the above mtges., while it not only appeared that none of such notes were then in existence, they having all been renewed several times & reduced in amount, but that it also contained a further note which was not indorsed at all:—*Held*: this mtge. was also bad, as it could not be said to contain a true statement of plff.’s liability. *KORON v. PRICE* (1877), 27 C. P. 309.—CAN.

k. — Must show indorsements or renewals will fall due within a year.]—A chattel mtge., given to secure the mtgee. against his indorsements for a mtgor., must show on its face that the notes indorsed, or any renewals thereof, will fall due within the year, otherwise the mtge. will be void against creditors or purchasers, but not against the assignee in insolvency. *ONTARIO BANK v. WILCOX* (1878), 43 U. C. R. 460.—CAN.

l. — Future
The requirements of R. S. O. 1877 (c. 119), s. 6, as to setting forth an agreement in the mtge. apply only to mtges. to secure future advances for the purposes therein mentioned. In the case of a mtge. under the above sect. as security against liabilities incurred by indorsing, or in any other way, all that is necessary is that the liability shall be one not extending for a longer period than one year from the date of the mtge., & shall be sufficiently described or identified therein. The reference to a possible future renewal or extension of liability, which has not been agreed to & which the mtgee. is not bound to grant, does not invalidate the mtge. if in other respects sufficient.—*EMBURY v. WEST* (1888), 15 A. R. 357.—CAN.

m. — Whether necessary to set out agreement—Amount of liability.]—A mtge. of goods & chattels for securing the mtgee. against the indorsement of promissory notes is void if it does not set forth by recital or otherwise the terms, nature & effect

of the agreement between the parties thereto, & the amount of the liability intended to be created, as required by Bills of Sale Act, 1893.—*LEVASSEUR v. BEAULIEU* (1896), 33 N. B. R. CAN.

n. — — — — —.]—*Scmble*: it is not essential to the validity of a chattel mtge. to secure the mtgee. against the indorsement of any bill or note, etc., under R. S. O. 1877 (c. 119), s. 6, that it should set forth fully the agreement between the parties & the amount of the liability intended to be created, & that the liability which it professes to secure should be truly stated.—*BARBER v. MACPHERSON* (1886) 13 A. R. 356; 15 A. R. 361.—CAN.

o. — — — — —.]—L. mortgaged to plffs. for £110 2s. 5d., reciting that he was indebted to them in £211 10s. 11d.; & that they had become security for him as indorsers of a note for £25 11s. 6d., making together £210 2s. 5d. for £100 of which he had previously given them another mtge.:—*Held*: the mtge. was defective, in not showing the terms, nature, & effect of the liability incurred by indorsing.—*BOULTON v. SMITH* (1860), 18 U. C. R. 458.—CAN.

p. — — — — — Sufficiency of recital.]—A recital that plff. had indorsed three notes made by J., giving the dates, sums, & time of payment, for the accommodation of J., & that J. had agreed to enter into the mtge. to indemnify & save harmless the mtgee. of & from payment of said notes, & from all liability or damage in respect thereof:—*Held*: sufficient.—*ROBINSON v. PATERSON* (1859), 18 U. C. R. 55.—CAN.

q. — S. P. MATHERS v. LYNCH (1869), 28 U. C. R. 351.—CAN.

r. — — — — — Sufficiency of affidavit.]—A chattel mtge. recited that the mtgee. had indorsed, at the request & for the accommodation of the mtgors., a certain promissory note bearing even date therewith, & payable three months

Sect. 1.—Consideration: Sub-sect. 2, A. & B.]

did, the substituted bill of sale being in a form in accordance with the law as laid down in the Ct. of Appeal, but being otherwise in practically the same form as the previous security:—*Held*: the consideration was not truly stated, as the real consideration, *viz.*, that debts held an invalid prior bill, did not appear in the substituted bill.—**BOUCHETTE v. CONSOLIDATED CREDIT & MORTGAGE CORPN., LTD.** (1889), 5 T. L. R. 653.

See, also, cases in Sub-sect. 2, C. (a) & (b), post.

R. Must be Substantially Correct.

212. "Shall truly set forth"—Word "truly" surplusage.]—The lease of a house & the furniture were sold for £600, of which £100 was paid by the purchaser. The remainder was secured by a bill of sale on the furniture which recited the consideration as "£500 now paid":—*Held*: the insertion of the word "truly" in 1882 Act, s. 8, did not distinguish that sect. from 1878 Act, s. 8, &

after date to C. B., or order, for \$1,000. The proviso & covenant were to pay the said note at maturity, & save harmless the said mtgee. against his indorsement thereof. The affidavit of the mtgee. stated that he had indorsed the promissory note in the mtge. named: "that the said mtge. was executed in good faith, & for the express purpose of securing the due payment of the said promissory note, & security & indemnity to me against the said indorsement or any loss thereby, & not for the purpose of protecting the goods & chattels mentioned in the said mtge. against the creditors of the said mtgors., therein named, or preventing the creditors of such mtgors. from obtaining payment of any claim against the said mtgors.":—*Held*: (1) the agreement was sufficiently set forth in the mtge. & verified in the affidavit; (2) the affidavit was sufficient.—**O'DONOHUE v. WILSON** (1877), 42 U. C. R. 329.—**CAN.**

s. ——— Note set out.]—The provisions of Ontario Chattel Mortgage Act requiring the consideration of a mtge. to be expressed therein is satisfied when the mtge. recites that the indorsement of a note is the consideration & then sets out the note. Only the facts need be stated, not their legal effect.—**ROBINSON v. MANN** (1901), 31 S. C. R. 484.—**CAN.**

PART V. SECT. 1, SUB-SECT. 2. —B.

t. Shall truly set forth—Construction of agreement limiting liability.]—A bill of sale reciting that £4 3s. 7¹/₂d. was then due from the grantor to the grantee, & that the grantor had requested the grantee to join in securing him to certain banks for £86 & £29, & such further or other sums as the grantee might advance to or for the grantor, or the grantee might be obliged to pay in consequence of his having become, or being about to become, or hereafter becoming surety for the grantor, stated that the consideration was £1 3s. 7¹/₂d. then due, & the agreement of the grantee "to undertake or join in certain liabilities" & such further or other sums in which the grantor might become indebted to the grantee: & it was further provided "that the sums to be secured hereby shall not exceed £300, nor shall it be obligatory on the grantee to advance any sum or undertake any liability beyond those already verbally agreed upon & at present existing." On the trial of an interpleader issue the grantee deposed: "The arrangement was I would secure or assist my brother (the grantor) to the extent of £300. It was agreed that I would secure &

the consideration was truly stated.—**STANFORTH v. CAPON** 3), 2 T. L. R. 493, D. C.

213. ———.]—Held: the addition of the word "truly" in 1882 Act, s. 8, was only putting into that sect. what the cts. had said was the meaning of 1878 Act, s. 8. *Semble*: cases decided on the former Act were authorities on the latter Act.—**Re HOCKADAY, Ex p. NELSON** (1887), 35 W. R. 264; 3 T. L. R. 285; 4 Morr. 12, C. A. *Annotation*:—**Mentd. Re Tweedale, Ex p. Tweedale**, [1892] 2 Q. B. 216.

214. Small inaccuracy—Clerical error.]—The original of a bill of sale stated in the recital the sum for which it was given as being £100, but by mistake, in the operative part of the instrument, the sum was described as £1,000. In all other parts of the bill the sum was correctly described as £100:—*Held*: this was a clerical error which might be amended, & did not invalidate the bill of sale.—**ELLIOTT v. FREEMAN** (1863), 1 New Rep. 328; 7 L. T. 715.

Annotation:—**Refd. Re Hower, Ex p. Kahen** (1882), 21 Ch. D. 871.

make advances to my brother: the limit to be £300." It was objected that the agreement so proved was that the grantee was bound to advance £300 while the bill of sale only stated that this was the limit of the advance:—*Held*: the substance of the consideration was truly stated, within 1879 Act, s. 8.—**QUANE v. QUANE** (1881), 15 L. L. T. 98.—**IR.**

a. ——— Strict accuracy.]—A bill of sale is void under (Chattel Securities Act 1880 Amendment Act, 1883, unless it sets out the consideration with strict accuracy.—**REID v. McCALLUM'S OFFICIAL ASSIGNEE** (1886), 5 N. Z. L. R. C. A. 68.—**N.Z.**

b. ——— Substantial accuracy.]—The full & true consideration for which a bill of sale is given must be set out in it, with substantial accuracy, otherwise the bill is void.

G. being indebted to B., gave his note for the amount which B. discounted at a bank. As security G. executed a chattel mtge. to the bank. At maturity B. took up the note. Afterwards he procured from G. a bill of sale of the goods. The bill recited the mtge. & an agreement to sell the goods for \$100 over the mtge. The expressed consideration was the premises & \$100. The \$100 was not paid or intended to be paid:—*Held*: although the debt upon the notes might have been a sufficient consideration for the bill of sale, yet, as that was not the consideration stated, the bill was void.—**BATHGATE v. MERCHANTS BANK** (1888), 5 Man. L. R. 210.—**CAN.**

c. ——— Notes taken from mortgage—Transferred by mortgagee prior to execution of mortgage.]—A chattel mtge. was expressed to secure payment of \$870.34 the amount owing by the mtgor. to the mtgee. A large portion of it, however, was represented by notes which the mtgee. had, previous to the date of the mtge., transferred to a bank as collateral security for his own debt:—*Held*: the mtge. was not upon that account invalid.—**STEPHENS v. McARTHUR** (1890), 6 Man. L. R. 496; *revid.* 19 S. C. R. 446.—**CAN.**

d. ——— Mortgage to secure liability on acceptances.]—In a chattel mtge. given & expressed to be given to secure a liability on notes the consideration is truly expressed & Bills of Sale Ordinance, s. 5, does not apply to the transaction.—**ONTARIO & WESTERN LUMBER CO., LTD. v. COTE** (1897), 3 Terr. L. R. 454.—**CAN.**

214 i. Small inaccuracy.]—A small inaccuracy in stating the consideration will not avoid a bill of sale.—**WALLEY v. HARRIS** (1892), 3 Terr. L. R. 161.—**CAN.**

214 ii. ———.]—Where upon the evidence it was shown that a fair price for the goods & an additional lowest in two further timber contracts was paid:—*Held*: an inaccuracy of statement was no indication of fraud; no sufficient reason for invalidating the bill of sale.—**CLIFF PAPER CO. v. AUGER** (1917), 13 O. W. N. 50.—**CAN.**

214 iii. ——— Clerical error.]—A bill of sale recited the sale to be for \$820 & other valuable considerations, & went on to say that it was in consideration of the said valuable considerations & of the sum of \$820. The affidavit of *bona fides* stated that the consideration was \$850, & it was admitted that the figures "820" were inserted in the bill of sale by a clerical error:—*Held*: the bill of sale was not one in which the consideration was not truly expressed within Bills of Sale Act, s. 13.—**TORONTO TYPE FOUNDRY CO. v. RIDDETT** (1913), 23 W. L. R. 951; 10 D. L. R. 633; 4 W. W. R. 292; 6 Sask. L. R. 212.—**CAN.**

214 iv. ——— Omission in recital.]—The mtge. to plff. was first drawn to secure \$500, but before execution it was changed to \$600 in every place except the recital, where the word "five" was inadvertently left:—*Held*: there was no such untrue statement in the affidavit attached to the mtge. as would invalidate it, the evidence affording satisfactory explanation of the mistake in the recital.—**FRASER v. MACPHERSON** (1898), 34 N. B. R. 417.—**CAN.**

214 v. ——— Omission to fill in blanks in printed form.]—Lien-notes given by plff. to deft. G., the agent of deft. co., for the price of goods sold to plff., were indorsed by G. to the co., & after they were overdue, plff. executed a document purporting to be a chattel mtge. upon some wheat in shock to secure the amount due upon the notes. The document was a printed form of chattel mtge., containing blanks to be filled in, but only some of the blanks were filled in, namely, those left for the names of the mtgor. & mtgee., the consideration for executing the document, \$312.98, & the property intended to be mortgaged. The form contained what was intended to be a redemption clause, but the amount to be paid or when it was to be paid was not filled in. It appeared from extrinsic evidence that the \$312.98 was the amount due upon the notes:—*Held*: the instrument was a mtge. to secure \$312.98, payable on demand, with interest at 5 per cent.—**v. PARIS PLOW CO.** (1910), 14 W. L. R. 680.—**CAN.**

215. — Misstatement as to amount due.—Bill good to extent of sum really due.]—The insertion in a bill of sale of a sum larger than that really due, does not invalidate the security, provided it be done without fraud, & with the intention that the security shall be made available only to the extent of the sum actually due.—*BIDDULPH v. GOULD* (1863), 2 New Rep. 420; 11 W. R. 882.

216. — False statement.]—A false statement of the amount of consideration does not avoid a bill of sale, if no fraud in fact be shown.—*KEVAN v. MAWSON* (1871), 24 L. T. 395; 35 J. P. 311; 19 W. R. 1145.

217. — The “consideration” mentioned by 1878 Act, s. 8 is that which the grantor receives for giving the bill of sale, not necessarily the amount secured by it.

A bill of sale was given to secure, not only a present advance, but also the amount for the time being due to the grantee upon a mtge. including future advances which had been previously given to him by the grantor. The recitals in the bill of sale in stating the amount then due on the mtge. omitted a sum which had been advanced on a bill then current:—*Held*: that misstatement formed no objection under s. 8 to the validity of the bill of sale.—*Re ROGERS, Ex p. CHALLINOR* (1880), 16 Ch. D. 260; 51 L. J. Ch. 476, n.; 44 L. T. 122; 29 W. R. 205, C. A.

Annotations:— *Reid. Re Wiltshire, Ex p. Eynon* (1899), 81 L. T. 616. *Mentd. Hamilton v. Chaine* (1881), 7 Q. B. D. 319; *Re Spindler, Ex p. Rolph* (1881), 19 Ch. D. 98; *Re Cowburn, Ex p. Firth* (1882), 19 Ch. D. 419; *Re Roper, Ex p. Bolland* (1882), 21 Ch. D. 543; *Roe v. Mutual Loan Fund Assn.* (1887), 56 L. T. 631; *London & Provinces Discount Co. v. Jones*, [1914] 1 K. B. 147.

218. — A bill of sale set forth part of the consideration for which it was given as £121 due for goods supplied to grantor. The evidence showed that £115 was actually due when the deed was executed:—Held: not a misstatement within 1878 Act. Semble: an honest inaccuracy will not render a bill of sale invalid where there is substantial accuracy & a truthful deed.—Ex p. PROBYN (1880), 21 Sol. Jo. 341, C. A.

219. — No particulars of old debt.]—A. lent £150 to B. & later, upon receiving a bill of sale, a further £50. The bill of sale stated the consideration to be an old debt of £150, a present advance of £50 & also 5s. It was contended for debt. that the description did not comply with 1878 Act, as it did not give any particulars of the old debt, & as the 5s. had not been paid as stated:—*Held*: the consideration was correctly described as an old debt, & there was no substance in the objection with respect to the 5s.—*CORKHILL v. LAMBERT* (1880), 70 L. T. Jo. 46.

220. — Amount due on account stated—No money passing.]—A. being indebted to B., gave him a bill of sale to secure £7,350, which, on stating the accounts between them, was found to be the balance due, & by such bill of sale that sum was to be paid by A. with interest on demand in writing. The bill of sale recited that B. had agreed to lend A. £7,350, & the consideration for such bill of sale was stated therein to be £7,350, then paid by B.

215 i. — Misstatement as to due.]—A misstatement of the consideration in a chattel mtge. is not, in the absence of bad faith, *ipso facto* a fatal defect. It is merely an element to be considered in dealing with the question of *bona fides*.—*MARTINSON v. PATTERSON* (1892), 19 A. R. 188.—CAN.

215 ii. — Question of fact.]—The consideration in the mtge. was stated as \$1,148; it appeared in evidence that the amount actually owing was \$1,030.80:—*Held*: the

erroneous statement of the consideration did not avoid the mtge., as a matter of law, but was a circumstance for the jury to consider when deciding the issue of fraud.—*HAMILTON v. HARRISON* (1881), 46 U. C. R. 127.—CAN.

215 iii. — Discounting of draft drawn by mortgagee.]—Part of the consideration of the mtge. was covered by a draft drawn by mtgee., a merchant, in the course of business, on the mtgor., a customer, & discounted at the bank:—*Held*: the amount of the indebted-

ness in the mtge. could not be said to be untrue. *HERBURN v. PARK* (1884), 6 O. R. 172.—CAN.

Annotations:— *Folld. Carrard v. Meek* (1880), 50 L. J. Q. B. 187. *Distd. Re Young, Ex p. Berwick* (1880), 43 L. T. 576. *Apld. Re Chapman, Ex p. Johnson* (1884), 26 Ch. D. 338. *Folld. Re Hockaday, Ex p. Nelson* (1887), 3 T. L. R. 285. *Distd. Mayer & Fulda v. Mindlevich* (1888), 59 L. T. 400. *Apld. Richardson v. Harris* (1889), 22 Q. B. D. 268. *Folld. Re Ronard, Ex p. Trustee* (1915), 85 L. J. K. B. 393. *Reid. Re Smith, Ex p. Tarbuck* (1894), 72 L. T. 59; *Darlow v. Bland*, [1897] 1 Q. B. 125. *Mentd. The Benwell Tower* (1895), 72 L. T. 664.

221. — Motive of grantor.]—A bill of sale dated Jan. 17, 1880, recited that the mtgor. owed the mtgee. £1,444 14s. 3d., & that the mtgor. had agreed to execute the mtge. deed in order to induce the mtgee. not to institute proceedings against him. The facts were, that on Jan. 13, 1880, the mtgee. drew a cheque for £1,444 14s. 3d., & gave it to the mtgor., but, upon hearing rumours about the mtgor., he stopped payment of the cheque. On Jan. 16 the stop was withdrawn by the mtgee. upon the understanding that good security should be given, & the cheque was paid a few hours prior to the execution of the bill of sale. No proceedings had been threatened by the mtgee.:—*Held*: the consideration was properly set forth.

A small inaccuracy in the statement of consideration is not sufficient to avoid a bill of sale (*JESSEL, M.R.*).—*Re FOTHERGILL, Ex p. WINTER* (1881), 44 L. T. 323; 29 W. R. 575, C. A.

222. — Grammatical error.]—A bill of sale, after reciting that the mtgor. had applied to the mtgees. to advance him £70, less £16 the agreed interest & expenses, to be deducted & retained as thereafter expressed, witnessed that, in consideration of £54 being the £70 less the £16 deducted & retained therefrom, & being the agreed interest & expenses in consideration of which the loan was granted, & which £54 & £16 conjointly were, thereafter called the loan, by the mtgees. paid to the mtgor. at or before the execution thereof, the receipt whereof the mtgor. thereby acknowledged, etc. It was proved or admitted that £54 only had been paid by the mtgees. to the mtgor. at the execution of the bill of sale:—*Held*: the consideration was truly set forth.—*COLLIS v. TUSON* (1882), 46 L. T. 387, D. C.

223. — Promissory notes misdescribed as bills of exchange—Covenant omitted.]—A bill of sale recited that two of the grantees were liable as sureties for the grantor on a bill of exchange for £60, which had been discounted at a bank, that two of the grantees & O. were liable as sureties for the grantor on a bill of exchange for £100, which had been discounted at the same bank, that the grantor was unable to meet the bills, & was also in urgent need for a further £45, & had applied to the grantees to take up the two bills of exchange & make him a further advance of £45, which they had agreed to do in consideration of the grantor entering into the bill of sale, “for the purpose of

ness in the mtge. could not be said to be untrue. *HERBURN v. PARK* (1884), 6 O. R. 172.—CAN.

i. — Amount due on account stated—Present advance.]—*PATTERSON v. PALMER* (1911), 19 W. L. R. 422; 1 W. W. R. 97; 4 Sask. L. R. 487.—CAN.

222 i. — Grammatical error.]—*Held*: recitals which used the singular instead of the plural number did not vitiate the instrument.—*TYAS v. MASTER* (1858), 8 C. P. 446.—CAN.

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securing repayment to them with interest as well of the £15, as also of the two bills of £60 & £100 respectively with all expenses due thereon." The bill of sale then witnessed that "in consideration of £15 now paid to the" grantor "by the grantees, & of the covenant on the part of the grantees hereinafter contained," the grantor covenanted with the grantees on demand to "pay to the grantees all & every the several sums of £60, £100, & £15, & all costs, charges, & expenses," & meanwhile to pay interest thereon. The instruments described as bills of exchange were promissory notes, & had not been discounted:—*Held*: the consideration was stated with sufficient accuracy, & "was truly set forth" within 1882 Act, s. 8, notwithstanding the misdescription of the promissory notes, & the agreement to take up the bills recited in the deed was in effect a covenant to take up the promissory notes.—**ROBERTS v. ROBERTS** (1884), 13 Q. B. D. 794; 53 L. J. Q. B. 313; 50 L. T. 351; 32 W. R. 605, C. A.

Annotations:—**Distd.** Mayer & Fulda v. Mindlevich (1888), 59 L. T. 100. **Refd.** Davies v. Jenkins (1899), 48 W. R. 286. **Mentd.** Bouchette v. Attenborough (1887), 3 T. L. R. 813; Witt v. Banner (1887), 20 Q. B. D. 114; Thomas v. Kelly (1888), 13 App. Cas. 506; Carpenter v. Deen (1889), 23 Q. B. D. 566.

224. — £32 "or thereabouts."]—By a bill of sale expressed to be given in consideration of the grantee thereof having at the request of the grantor become guarantee, & signed a promissory note for payment of £15 by the grantor, of which £32, or thereabouts, was then owing, the grantor assigned to the grantee certain chattels, described in a schedule, by way of security for any money which the grantee might be called upon to pay in respect of such guarantee, & interest thereon at the rate of 5 per cent. *per annum*, & the grantor agreed that he would pay to the grantee any sums as aforesaid, together with interest then due, by

h. — £10,000 & upwards.] The consideration in the mtge. being stated at £10,000 & upwards:—*Held*: good, the amount being certain as to £10,000, & it not being shown that there were more goods than would satisfy that amount.—**McGEE v. SMITH** (1859), 9 C. P. 89.—**CAN.**

k. — *Present debt payable at future day.*] The mtge. showed the debt in the proviso as only becoming due & payable at a future day, but the consideration was stated to be money acknowledged to be paid for the transfer of the property, & the evidence showed it was given to secure an overdue debt:—*Held*: the mtge. could be upheld, regarding it as given for a present debt to be paid at a future day.—**FARLINGER v. McDONALD** (1880), 45 U. C. R. 233. **CAN.**

PART V. SECT. 1, SUB-SECT. 2.
—C (a).

l. *What amounts to present payment.*]—An advance of a sum of money to a mtgee. seven days before the execution by him of a bill of sale is not an advance made contemporaneously with the execution. **REID v. McCALLUM'S OFFICIAL ASSIGNEE** (1886), 5 N. Z. L. R. C. A. 68.—**N.Z.**

m. — *Agreement to make future advances.*]—The consideration in a bill of sale was not the actual payment of, but an agreement to advance money:—*Held*: the consideration was sufficient & claimant under the bill of sale was entitled to the goods.—**HARRISON v. MOORE** (1871), 2 V. R. (Law.) 69.—**AUS.**

n. — — —.]—An agreement to make future advances may be supported as a contemporaneous advance under 1899 Act, s. 5, but the *onus* lies

upon the grantee claiming to support a bill of sale by such consideration, to show that money has been advanced under such agreement.—**IDA H. MINING CO., LTD. v. JONES** (1905), 7 W. A. L. R. 329.—**AUS.**

o. *Debt secured not yet due—Mortgage gratuitous.*]—A chattel mtge. given without consideration to secure a debt not yet due is presumed to be gratuitous.—**EASTERN TOWNSHIP'S BANK v. PICARD** (1913), Q. R. 23 K. B. 488. **CAN.**

p. — — *Bill to secure accommodation indorsement.*] A bill of sale given to secure the grantee against his liability on his indorsement of a promissory note for the accommodation of the grantor is not invalid under Chattels Securities Act Amendment Act, 1883.—**PEAKE v. HOAG** (1885), 4 N. Z. L. R. 190.—**N.Z.**

q. — — — *Grantee liable as surety for grantor.*]—A bill of sale to secure a contingent liability, given to a person who has become surety for an advance made by a third person to a mtgor., is void under Bankruptcy Act, 1883, s. 80, if the mtgor. becomes bkpt. within six months after the giving of the security. **OFFICIAL ASSIGNEE v. BERTIE** (1886), 5 N. Z. L. R. 224.—**N.Z.**

r. *Mortgage to secure against indorsements—Accommodation indorsements only.*]—The words in R. S., c. 92, s. 5, "for securing the mtgee. against the indorsement of any bills, etc.," relate to accommodation indorsements, & becoming liable to a third person as surety, & not to cases where the grantor owes the grantee a debt, & gives his note for the amount.—**PHINNEY v. MORSE** 25 N. S. R. 502; *reversd.* on other grounds, 22 S. C. R. 563.—**CAN.**

s. — — *Not future indorsements or*

monthly payments of £2 on the first of every month:—*Held*: the consideration for which the bill was given was sufficiently set forth.—**HUGHES v. LITTLE** (1886), 18 Q. B. D. 32; 56 L. J. Q. B. 96; 55 L. T. 476; 35 W. R. 36; 3 T. L. R. 14, C. A.

Annotations:—**Mentd.** Pulbrook v. Ashby (1887), 56 L. J. Q. B. 376; Stevens v. Marston (1890), 60 L. J. Q. B. 192; McNair v. Audenshaw Paint & Colour Co., [1891] 2 Q. B. 502; *Re Hill*, Official Receiver v. Ellis (1895), 2 Mans. 208; De Braam v. Ford (1899), 69 L. J. Ch. 82.

225. — Arithmetical error.]—Where the consideration of a bill of sale was stated to consist of two sums of £92 11s. & £12 17s., & it appeared that those sums had been arrived at by arithmetical error between the parties, the sum really owing being £129 10s., instead of £135 8s. as shown in the bill:—*Held*: the sums stated in the bill represented truly the account as stated between the parties, though that account contained an arithmetical error honestly made, & the consideration was truly stated.—**GRIFFITH v. WILLIAMS** (1892), 93 T. Jo. D. C.

226. — Goods delivered—Part of goods not delivered.]—Part of the consideration of a bill of sale was stated to be a debt of £10 the value of goods sold & delivered to the grantor to enable him to carry on his business. Part of the goods were not in fact delivered until some time after the execution of the bill:—*Held*: the language of the bill was consistent with the fact that the goods had not all been delivered, & the consideration was truly stated.—**GRIFFITH v. WILLIAMS** (1892), 93 L. T. Jo. 8, D. C.

C. What may be described as Consideration.

(a) *Present Payment.*

227. True statement—Past debt of grantor.]—By a bill of sale in consideration of £200 then due, & "in consideration of £50 now advanced," debtor

liabilities.] A chattel mtge. under C. S. U. C., c. 45, s. 5, may be given as security against past or concurrent, but not against future, indorsements or liabilities. If it did not apply to past liabilities, then a mtge. to secure against them would not be avoided by the Act for want of compliance with its provisions. **MATHERS v. LYNCH** (1869), 28 U. C. R. 354. **CAN.**

t. *Mortgage to secure present payment & future indebtedness—Not void in toto.*]—A chattel mtge. was given to secure (1) payment of an existing debt, & (2) future indebtedness: *Held*: the mtge. was valid as to (1) but invalid as to (2). **HUNT v. LONG** (1916), 9 O. W. N. 421. **CAN.**

u. *Past advances—Moneys never received.*]—Bankruptcy Act, 1892, s. 79 (2), renders null & void a contract to pay moneys which have never been received, as well as a contract to pay past advances.—*Re Gore* (1895), 13 N. Z. L. R. 710.—**N.Z.**

v. *Debt secured not existing—Verbal promise by grantee to make future advances.*]—Under 20 Vict. c. 3, a mtge. cannot be supported which is given in great part for a debt not existing, but for advances which the mtgee. has merely promised verbally to make, & had not made when the mtge. was executed or the affidavit for registry made.—**ROBINSON v. PATERSON** (1859), 18 U. C. R. 55.—**CAN.**

227 i. True statement—Past debt of grantor.]—A bill of sale represented the £100 consideration as a pre-existing debt. It appeared that £98 had been owing from the grantor to the grantee, & that the attesting solr. required the balance of £2 to be paid over before execution. A payment was accordingly made, but the sum actually

assigned to his brother his stock-in-trade & other effects. Of the £50 expressed to be then advanced, £5 had been advanced at the request of debtor the previous day, so that on execution of the deed, only £45 was actually paid over:—*Held*: the consideration was truly set forth, since the present advance was in fact £50, though £5 of it was paid on the previous day.—*Re SMITH, Ex p. SMITH* (1880), 15 L. J. N. C. 39.

228. ———.]—A bill of sale was expressed to be in consideration of the payment of £81 18s. by the grantee to the grantor, & in further consideration of the payment of £16 3s. by the grantee to the sheriff of Surrey for & at the request of the grantor. The former sum was a past payment & the latter sum was a present payment made in discharging an execution levied on the goods of the grantor:—*Held*: a sufficient setting forth of the consideration.—*CARRARD v. MEEK* (1880), 50 L. J. Q. B. 187; 43 L. T. 760; 29 W. R. 244, D. C.

229. ——— Two advances really one transaction.]—Debtor applied on July 7 to persons to whom he already owed £1,530 for a fresh advance of £200, & that advance was then made to him on his signing an agreement to execute a bill of sale on demand to secure both sums & interest. On July 11 debtor applied to the same creditors for a further advance of £200, which was then made to him, & the same day he executed a bill of sale in which, after reciting that "the mtgor. is now indebted to the mtgees. in the sum of £4,530, & has applied to them to advance & lend to him the further sum of £100, which they have agreed to do upon having repayment of same, & also of the £1,530," secured, the consideration was stated to be "£400 on or immediately before the execution of these presents paid":—*Held*: the consideration was truly stated so as to satisfy the requirements of 1878 Act, s. 8.

advanced was £20:—*Held* the consideration was sufficiently stated.—*Re PARKE* (1884), 13 L. R. Ir. 85.—**IR.**

227 ii. ———.]—Where the borrower, prior to the execution of a chattel mtge., is indebted, & part of the money advanced on security of the mtge. is by his direction used in the payment of the debt, the whole sum may be stated in the deed as the consideration paid to the borrower.—*WALLEY v. HARRIS* (1892), 3 Terr. L. R. 101.—**CAN.**

227 iii. ———.]—The price of goods supplied before being included with others supplied under the mtge. will not affect the validity of the mtge.—*NEWLANDS v. HIGGINS* (1907), 7 W. L. R. 59; 1 Alta. L. R. 18.—**CAN.**

227 iv. ———.]—Where the real object of a chattel mtge. is to secure a past debt the concealment of that fact by stating the consideration to be money lent on the security of a promissory note of even date with the mtge. does not invalidate the mtge.—*ROYAL BANK v. WHIELDON* (1915), 8 W. W. R. 734; *reversd.* 9 W. W. R. 776.—**CAN.**

227 v. ———.]—Where the consideration, or a part thereof, expressed in a chattel mtge. is in fact money owing at the time of the execution of the mtge. from the mtgor. to the mtgee., it is not necessary in order to have the chattel mtge. truly express the consideration for the mtgor. to go through the formality of paying over said amount to the mtgee., so that the mtgee. may immediately repay it to him.—*ROYAL TRUST CO. v. CASTOR TOWN*, [1917] 3 W. W. R. 586; 37 D. L. R. 277.—**CAN.**

227 vi. ———.]—*Second bill.*—A. gave to B. a bill of sale over certain chattels & a mtge. of his interest under

The two transactions of July 7 & 11 may properly be considered as one transaction, & the statement, that the £400 was advanced "on or immediately before the execution of these presents," is a truthful statement of what really took place, there being only that short interval of four days between the two transactions, so that really the transactions which led up to the bill of sale may be considered as begun by the undertaking given on July 7, & that would be sufficient to prevent our setting the deed aside (*COTTON, L.J.*).—*Re CHAPMAN, Ex p. JOHNSON* (1884), 26 Ch. D. 338; 53 L. J. Ch. 762; 50 L. T. 214; 48 J. P. 648; 32 W. R. 693, C. A.

Annotations:—*Apld.* *Richardson v. Harris* (1889), 22 Q. B. D. 268; *Re Rouard, Ex p. Trustee* (1915), 85 L. J. K. B. 393. *Refd.* *Re Smith, Ex p. Tarbuck* (1894), 72 L. T. 59; *Darlow v. Bland*, [1897] 1 Q. B. 125. *Mentd.* *Administrator-General of Jamaica v. Lascelles, De Mercado*, [1894] A. C. 135; *Baker v. Ambrose*, [1896] 2 Q. B. 372.

230. ——— *Second bill given in lieu of invalid prior bill—No fresh consideration.*—A second bill of sale was executed four days after the first *bonâ fide* for the purpose of correcting material errors in the first; it comprised the same property, & no fresh consideration passed. The consideration in both bills of sale was stated as "£1,500 now paid," but the money was paid on the execution of the first. The second bill was duly registered:—*Held*: the consideration was truly set forth.—*Re MUNDAY, Ex p. ALLAM* (1881), 14 Q. B. D. 43; 33 W. R. 231, D. C.

—*Consd.* *Re Rouard, Ex p. Trustee* (1915), 85 L. J. K. B. 393. *Refd.* *Re Smith, Ex p. Tarbuck* (1894), 72 L. T. 59. *Mentd.* *Gilroy v. Bowey* (1888), 59 L. T. 223.

231. ———.]—A. made a *bonâ fide* advance to B. of £220 which was secured by a bill of sale. After the day for repayment was past, the bill was found to be invalid, thereupon a new bill was by the agreement of all parties drawn up according to the form given in 1882 Act; it

a will, to secure an advance of £800 then made to him by B. with interest thereon, the principal money being made repayable under each instrument on a certain date in 1911. The bill of sale contained a provision that in case any caveat should be lodged against the filing thereof, it should be lawful for B. to sell the chattels, & that whenever a right should arise under the bill of sale to sell the chattels the whole of the principal & other moneys secured & for the time being due & payable under the bill of sale should immediately become "due, payable & recoverable." Caveats were lodged against the filing of this bill of sale & it was not filed & became void. Three months afterwards A. gave B. a second bill of sale which recited that A. was indebted to B. in £800, & that "the same is now due & owing," & that A. had requested B. not to press for the immediate payment thereof, which request B. had agreed to grant upon A. giving the bill of sale. The consideration was stated as "the sum of £800 now due & owing" by A. to B., & the time for repayment of the principal was the same date in 1911 as under the first bill of sale & the mtge. In the notice of intention to file the second bill of sale the consideration was stated under the sub-heading "past debt" as being "the sum of £800 now due & owing by A. to B., & in consideration of B. agreeing not to press for the immediate payment thereof":—the consideration was sufficiently stated in the notice & in the second bill of sale.—*O'CONNOR v. QUINN* (1911), 12 C. L. R. 239.—**AUS.**

d. ——— *Mortgage to secure overdue*—The consideration in a stock mtge. was found to be "a forbearance to sue on certain promissory notes." The mtge. was given to secure these

promissory notes which were overdue, & which amounted to the sum of £1,013 7s. 8d. The deed purported to be given in consideration of a sum of money, mentioning the above amount, "now due & owing," & further advances, & the sum was made payable on demand. The deed was registered, & in the memorial so registered there appeared under the column headed "consideration" the words "one thousand & thirteen pounds seven shillings & eightpence & further advances":—*Held*: the registration was sufficient.—*VICTORIAN FARMERS LOAN CO. v. LINDO* (1893), 19 V. L. R. 599.—**AUS.**

e. ——— *Present advance—Not merely to secure future liability.*—F. owed plff. & M. \$200 & \$100 respectively for goods supplied by them, & had given a chattel mtge. on his property to Flint for \$600. Being pressed by Flint, he applied to plff. & M. for the money, offering them a chattel mtge. therefor as well as for what he already owed them, which they agreed to, but not having the money at the time they borrowed it from J., giving him their note indorsed by F., & Flint was paid off. F. gave plff. & M. the mtge. in question, the expressed consideration being \$900. The affidavit of *bonâ fides* made by plff. stated that the mtgor. was justly & truly indebted to him & M. as the mtgees. therein named in the sum of \$900 mentioned therein, etc.; on renewal of the mtge. the affidavit was made by plff. in like manner. Plff. & M. were not connected in business. The note was renewed several times, F. being a party to only one of the renewals:—*Held*: the mtge. was valid; the evidence showed that it was given for a present advance by the mtgees., & not merely as security for a

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contained the words, "in consideration of £220 now paid to B. by A. the receipt of which B. hereby acknowledges." No interest was charged, though it continued to be paid under the terms of the first bill of sale, & no fresh advance was made to B.:

Held: the consideration was truly stated.—*Re HOCKADAY, Ex p. NELSON* (1887), 35 W. R. 264; 3 T. L. R. 285; 4 Morr. 12, C. A.; *affg.* (1886), 55 L. T. 819, D. C.

Annotation:—*Mentd. Re Tweedale, Ex p. Tweedale*, [1892] 2 Q. B. 216.

232. — Series of advances.]—Six persons joined together to advance £600 to S. They contributed the loan in different amounts & at different times. When all the £600 had been paid, S. gave a bill of sale to T., one of the six, to secure the loan of £600. The consideration was stated to be £600 now paid by T. T. subsequently gave a memorandum to the other members of the syndicate acknowledging that he held the bill of sale as trustee for them:—**Held:** T. was in the position of a collector, & acted as agent responsible to see that the money was duly applied, & where a bill of sale was given to a person in that position it was true to state the consideration therein as now paid by the collector or agent.—*Re SMITH, Ex p. TARBUCK* (1894), 72 L. T. 59; 43 W. R. 206; 39 Sol. Jo. 182, D. C.

Annotation:—*Distd. Kinnersley v. Payne* (1909), 100 L. T. 226.

233. — Execution delayed after payment of consideration.]—Where in a bill of sale given on June 11 the consideration was stated to be "now paid," whereas in fact the money had been paid on May 18, but it was found that the transaction was a perfectly *bonâ fide* one:—**Held:** the consideration was truly stated, & there was no objection to the validity of the bill of sale.—*Re ROUARD, Ex p. TRUSTEE* (1915), 85 L. J. K. B. D. C.

liability incurred as accommodation makers of the note, so as to bring the transaction within Chattel Mortgage Act, s. 6.—*CORRY v. CLARKE* (1879), 30 C. P. 368.—**CAN.**

f. — — — — —.]—A mercantile firm to whom a customer was indebted on unmatured paper, part of which was under discount at a bank, in good faith & in the honest belief that it would enable him to carry on his business, agreed to make a fresh advance to him of about one-half of his indebtedness to them, & took from him to one of the firm a chattel mtge. for the whole amount, the mtgee. making the usual affidavit of *bona fides*. When the mtge. was executed a cheque for the fresh advance was given to the customer, who, pursuant to a subsequent arrangement, did not use it, but afterwards drew at intervals on the firm, until the amount of the cheque was paid, when it was returned:—**Held:** the mtge. was valid as it was a mtge. to secure a present actual advance, & not future advances so as to come within s. 6 of the Act.—*ROSS v. DUNN* (1889), 16 A. R. 552.—**CAN.**

g. Untrue statement—Grantor's account guaranteed at bank—Overdraft paid by grantee.]—M., having agreed to lend to B. the sum of £500 upon the security of certain chattels, a bill of sale was executed by B. reciting the agreement, but containing nothing as to the consideration for which it was given. B. signed the receipt endorsed on the bill of sale for £500. As a matter of fact M. did not lend the money, but guaranteed B.'s account at a bank to the extent of £500, all of which sum was drawn out by B., & was eventually paid off by M.:—**Held:** the consideration was not truly set forth, & the bill of sale was of no effect

234. Untrue statement—Grantor's rent paid by grantee—Rent not due at execution of bill.]

A bill of sale, dated Mar. 23, was expressed to be made "in consideration of £50 by the assignee paid to the assignor at or before the execution hereof." In fact only £21 10s. was paid to the assignor on the execution of the deed, £3 10s. being retained by the assignee for the expenses of the deed, & £25 being also retained & paid by him on Mar. 30 to the landlord of the assignor's house, in which the chattels comprised in the deed were, for two quarters' rent for the quarters ending respectively Mar. 25 & June 24. The rent of the house was payable quarterly, but there was nothing to show that it was payable in advance. The £3 10s. & the £25 were retained upon the written request of the assignor dated the day of the execution of the deed:—**Held:** the consideration was not truly stated in the deed, because, even if the £25 were taken to have been paid to the assignor, it was not paid "at or before the execution" of the deed.—*Re SPINDLER, Ex p. ROLPH* (1881), 19 Ch. D. 98; 51 L. J. Ch. 88; 45 L. T. 482; 46 J. P. 181; 30 W. R. 52, C. A.

Annotations:—*Consd. Cochrane v. Dixon* (1887), 3 T. L. R. 717. *Fold. Bishop v. Consolidated Credit Corp.* (1889), 5 T. L. R. 378. *Mentd. Re Cowburn, Ex p. Firth* (1882), 19 Ch. D. 419.

235. — Past debt.]—A bill of sale, given to secure a past debt contracted by instalments, stated the consideration as "now paid":—**Held:** the consideration was not truly set forth.—*Re YOUNG & Co., Ex p. BERWICK* (1880), 13 L. T. 576; 29 W. R. 292.

236. — Agreement by grantee to meet bills of exchange—Not then due.]—A bill of sale purported to be given for £312 "then owing" by the grantor to the grantee. The grantee of the bill of sale, at the request of the grantor, signed bills of exchange, drawn on the grantor, & made payable

now paid to the said B. by the said M., assigned to M. certain goods & chattels therein specifically described, by way of security for the payment of the sum of £50 & interest thereon. No sum of £50 was at the execution of the bill of sale paid to B.; the only money which passed was a sum of £10 solrs. costs, but there had been previous money transactions between the parties, in which B. was indebted to M. for over £50:—**Held:** the bill of sale was entirely void, as the consideration was not "truly set forth," within 1883 Act, s. 8.—*WHELAN v. WALSH* (1890), 24 L. L. T. 75.—**IR.**

235 iii. — — — — —.]—Plff. having verbally agreed to make an advance of £1,500 on overdrawn account to the N. Co. upon certain securities, including a bill of sale, allowed the co. to commence drawing before the actual execution of the securities. At the date of the execution of the securities, the co. had drawn £1,214, but the consideration was stated in the bill of sale to be "the sum of £1,500 at or immediately before the execution of these presents lent & advanced." The full amount of £1,500 was subsequently drawn:—**Held:** the consideration was not truly stated, & the bill of sale was void as to the chattels comprised therein, which were liable to be taken in execution by debt.—*QUEENSLAND NATIONAL BANK, LTD. v. McBRAIR*, [1902] S. R. Q. 268.—**AUS.**

235 iv. — — — — —.]—C. Brothers, in partnership, being indebted to Mrs. C., wife of one of the partners, in £200, for which she held no security, gave to her solrs. a cheque for the full amount of the debt, upon the understanding that this amount would be re-advanced. Next day Mrs. C. gave her solrs.

as to the chattels comprised in it.—*Re BACHERT, Ex p. KENNA*, [1902] S. R. Q. 288.—**AUS.**

h. — Grantee taking over grantor's debt to third party—No money actually advanced.]—H., being indebted to a benefit society, agreed to give S., the president of the society, a bill of sale over certain chattels for a sum equal to the amount of the indebtedness, on consideration that proceedings were not taken against him, S. taking over the liability of H. to the society. No money was actually advanced by S. to H., nor had S. paid any part of the sum due to the society. In the bill of sale from H. to S. the consideration was described as money now lent by S. to H.:—**Held:** the consideration was not truly stated on the bill of sale, which was void as against the execution creditors.—*SHIOSAKI MANKICHI v. STREETER & Co.* (1907), 9 W. A. L. R. 205.—**AUS.**

k. — Post-due debt.]—The consideration of a bill of sale was stated in the bill to be certain moneys "this day paid," whereas in fact no moneys then passed, the consideration really being a post-due debt:—**Held:** the consideration was not truly stated, & the bill of sale was void.—*YIT TIE CHEE v. MEE SUEY* (1895), 21 V. L. R. 500.—**AUS.**

235 i. — — — — —.]—Where a bill of sale stated that the consideration was "now paid," & the parties admitted that the money had been paid some months before the bill was executed:—**Held:** the consideration was not truly stated, & the bill of sale was void.—*Re O'KELLY*, [1895] 29 L. L. T. 148.—**IR.**

235 ii. — — — — —.]—A bill of sale in consideration of the sum of

to creditors of the grantor, which were intended to secure a composition made by the grantor with his creditors. The bills were accepted by the grantee, amounting to £126, being part of the alleged consideration. There was an arrangement between the parties that the grantee should be the person to pay the bills when due, & in point of fact the bills were afterwards duly paid by the grantee as they became due. The transaction was a *bona fide* one, & there was no intention to mislead. At the time of the execution of the bill of sale the bills were not then due, & the grantee had not paid them:—*Held*: the £126, the amount of the bills accepted by the grantee of the bill of sale, was not “then owing” by the grantor to the grantee, & the consideration was not truly set forth.—*MAYER & FULDA v. MINDLEVICH* (1888), 59 L. T. 400, D. C.

237. — Payment delayed after execution of bill.—A bill of sale set forth the consideration for which it was given as “money now paid,” but, in fact, no money was actually paid at the time of the execution of the bill of sale, nor until three days afterwards. On the fourth day afterwards, the bill was duly registered:—*Held*: the bill did not truly set forth the consideration for which it was given.—*CRIDDLE v. SCOTT* (1895), 59 J. P. 119; 11 T. L. R. 222, D. C.

238. Bills of exchange given to grantee—Payable after execution of bill.—The consideration for a bill of sale granted by one who had become bkpt. was stated to have been £300 paid to bkpt. In fact £100 was paid by cheque & two bills of exchange were given for £100 each, payable twelve months after date:—*Held*: the consideration was not truly stated.—*Re MOORE, Ex p. OFFICIAL RECEIVER* (1897), 4 Mans. 51.

239. — Present payment & future liability.—A bill of sale was given in consideration of 12s. “now owing” under a promissory note, & of £16 8s. paid at the time of making the bill of sale. The promissory note had been previously

authority to re-advance the money upon security. F. (a brother of the partners) had about the same time made arrangements to advance £200 to the firm. The following day a bill of sale was executed by the partners in favour of Mrs. C. & F. to secure £100, which amount was recited as “well & truly paid, lent & advanced,” in equal sums of £200 each, “at or immediately before the execution of these presents.” Upon the day of execution F. gave his cheque for £200 to the same solrs., who one day later drew their own cheque for £400 & paid it to the credit of the partnership banking account:—*Held*: the consideration being as to £200 a past debt & not a present advance was not truly set forth & the bill of sale was void as to the chattels comprised in it.—*Re COLLINS BROTHERS, Ex p. WHITE*, [1903] S. R. Q. 47.—**AUS.**

235 v. ——Where the consideration for a bill of sale was stated to be a present payment of \$1,000 but where it was actually a past indebtedness:—*Held*: the consideration was not truly set out therein, under Bills of Sale Ordinance, s. 11, & the instrument was void.—*SASKATCHEWAN LUMBER CO. v. MICHAUD* (1908), 1 Sask. L. R. 412; 8 W. L. R. 946.—**CAN.**

235 vi. ——A mtge. on its face appeared to be given to secure a loan: the transaction was in fact largely for security for prior indebtedness:—*Held*: the mtge. was invalid, the true consideration not being stated.—*INNIS & GRIFFITH v. CAMERON VALLEY LAND CO., LTD., & MERCHANTS FINANCE & TRADING CO., LTD.*, [1919] 1 W. W. R. 752.—**CAN.**

239 i. — Present payment & future

given by the grantors of the bill of sale to the grantee, & by it the grantors of the bill of sale promised to pay to the grantee £14 3s. 4d. by twenty-five weekly instalments. The actual consideration for the promissory note was £10. At the time the bill of sale was given the first instalment under the promissory note had been duly paid, but the other instalments had not become due & payable:—*Held*: the consideration was not truly set forth.—*DARLOW v. BLAND*, [1897] 1 Q. B. 125; 66 L. J. Q. B. 157; 75 L. T. 537; 45 W. R. 177; 13 T. L. R. 108, C. A.

Annotation:—*Consd. London & Provinces Discount Co. v. Jones* (1913), 109 L. T. 742.

240. — Past debt & present advance.—In a bill of sale the consideration was stated to be “£90 now due & owing” from the grantor to the grantee. Of the £90 £10 had been advanced in various amounts before the date of the bill of sale, & £50 was advanced at the time the bill of sale was made:—*Held*: as £50, part of the £90 declared to be then “due & owing” was not then due & owing, the consideration was not truly stated, & the bill of sale was void upon that ground.—*DAVIES v. JENKINS*, [1900] 1 Q. B. 133; 69 L. J. Q. B. 187; 81 L. T. 788; 48 W. R. 286; 44 Sol. Jo. 103; 7 Mans. 149, D. C.

Annotation:—*Consd. Burchell v. Thompson*, [1920] 2 K. B. 80.

(b) Payment to Grantor.

241. Debt of dissolved partnership—& new advance to remaining partner.—A bill of sale, dated Jan. 10, 1879, recited that in the month of June preceding the mtgor. applied to the mtgee. for a loan of £340, which the mtgee. consented to make on the mtgor. agreeing to execute a bill of sale, when called upon to do so, of certain chattels, & that in the month of July following the mtgor. applied for a further loan of £60, which the mtgee. agreed to make, on the condition that the advance should be secured in like manner. The facts were,

—*Held*: the fact that as to part of the consideration for their mtge. debts, had not made an actual advance, but were merely liable on promissory notes, did not invalidate the mtge., R. S. O. 1877 (c. 119), not requiring, as does the corresponding English Act, that the consideration should be truly expressed.—*CRAIB* (1883), 4 O. R. 696.—**CAN.**

239 ii. ——A mtge. was given for \$1,070. It afterwards appeared that the amount was made up in part of a note made & given by the mtgee. to the mtgor. at the time of the execution of the mtge., & not paid for some months afterwards:—*Held*: in the absence of fraud the mtge. was valid.—*WALKER v. NILES* (1871), 18 Gr. 210.—**CAN.**

239 iii. ——A chattel mtge. was given for an alleged consideration of \$1,500, the real consideration being \$1,203 in promissory notes, & an agreement on the part of the grantees to supply goods for the balance. The affidavit set out that the sum of \$1,203 was justly & honestly due, & “as regards the balance the parties have agreed to supply goods for the full value thereof, etc.”:—*Held*: as the mtge. did not set forth the terms, nature & effect of the agreement for future advances, & as the affidavit did not state that the amount set forth as the consideration was justly & honestly due, nor that the mtge. truly set forth the agreement entered into, the filing & registration of the instrument was incomplete & defective, & could not operate to prevent the sheriff from seizing the goods under execution.—*LEVY v. LOGAN* (1892), 24 N. S. R. 412.—**CAN.**

239 iv. ——A bill of sale executed by the members of a co-partnership purported to be made in consideration of £300 already advanced through a cash credit bond for £400, & of a present cash advance of £300. The first sum of £300 consisted of two sums of £150 each, one of which was a private debt due from one of the mtgors. to one of the mtgees. The second sum of £300 was not advanced in cash, but by acceptances. It was contended that the deed was fraudulent, because it represented part of the consideration as a present cash advance, whereas acceptances only had been given:—*Held*: the misrepresentation as to the nature of the consideration, rendered the transaction suspicious; but if the mtgors. chose to treat the acceptance as cash the objection could not be taken.—*MORRIS v. McNEIL, O. B. & F.* 55.—**N.Z.**

240 i. — Past debt & present advance.—Where the consideration was expressed to be a present payment but it was really only partly cash & partly an old debt:—*Held*: the bill of sale was void, under Bills of Sale Ordinance, s. 11.—*HENNENFEST v. MALCHOSE* (1906), 3 W. L. R. 171.—**CAN.**

240 ii. ——A mtge. was taken to secure an old debt of \$600, & a fresh sale of goods for \$100, & the consideration was stated in the mtge. to be \$700 “paid at or before the sealing & delivery of these presents”:—*Held*: the consideration was not truly expressed in either the mtge. or the affidavit of *bona fides*.—*AYERILL v. CASWELL & Co.* (1915), 31 W. L. R. 953; 23 D. L. R. 112; 8 Sask. L. R. 269.—**CAN.**

Sect. 1.

l. 2, C. (b).]

that £73 on Mar. 3, 1878, £60 on Apr. 6 or 7, 1878, & £107 on Apr. 26 or 27, 1878, were severally advanced by the mtgee. to a partnership firm, consisting of the mtgor. & another person. On June 8, 1878, the partnership was dissolved, the mtgor. taking over the assets, & undertaking in an informal way to indemnify his late co-partner against the debts of the partnership, of which the above £240 remained one. On June 14, 1878, the mtgee. advanced £100, & on July 16 he advanced the remaining £60 to the mtgor. alone:—*Held*: the consideration for which the bill of sale was given was not set forth therein sufficiently to satisfy 1878 Act.—*Re THREAPPLETON, Ex p. CARTER* (1879), 12 Ch. D. 908; 41 L. T. 37; 27 W. R. 943.

Annotations:—*Expld.* Credit Co. v. Pott (1880), 42 L. T. 592. *Distd.* *Re Haynes, Ex p. National Mercantile Bank* (1880), 15 Ch. D. 42. *Refd.* *Hamilton v. Chaine* (1881), 7 Q. B. D. 319.

242. Partial retention to meet liability of grantor—For expenses of grantee & to third parties.]—The consideration for a bill of sale was stated to be “£182 3s. now paid by the grantee to the grantor.” That sum was, at the request of the grantor, in fact paid as follows: £8 3s. 3d. & £103 17s. 5d. to discharge two executions against the grantor’s goods, £25 0s. 9d. to a solr., who attested the execution of the bill of sale, for money lent & for costs due to him from the grantor, & the balance, £45 1s. 7d., in cash to the grantor:—*Held*: in the absence of any suggestion of fraud, a sufficient setting forth of the consideration.—*HAMLIN v. BETTELEY* (1880), 5 C. P. D. 327; 49 L. J. Q. B. 465; 42 L. T. 373; 11 J. P. 111; 28 W. R. 956, D. C.

Annotations:—*Consd.* *Re Rogers, Ex p. Challinor* (1880), 16 Ch. D. 260. *Refd.* Credit Co. v. Pott (1880), 42 L. T. 592; *Hamilton v. Chaine* (1881), 7 Q. B. D. 1. *Mentd.* *Re Haynes, Ex p. National Mercantile Bank* (1880), 15 Ch. D. 42.

243. ———.]—The consideration of a bill of sale was paid in two cheques. By arrangement one of them was applied in payment of a previous charge to a third person, & a part of the other was paid by the grantor to the solr. of the grantee:—*Held*: the consideration was truly stated.—*FURBER v. ABREY* (1883), Cab. & El. 186.

244. ——— Effect of receipt clause.]—In the operative part of a bill of sale it was expressed to be made in consideration of £120 advanced upon its execution by the grantee to the grantor. In fact, only £90 was paid to the grantor, £30 being retained by the grantee for “interest & expenses.” At the foot of the deed, immediately after the attestation clause, there was a receipt, signed by the grantor, which stated that the £90, “together with the agreed sum of £30 for interest & expenses,” made the £120, “the consideration money within expressed to be paid”:—*Held*: the receipt was not part of the deed, & the deed did not set forth the consideration.—*Re PARKER, Ex p. CHARING CROSS ADVANCE & DEPOSIT BANK* (1880), 16 Ch. D. 35; 50 L. J. Ch. 157; 44 L. T. 113; 29 W. R. 201, C. A.

Annotations:—*Distd.* *Re Rogers, Ex p. Challinor* (1880), 16 Ch. D. 260. *Apld.* *Hamilton v. Chaine* (1881), 7 Q. B. D. 1. *Distd.* *Re Spindler, Ex p. Rolph* (1881), 19 Ch. D. 98.

245. ——— Including auctioneer’s fee for valuing property.]—A bill of sale is not vitiated

under 1878 Act, s. 8, because a part of the sum stated in it as the consideration is retained by the grantee to pay the solr.’s costs of preparing the deed & a further agreed sum for costs previously incurred, & the fee of an auctioneer for valuing the property with a view to the making of the loan.—*Re ROGERS, Ex p. CHALLINOR* (1880), 16 Ch. D. 260; 51 L. J. Ch. 476, n.; 44 L. T. 122; 29 W. R. 205, C. A.

Annotations:—*Distd.* *Hamilton v. Chaine* (1881), 7 Q. B. D. 319; *Re Spindler, Ex p. Rolph* (1881), 19 Ch. D. 98. *Consd.* *Re Cowburn, Ex p. Firth* (1882), 19 Ch. D. 419. In *Ex p. Challinor* all that JAMES, L.J., intended to decide was that a debt strictly so called, a debt existing at the time, might be deducted; this reconciles the case with the subsequent decisions (JESSEL, M.R.). *Expld.* *Re Roper, Ex p. Bolland* (1882), 21 Ch. D. 543. *Consd.* *Roe v. Mutual Loan Fund Assocn.* (1887), 56 L. T. 631; *London & Provinces Discount Co. v. Jones*, [1914] 1 K. B. 147. *Mentd.* *Re Wiltshire, Ex p. Eynon* (1899), 81 L. T. 616.

246. ——— & commission on loan.]—In a bill of sale the consideration was stated to be “£700, now in hand, paid.” On the making of the bill of sale the grantee gave the grantor two cheques amounting to £700, & under a previous arrangement between them, the cheques were cashed, & out of the proceeds £7 10s. cash, together with a promissory note for £10, was paid to the grantee for “commission on the loan & expenses”:—*Held*: the consideration was not truly stated.—*HAMILTON v. CHAINE* (1881), 7 Q. B. D. 319; 50 L. J. Q. B. 456; 44 L. T. 764; 29 W. R. 676, C. A. *Annotations*:—*Refd.* *Re Spindler, Ex p. Rolph* (1881), 19 Ch. D. 98; *Parsons v. Equitable Investment Co.*, [1916] 2 Ch. 527.

247. ———.]—If the amount of the expenses incident to the preparation of a bill of sale, given by way of mtge., is deducted from the sum stated in it as the consideration, & the balance only is actually paid by the lender to the borrower, the consideration is not truly stated so as to satisfy 1878 Act, s. 8.—*Re COWBURN, Ex p. FIRTH* (1882), 19 Ch. D. 419; 51 L. J. 173; 46 L. T. 120; 30 W. R. 529, C. A.

Annotations:—*Distd.* *Re Cann, Ex p. Hunt* (1881), 13 Q. B. D. 36. *Consd.* *London & Provinces Discount Co. v. Jones*, [1914] 1 K. B. 147. *Mentd.* *Re Sharp, Ex p. Sharp* (1893), 10 Morr. 114; *Wales v. Carr*, [1902] 1 Ch. 860.

248. ——— Solicitor acting for both parties.]—A bill of sale in its operative part was stated to be given “in consideration of £10 now paid by H. to C.” In the preparation of the bill of sale D. acted as solr. for both H. & C., & on the execution of the deed retained with C.’s consent, £9 out of the £10 in payment of his bill of costs in the matter, & only handed C. the balance of £1:—*Held*: in the circumstances, the consideration was truly stated, for, on the execution of the deed, D. no longer held the money as agent for H. or had any duty to perform towards him, but held the money as C.’s agent & could with C.’s consent retain the amount of his bill of costs.—*Re CANN, Ex p. HUNT & Co.* (1884), 13 Q. B. D. 36.

249. ———.]—The consideration for a bill of sale was stated to be the payment of a sum of money by the grantee to the grantor. Part only of such sum was in fact paid over, the remainder being retained by the grantee, by agreement with the grantor, in satisfaction (*inter alia*) of an agreed sum for expenses of the transaction:—*Held*: the consideration was not truly stated.—*RICHARDSON v. HARRIS* (1889), 22 Q. B. D. 268; 37 W. R. 426; 5 T. L. R. 178, C. A.

PART V. SECT. 1, SUB-SECT. 2. — C (b)

248 i. Partial retention to meet liability of grantor—For expenses of grantee—Solicitor acting for both parties.]—Where

a solr. acting for both the grantor & grantee of a bill of sale, retained, with the consent of the grantor, the amount of his costs & charges incident to the preparation of the deed from the sum actually lent, the

truly stated within Chattel Securities Act, 1880, Amendment Act, 1883, s. 4. —*MOUNT WELLINGTON ROAD BOARD v. VARE* (1889), 9 N. Z. L. R. 641.—*N.Z.*

Annotations:—**Folld.** *Cohen v. Higgins, Jones v. Higgins* (1891), 8 T. L. R. 8. **Consd.** *Re Wiltshire, Ex p. Eynon* (1899), 69 L. J. Q. B. 145. **Folld.** *Parsons v. Equitable Investment Co.*, [1916] 2 Ch. 527.

250. ———.]—The grantor of a bill of sale agreed to pay £10, the costs of preparation of the bill, to the grantee's solr. out of £114 which the grantee agreed to advance. The consideration was stated as £114 paid to the grantor, & no mention was made of the agreement to pay the costs:—*Held*: the consideration was not truly stated.—**COHEN v. HIGGINS, JONES v. HIGGINS** (1891), 8 T. L. R. 8, D. C.

251. ——— **On bills of exchange given to grantee.**]—The consideration in a bill of sale was stated to be £2,050. On the execution of the bill the grantor returned £550 to the grantee to pay off his promissory notes & a bill of exchange, which he had previously given for advances:—*Held*: the consideration was sufficiently stated.—*Re HAYNES, Ex p. NATIONAL MERCANTILE BANK* (1880), 15 Ch. D. 42; 49 L. J. Bcy. 62; 43 L. T. 36; 44 J. P. 780; 28 W. R. 848, C. A.

Annotations:—**Appld.** *Credit Co. v. Pott* (1880), 6 Q. B. D. 295. **Distd.** *Re Parker, Ex p. Charing Cross Advance & Deposit Bank* (1880), 16 Ch. D. 35. **Expld.** *Re Rogers, Ex p. Challinor* (1880), 16 Ch. D. 260. When a man borrows money he generally does so for the purpose of paying his debts, at any rate he ought to employ it in paying them, & if by his direction the money stated as the consideration is applied by the lender in the honest discharge of the borrower's debts, there is no reason for saying that that is not a payment of the money to him—that was the principle of our decision in *Ex p. National Mercantile Bank* (JAMES, L.J.). **Distd.** *Hamilton v. Chaine* (1881), 7 Q. B. D. 319. **Consd.** *Re Spindler, Ex p. Rolph* (1881), 19 Ch. D. 98. **Expld.** *Re Cowburn, Ex p. Firth* (1882), 19 Ch. D. 419. *Ex p. National Mercantile Bank* can only be treated in future as a binding authority for this, that, if a part of the money stated in a bill of sale as the consideration paid at the time of its execution is, by the direction of the borrower, given at the time, paid in order to satisfy debts of his then existing, the money so paid may be properly stated in the deed as money then paid by him (BUETT, L.J.). **Consd.** *Re Roper, Ex p. Bolland* (1882), 21 Ch. D. 543. **Expld.** *Re Chapman, Ex p. Johnson* (1884), 26 Ch. D. 338. **Consd.** *Richardson v. Harris* (1889), 22 Q. B. D. 268; *Parsons v. Equitable Investment Co.*, [1916] 2 Ch. 527. **Refd.** *Re Smith, Ex p. Tarbuck* (1894), 72 L. T. 59. **Mentd.** *Seal v. Claridge* (1881), 7 Q. B. D. 516; *Throssell v. Marsh* (1885), 53 L. T. 321; *Barron v. Potter* (1914), 84 L. J. K. B. 751.

252. ——— **For rent not then due.**]—A bill of sale of chattels dated Mar. 23, was expressed to be made "in consideration of £50 by the assignee paid to the assignor at or before the execution hereof." In fact £25 was retained & paid by the assignee on Mar. 30 to the landlord of the assignor's house, in which the chattels comprised in the deed were, for two quarters' rent for the quarters ending respectively Mar. 25 & June 24. The rent of the house was payable quarterly, but there was nothing to show that it was payable in advance. The £25 was retained upon the written request of the assignor dated the day of the execution of the deed:—*Held*: the consideration was not truly stated, because the £25 was not paid to the assignor, but only agreed to be paid on his behalf.—*Re SPINDLER, Ex p. ROLPH* (1881), 19 Ch. D. 98; 51 L. J. Ch. 88; 45 L. T. 482; 46 J. P. 181; 30 W. R. 52, C. A.

Annotations:—**Consd.** *Cochrane v. Dixon* (1887), 3 T. L. R. 717. **Folld.** *Bishop v. Consolidated Credit Corp.* (1889), 5 T. L. R. 378. **Mentd.** *Re Cowburn, Ex p. Firth* (1882), 19 Ch. D. 419.

253. ——— **For rent then due & costs of distress.**]—A distress for rent having been levied on the tenant's furniture a bill of sale was given by her, in which the consideration was stated as "£30

m. ——— **On antecedent debt due to grantee—Retention at request of grantor—By solicitor acting for both parties.**]—Where a cheque for the whole amount stated as the consideration for a bill of sale was handed, on the execution of

the document, by the lender to the borrower, & the borrower handed the cheque to the solr. for both parties, & requested him to make certain payments out of it, including a debt due to the lender, & give him the balance:

now paid." In fact a cheque for £30 was handed to, & indorsed by, her, & was then cashed by the grantee's agent, who, as a condition of making the loan out of the proceeds, paid £25 15s. for the rent & costs of the distress & gave the balance to the grantor:—*Held*: the consideration was not truly stated.—**BISHOP v. CONSOLIDATED CREDIT CORPN.** (1889), 5 T. L. R. 378, D. C.

254. ——— **For balance of purchase-money then due.**]—A mtge. of a leasehold brewery & some chattels was stated to be made in consideration of £2,000 paid by the grantee to the grantor "immediately before the execution of these presents." No money was in fact paid by the grantee to the grantor, but the £2,000 was the balance due by the grantor to the grantee in respect of the purchase-money of the brewery, which had been assigned by the grantee to the grantor, in consideration of £2,500, by a deed executed immediately before the mtge. Of that sum only £500 was paid by the grantor, it being agreed that the balance of £2,000 should be secured by the mtge.:—*Held*: the consideration was truly stated in the mtge. deed, so as to satisfy 1878 Act, s. 8.—*Re ROPER, Ex p. BOLLAND* (1882), 21 Ch. D. 543; 52 L. J. Ch. 113; 47 L. T. 488; 31 W. R. 102, C. A.

Annotations:—**Folld.** *Staniforth v. Capon* (1886), 2 T. L. R. 493. **Refd.** *Thomas v. Searles* (1891), 60 L. J. Q. B. 722. **Mentd.** *The Benwell Tower* (1895), 72 L. T. 664.

255. ——— **On prior bill of sale not then due.**]—In July, 1881, A. in consideration of a loan of £30 from B. executed a bill of sale to secure that sum & £15 for bonus & interest, the money to be repaid by weekly instalments of £1. On July 5 A. executed another bill of sale to B., in consideration of a further loan of £35 to secure that amount & a further sum of £10 for bonus & interest, & a cheque for £35 was drawn by B., cashed by a clerk, & after deducting £17 which was owing on the first bill but was not then payable, together with 5s. for stamps from the £35, the balance of £17 15s. was received by A.:—*Held*: £17 15s. being all that A. actually obtained upon the second bill of sale, the consideration was not truly stated.—*Re GORDON, Ex p. BERNSTEIN* (1883), 74 L. T. Jo. 245.

256. ———.]—Pltf. in 1914 borrowed on a bill of sale from defts. £400, repayable by instalments, of which £325 was still unpaid. In 1915 she borrowed on a fresh bill of sale from defts. £450, of which by agreement £100 was paid to one of her creditors, £25 to herself, & the remainder was retained to meet the £325. That agreement was carried out in such a way that a question arose whether in fact the £450 was at any time at her disposal. The consideration was stated in the second bill of sale to be "£450 by the co. now paid." Pltf. also signed a receipt as follows: "I acknowledge to have received from you this day £450 free from all deductions on a bill of sale & that I have been to the bank & cashed the cheque myself":—*Held*: as the £325 was not actually due, it could not be treated as paid, & the consideration for the bill of sale was not truly set forth therein.

Where part of the money lent is retained by the lender it will not be treated as paid to the borrower unless it is retained to pay a debt which is actually due.—**PARSONS v. EQUITABLE INVESTMENT CO.**,

—*Held*: the solr. was the agent of the borrower for making such payments, & the consideration for the bill of sale truly stated.—**TAYLOR v. PYNE** (1889), 7 N. Z. L. R. 555.—N.Z.

BILLS OF SALE.

*Sect. 1.—Consideration: Sub-sect. 2, C. (b) & (c).
Sect. 2: Sub-sect. 1.]*

LTD., [1916] 2 Ch. 527; 85 L. J. Ch. 761; 115 L. T. 194; 60 Sol. Jo. 639, C. A.

257. — On prior bill of sale then due.]—In Jan., 1889, H., being indebted to pltf. upon a bill of sale, & being desirous of obtaining a further advance of £50, it was arranged that pltf. should take a second bill of sale upon the same goods for £290, & should advance the £50 to H., upon the understanding that H. should pay to pltf. £235, the agreed amount of the previous debt. H. executed a bill of sale, expressed to be in consideration of £290, which sum was paid to him by two cheques, & two days later he paid back to pltf. the £235:—*Held*: the consideration was truly stated.—THOMAS v. SEARLES, [1891] 2 Q. B. 408; 60 L. J. Q. B. 722; 65 L. T. 39; 39 W. R. 692; 7 T. L. R. 606, C. A.

Annotations:—Consd. Parsons v. Equitable Investment Co., [1916] 2 Ch. 527. *Mentd.* Edwards v. Marcus (1894), 70 L. T. 182.

258. — —.]—The grantor received from the grantees a cheque for £310, the consideration as expressed in a bill of sale. The cheque was cashed & the proceeds were received by the grantor, who then returned £300 to the grantees to pay off a prior bill of sale:—*Held*: it was not necessary to set forth the payment to the grantees, & the consideration was truly stated.—*Re* DAVIES, *Ex p.* EQUITABLE INVESTMENT CO., LTD. (1897), 77 L. T. 567; 4 Mans. 358.

Annotations:—N.F. Parsons v. Equitable Investment Co., [1916] 2 Ch. 527. *Mentd.* Barron v. Potter, Potter v. Berry (1914), 84 L. J. K. B. 751.

259. — On antecedent debt.]—The grantor having received £30, the full amount for which a bill of sale was given, paid back £1 to the grantee for an existing debt. There was no agreement that he should do so:—*Held*: the consideration was truly stated as £30 paid to the grantor.—COCHRANE v. DIXON (1887), 3 T. L. R. 717, D. C.

260. — For future hire of furniture—& on current acceptances.]—The consideration for a bill of sale was stated to be the payment of a sum of money by the grantee to the grantor. Part of such sum was retained by the grantee by agreement with the grantor in satisfaction (*inter alia*) of the amounts of acceptances which had been given by the grantor to the grantee, & were then running, & a sum agreed to be paid by the grantor to the grantee for the hire of furniture assigned by the bill of sale for a period of three months:—*Held*: the consideration was not truly stated.—RICHARDSON v. HARRIS (1889), 22 Q. B. D. 268; 37 W. R. 426; 5 T. L. R. 178, C. A.

Annotations:—Folld. Cohen v. Higgins, Jones v. Higgins (1891), 8 T. L. R. 8. *Consd.* *Re* Wiltshire, *Ex p.* EYNON, [1900] 1 Q. B. 96. *Folld.* Parsons v. Equitable Investment Co., [1916] 2 Ch. 527.

261. — To third party—On promissory note not then due.]—W., who owed E. £100, applied for a further loan of £200. E. advanced the £200, on condition that W. should apply £100 in retiring a promissory note, on which they were both jointly & severally liable, which was shortly to become due, & give E. a bill of sale for £300 to secure the £100 already owing together with the £200 then advanced. E. gave W. two cheques for £100 each, one payable to W. & the other to the bank who were holders of the promissory note, & who were also W.'s bankers. The bill of sale stated the consideration to be £300 "now paid" by the grantee to the grantor:—*Held*: as the liability under the promissory note was a liability to a third party & not to the grantee, the fact that it was not due did not render it necessary to set out in the

bill of sale the agreement under which the money was advanced, & the consideration was truly stated.—*Re* WILTSHIRE, *Ex p.* EYNON, [1900] 1 Q. B. 96; 69 L. J. Q. B. 145; 81 L. T. 616; 48 W. R. 256; 7 Mans. 145, D. C.

262. Payment to joint account—Of grantor & agent for grantees.]—Debtor, in order to pay an agreed composition to his creditors, obtained a loan of £150 from certain of the creditors, & in consideration thereof granted a bill of sale to such creditors to secure the advance of £150 & their own compositions. The advance was made by cheques payable to the joint order, & paid into the joint account, of the grantor & L., the agent of one of the grantees, who was to see to the payment of the compositions to the other creditors, the joint account being opened for the purpose of enabling L. to make the payments:—*Held*: the advance was really made to the grantor for the purposes set forth in the bill of sale, & the arrangement made as to the joint account did not alter the character of the consideration, which was truly stated.—PEACE v. BROOKES, [1895] 2 Q. B. 451; 64 L. J. Q. B. 747; 72 L. T. 798; 2 Mans. 491; 15 R. 593.

263. Payment to trustees.]—In 1904 A., a butcher, died, leaving his business to his widow, B., & C. as trustees, with power to carry on the business. In 1907 D. was empowered by an order of the Ch. Div. to lend £250 to the business, & on his lending such sum D. was to take C.'s place as trustee. D., having no money of his own, borrowed the £250 from F., & lent it to the business in Feb., 1908. He became trustee on Apr. 9, & on Apr. 27 D. & B., as trustees, gave a mtge. of leaseholds to D. to secure the £250, & D. transferred the mtge. to F., the real lender of the money. On May 1 a further £90 was lent to D. by F., & by him to the trustees. As before a mtge. was given to D., & transferred by him to F., but on that occasion F. exacted from the trustees a promise that they would give her a bill of sale whenever she demanded it. The first mtge. was repayable on July 27, the second on Aug. 1. Subsequently a further advance of £50 was made by F. without security. In Dec. the trustees required a further loan of £34, but F. insisted on getting a bill of sale over the chattel assets of the trustees before she would lend the £34, & on Dec. 23, the trustees granted a bill of sale, in which the consideration was stated to be £250, £90, & £50, already due & owing from D. & B. to F., & £34 then paid by F. to D. & B. The county ct. judge having found that the consideration was not truly stated, the loans having been made by F. to D., & not by F. to D. & B., as recited in the bill of sale:—*Held*: the consideration was truly stated, for the real truth was that F. had lent the trustees all the sums recited in the bill of sale.—*Re* JONES, *Ex p.* OFFICIAL RECEIVER (1910), 55 Sol. Jo. 30, D. C.

(c) *Payment by Grantee.*

264. Grantees being partners—Money stated to have been advanced by grantees in equal shares.]—A bill of sale recited as the consideration an advance of £40 "in equal shares by A. & B.," who carried on business in partnership. The advance was made by the firm:—*Held*: the consideration was truly stated.—DAVIDSON v. CARLTON BANK (1892), 8 T. L. R. 741; *affd.* without touching this point, [1893] 1 Q. B. 82, C. A.

265. Grantee collector for several lenders.]—Six persons joined together to advance £600 to S. They contributed the loan in different amounts & at different times. When the whole £600 had been

advanced, S. gave a bill of sale to T., one of the six, to secure the loan of £600. The consideration was therein stated as £600 now paid by T.:—*Held*: this was a true statement of the consideration, & T. was not a trustee, but merely a collector for the six lenders.—*Re SMITH, Ex p. TARBUCK* (1894), 72 L. T. 59; 43 W. R. 206; 39 Sol. Jo. 182, D. C.

Annotation:—*Distd. Kinnersley v. Payne* (1909), 100 L. T. 229.

266. Grantee trustee for firm—No mention made of firm.—The grantee of a bill of sale was acting as trustee for a firm which really advanced the money. The bill recited the payment as by the grantee without any mention of the firm:—*Held*: it was important to state by whom the payment was made, & the consideration was not truly stated.—*KIMMER v. BRERETON* (1897), 41 Sol. Jo. 510, D. C.

267. Grantee advancing only part of sum expressed—Remainder paid direct to grantor by third party not named in bill.—K. & P. each advanced £100 to F., who in pursuance of a previous arrangement gave P. a bill of sale on furniture belonging to F. to secure £200, which was expressed in the bill of sale to have been paid by P. to F., whereas in fact, K. paid his £100 direct to F.:—*Held*: the consideration for the bill was untruly stated.—*KINNERSLEY v. PAYNE* (1909), 100 L. T. 229.

SECT. 2.—FORM OF BILLS OF SALE BY WAY OF SECURITY.

See 1882 Act, s. 9.

SUB-SECT. 1.—IN GENERAL.

268. Necessity for statutory form—Instrument not reducible to form.—Although it is from its nature impossible that a licence to take immediate possession of goods as a security for a debt, which is a bill of sale within 1878 & 1882 Acts, should be made in the form given in 1882 Act sched., such a licence is void under s. 9 of that Act as between grantor & grantee, the object of the Act being to make void every bill of sale given to secure payment of money by the grantor, unless it is made substantially in accordance with the statutory form.—*Re TOWNSEND, Ex p. PARSONS* (1886), 16 Q. B. D. 532; 55 L. J. Q. B. 137; 53 L. T. 897; 34 W. R. 329; 2 T. L. R. 253; 3 Morr. 36, C. A.

Annotations:—*Consd. Re Hardwick, Ex p. Hubbard* (1886), 17 Q. B. D. 699. *Refd. Pulbrook v. Ashby* (1887), 56 L. J. Q. B. 376; *Newlove v. Shrewsbury* (1888), 21 Q. B. D. 41; *Re Yates, Batchelor v. Yates* (1888), 59 L. T. 47; *Mills v. Charlesworth* (1890), 25 Q. B. D. 421; *Grigg v. National Guardian Assoc.*, [1891] 3 Ch. 206; *Saunders v. White*, [1902] 1 K. B. 472; *G. E. Ry. v. Lord's Trustee*, [1909] A. C. 109; *Dublin City Distillery v. Doherty*, [1914] A. C. 823; *Burchell v. Thompson*, [1920] 2 K. B. 80. *Mentd. Furber v. Cobb* (1886), 55 L. J. Q. B. 487; *Morris v. Delobel-Flipo*, [1892] 2 Ch. 352; *Re O'Sullivan, Ex p. Baller* (1892), 61 L. J. Q. B. 228.

PART V. SECT. 2, SUB-SECT. 1.

n. Accuracy essential.—Bills of sale should not be so framed as to convey an untrue or misleading impression, to those who are likely to be affected by or to act on them.—*Re DONOVAN* (1910), 10 S. R. N. S. W. 532.—**AUS.**

270 i. Necessity for statutory form—Bill absolute in form—In fact by way of security.—When the transaction evidenced by an instrument in the form of an absolute bill of sale is in fact the giving of security for an existing debt, the parties cannot evade compliance with R. S. O. 1897 (c. 148, ss. 2 & 3), merely by the form of the instrument. If, however, the real transaction is a

sale with a right of re-purchase upon certain terms, the vendor can only be required to observe the provisions of s. 6.—*HOPE v. PARROTT* (1903), 24 C. L. T. Occ. N. 206; 7 O. L. R. 496; 2 O. W. R. 248; 3 O. W. R. 499.—**CAN.**

270 ii. — — — — —.]—The facts that a bill of sale, on the face of it absolute, is in truth only a mtgo., & that the vendor after the sale is allowed to remain in possession of the goods, are badges of fraud to be weighed by a jury, not conclusive proofs of fraud.—*HUNTER v. CORBETT* (1850), 7 U. C. R. 75.—**CAN.**

270 iii. — — — — —.]—A bill of sale absolute in form is invalid, where

269. Document “deemed to be” bill.]—

Documents, which by 1878 Act, s. 6, are “deemed to be” bills of sale, although they require registration, need not be in the statutory form, as s. 9 does not apply to them.—*GREEN v. MARSH*, [1892] 2 Q. B. 330; 61 L. J. Q. B. 412; 66 L. T. 480; 56 J. P. 839; 40 W. R. 449; 8 T. L. R. 498; 36 Sol. Jo. 412, C. A.

Annotation:—*Refd. Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.* (1896), 75 L. T. 508.

270. — Bill absolute in form—In fact by way of security.]—Pltf. executed a deed, by which he assigned chattels absolutely to defts., & a hiring agreement, by which he hired the chattels from defts. The documents did not represent the real transaction between the parties, their intention being merely to create a security for money. The documents were not registered as required by Bills of Sale Acts:—*Held*: the documents amounted to a bill of sale, & were void for want of registration.—*MADELL v. THOMAS & Co.*, [1891] 1 Q. B. 230; 60 L. J. Q. B. 227; 64 L. T. 9; 39 W. R. 280; 7 T. L. R. 170, C. A.

Annotations:—*Consd. Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 638. *Mentd. Edwards v. Marcus*, [1894] 1 Q. B.

271. — — — — — of sale given by way of security for payment of money by the grantor must be in the statutory form, & unless it is in that form it is wholly void.

Where a bill of sale in form absolute was given to secure a loan of £1,000:—*Held*: the bill of sale, not being in the proper form, was void.—*Re LINTON, Ex p. FINLAY* (1893), 10 Morr. 258.

272. What variations from statutory form invalidate bill—Substantial & material.]—A bill of sale of personal chattels, whereby the grantor, “as beneficial owner,” assigns the goods as security for money, is void under 1882 Act, s. 9, as not being in accordance with the statutory form, on the ground that the words “beneficial owner” introduce the implied covenants of Conveyancing Act, 1881 (c. 41), s. 7 (c), which covenants are not in accordance with the statutory form in 1882 Act.

—*Re BARBEI, Ex p. STANFORD* (1886), 17 Q. B. D. 259; 55 L. J. Q. B. 341; 54 L. T. 894; 34 W. R. 507; 2 T. L. R. 557, C. A.

Annotations:—*Consd. Bianchi v. Offord* (1886), 17 Q. B. D. 484. *Distd. Re Cleaver, Ex p. Rawlings* (1886), 55 L. J. Q. B. 455. *Apld. Davies v. Rees* (1886), 17 Q. B. D. 408; *Hughes v. Little* (1886), 18 Q. B. D. 32. *Consd. Re Morritt, Ex p. Official Receiver* (1886), 18 Q. B. D. 222; *Real Personal Advance Co. v. Cleas* (1888), 20 J. B. D. 304; *Thomas v. Kelly* (1888), 13 App. Cas. 506; *Curtis v. National Bank of Wales* (1889), 5 T. L. R. 338; *C. v. Entwistle* (1890), 25 Q. B. D. 116; *Parsons v. Brand, Coulson v. Dickson* (1890), 25 Q. B. D. 110; *Re Heseltine, Woodward v. Heseltine*, [1891] 1 Ch. 464; *De Braam v. Ford*, [1900] 1 Ch. 142. *Apld. Brandon Hill v. Lane*, [1915] 1 K. B. 250. *Refd. Blatberg v. Beckett* (1886), 18 Q. B. D. 96; *Parsons v. Hargreaves* (1886), 34 W. R. 717; *Barr v. Kingsford* (1887), 56 L. T. 861; *Furber v. Cobb* (1887), 18 Q. B. D. 494; *Topley v. Corsbie* (1888), 58 L. T. 342; *Turner v. Culpan* (1888), 58 L. T. 340; *Re Yates, Batchelor v. Yates* (1888), 59 L. T. 47; *Haslewood v. Consolidated Co.* (1890), 60 L. J. Q. B. 12; *Re Tweedale*,

the transaction is really one of mtgo., for not setting forth the true consideration.—*MATHESON v. POLLOCK* (1893), 3 B. C. R. 74.—**CAN.**

270 iv. — — — — —.]—*Semble*: where an absolute bill is in fact given by way of security, Bills of Sale Act, s. 8, only makes the registration void.—*CLANCEY v. GRAND TRUNK PACIFIC Ry. Co.* (1910), 14 W. L. R. 201.—**CAN.**

270 v. — — — — —.]—*LAMONT v. OLSON* (1911), 18 W. L. R. 200.—**CAN.**

q. Whether instrument bill of sale or mortgage—Inconclusive evidence.—*COONS v. ELVIN* (1911), 19 O. W. R. 722; 2 O. W. N. 1391.—**CAN.**

Sect. 2.—Form of bills of sale by way of security:
Sub-sects. .]

Ex p. Tweedale, [1892] 2 Q. B. 216; Cartwright v. Regan, [1895] 1 Q. B. 900; Saunders v. White, [1902] 1 K. B. 472; Attia v. Finch (1904), 91 L. T. 70. **Mentd.** Goldstrom v. Tallerman (1886), 18 Q. B. D. 1; Calvert v. Thomas (1887), 19 Q. B. D. 204; Lumley v. Simmons (1887), 34 Ch. D. 698; Weardale Coal & Iron Co. v. Hodson (1894), 1 Q. B. 598.

273. — Effect of document unaltered.]

—A bill of sale assigned by way of security for payment of money chattels specifically described in the schedule to the bill of sale, "together with all other chattels & things the property of the mtgor. now in & about the premises [described], & also all chattels & things which may at any time during the continuance of this security be in or about same or any other premises of the mtgor., to which the chattels or things or any part thereof may have been removed, whether brought there in substitution for or renewal of or in addition to the chattels & things hereby assigned by way of security for payment of the " money :—*Held* : the bill was not in accordance with the statutory form & was altogether void.—THOMAS v. KELLY (1888), 13 App. Cas. 506; 58 L. J. Q. B. 66; 60 L. T. 114; 37 W. R. 353; 4 T. L. R. 683, H. L. *affg.* S. C. *sub nom.* KELLY & Co. v. " , 20 Q. B. D. 569, C. A.

Annotations:—*Folld.* Hadden Best v. Oppenheim (1889), 60 L. T. 962. *Consd.* *Re* Heseltine, Woodward v. Heseltine, [1891] 1 Ch. 464. *Distd.* Seed v. Bradley, [1894] 1 Q. B. 319. *Consd.* Coates v. Moore, [1903] 2 K. B. 140; Burchell v. Thompson, [1920] 2 K. B. 80. *Refd.* Bouchette v. Attenborough (1887), 3 T. L. R. 813; Tailby v. Official Receiver (1888), 13 App. Cas. 523; Parsons v. Brand (Coulson & Dickson (1890), 25 Q. B. D. 110; Bird v. Davey, [1891] 1 Q. B. 29; Heseltine v. Simmons, [1892] 2 Q. B. 517; Peace v. Brookes, [1895] 2 Q. B. 451; Sims v. Trollope (1896), 75 L. T. 351; De Braam v. Ford, [1900] 1 Ch. 142; Saunders v. White, [1902] 1 K. B. 472; Mourmand v. Le Clair (1903), 51 W. R. 589; Brandon Hill v. Lane, [1915] 1 K. B. 250. **Mentd.** *Re* Tweedale, *Ex p.* Tweedale, [1892] 2 Q. B. 216; Lysons v. Knowles, Stuart v. Nixon & Bruce, [1901] A. C. 79; Ball v. Hunt, [1912] A. C. 496; Ryan v. Oceanic Steam Navigation Co., [1914] 3 K. B. 731.

274. — Verbal omission.]—In the operative part of a bill of sale the words "by way of security" were omitted :—*Held* : the omission did not affect the validity of the bill, as it was clearly intended to operate only as a security.—ROBERTS v. ROBERTS (1884), 13 Q. B. D. 794; 53 L. J. Q. B. 313; 50 L. T. 351; 32 W. R. 605, C. A.

Annotations:—*Mentd.* Bouchette v. Attenborough (1887), 3 T. L. R. 813; Witt v. Banner (1887), 20 Q. B. D. 114; Mayer & Fulda v. Mindlevich (1888), 59 L. T. 400; Thomas v. Kelly (1888), 13 App. Cas. 506; Carpenter v. Deen (1889), 23 Q. B. D. 566; Davies v. Jenkins (1899), 48 W. R. 286.

275. — .]—A bill of sale to secure a loan of £70 & interest at 1s. in the pound per month stipulated that the principal & interest

r. Necessity for sealing.]—A chattel mtge. need not be under seal.—PATERSON v. MAUGHAN (1876), 39 U. C. R. 371. —CAN.

s. S. P. HALL v. COLLINS BAY RAFTING & FORWARDING CO. (1884), 12 A. R. 65.—CAN.

t. — Bill of sale by corporation.]—Under 4th R. S., c. 53, s. 15, the sealing of a bill of sale by the corpn. making same :—*Held* : not necessary.—BRADLEY v. McLEAN (1877), 2 R. & C. 584.—CAN.

a. — Departure from prescribed mode.]—Where the deed of association of a mining co. required the sanction & presence of two directors for the use of the seal (of which the manager had the care & custody), but did not require their attestation :—*Held* : a bill of sale sealed & registered was valid, as far as the grantee was con-

cerned, though the seal was attached without the presence of two directors.—NEWBY v. RUTHERFORD (1877), 3 V. L. R. 340.—AUS.

b. Time for execution—Bonâ fide sale of goods.]—On a *bonâ fide* sale of goods, it is not necessary that the bill of sale shall be completed by execution of the instrument in any particular time after the actual sale.—MCDONALD v. GAUNT (1899), 30 O. R. 398.—CAN.

c. Formal defect—Blanks in clause not filled up—Clause unenforceable.]—One of the clauses of a hire-purchase agreement contained a number of blanks which, by inadvertence, were not filled up at the time the agreement was executed :—*Held* : the ct. could not give effect to the clause in question, but must deal with the agreement as if the clause were not there at all.—MILLER BROTHERS v. BLAIR (1905), 37 N. S. R. 293.—CAN.

should be repaid by monthly instalments of "seven" on a certain date in each month :—*Held* : as, having regard to the amount of monthly interest, the bill of sale could only be paid off if the repayments were at the rate of £7 per month, the bill of sale was not rendered invalid by the omission of any unit of monetary denomination after the word "seven," & was not void as not being in accordance with the statutory form.—MOURMAND v. LE CLAIR, [1903] 2 K. B. 216; 72 L. J. K. B. 496; 88 L. T. 738; 51 W. R. 589; 19 T. L. R. 454; 47 Sol. Jo. 516; 10 Mans. 261, D. C.

Annotation:—*Refd.* Attia v. Finch (1904), 91 L. T. 70.

276. — Complicated provisions.]—A bill of sale, which is in its terms so complicated as substantially to vary from the statutory form, is void by 1882 Act, s. 9, notwithstanding it may not contravene any of the other sects.

A bill of sale made between the grantor & four sets of mtgees. to secure different debts owing to each respectively at different times, with a declaration that, in case of default in payment of any sum thereby secured or of any other default mentioned as a cause of seizure in 1882 Act, s. 7, it should be lawful for the mtgees. to seize & sell the goods assigned :—*Held* : to be not in conformity with the statutory form, & void.—MELVILLE v. STRINGER (1881), 13 Q. B. D. 392; 53 L. J. Q. B. 482; 50 L. T. 774; 32 W. R. 890, C. A.

Annotations:—*Consd.* Hughes v. Little (1886), 17 Q. B. D. 204; Saunders v. White, [1902] 1 K. B. 472; Brandon Hill v. Lane, [1915] 1 K. B. 250. *Refd.* Consolidated Credit Corpn. v. Gosney (1885), 16 Q. B. D. 24; *Re* Barber, *Ex p.* Stanford (1886), 17 Q. B. D. 259; Goldstrom v. Tallerman (1886), 17 Q. B. D. 80; Haslewood v. Consolidated Co. (1890), 60 L. J. Q. B. 12; Peace v. Brookes, [1895] 2 Q. B. 451. **Mentd.** Davies v. Usher (1884), 51 L. T. 297.

277. — Inconsistent clauses.]—A bill of sale contained two sets of clauses covering the same ground, & giving rise to the supposition that they are not identical in effect or consonant to the powers of Bills of Sale Acts :—*Held* : a perverse departure from the statutory form, which avoided the bill.

If people choose to insert in a bill of sale two sets of clauses which, assuming that they produce the same result, are expressed in different words, they make the true interpretation of the bill of sale a puzzle to any one who reads it, & on that ground it is invalid (LORD ESHER, M.R.)—FURBER v. COBB (1887), 18 Q. B. D. 491; 56 L. J. Q. B. 273; 56 L. T. 689; 35 W. R. 3 T. L. R. 456, C. A.

Annotations:—*Distd.* *Re* Paxton, *Ex p.* Pope (1889), 60 L. T. 428. **Mentd.** Blalberg v. Beckett (1886), 3 T. L. R. 17; Watson v. Strickland (1887), 56 L. J. Q. B. 594; Topley v. Corsbie (1888), 20 Q. B. D. 350; Turner v. Culpan (1888), 58 L. T. 310; Carpenter v. Deen (1889),

d. — Mortgage executed in blank—Blanks filled in subsequently.]—Pltf. as assignee of C.'s estate, brought action to recover damages for alleged illegal seizure & sale of C.'s goods. Defts. seized the goods, before pltf.'s assignment, on chattel mtges., which C. had signed in blank & which were filled in later according to C.'s instructions :—*Held* : the mtges. were valid, despite the manner in which they were made.—WADE v. BELL (1910), 16 O. W. R. 636; 1 O. W. N. 1052.—CAN.

e. — Cured by conveyance before execution levied—Conveyance not retroactive.]—A formal defect in a chattel mtge. may be cured by a conveyance at any time before an execution reaches the sheriff's hands, but such conveyance, whether effected by a deed or by delivery only, has no retroactive operation.—SMITH v. FAIR (1885), 11 A. R. 755.—CAN.

23 Q. B. D. 566; *Bourne v. Wall* (1891), 64 L. T. 530. *Seed v. Bradley*, [1894] 1 Q. B. D. 319; *Weardale Coal & Iron Co. v. Hodson*, [1894] 1 Q. B. 598.

278. — Disagreement of courts as to meaning of departure.]—Where a bill of sale departs from the scheduled form, the fact that such departure gives rise to a difference of judicial opinion as to the construction of the bill is not a ground for declaring the bill void.—*HASLEWOOD v. CONSOLIDATED CREDIT CO.* (1890), 25 Q. B. D. 555; 60 L. J. Q. B. 12; 63 L. T. 71; 39 W. R. 54; 6 T. L. R. 315, C. A.; *reversg. S. C. sub nom. CONSOLIDATED CREDIT CO. v. WITHERS*, 6 T. L. R. 218, D. C.

Annotation:—Refd. Weardale Coal & Iron Co. v. Hodson, [1894] 1 Q. B. 598.

279. — Superfluous recitals.]—The grantor of a bill of sale thereby assigned chattels, as security for money paid by the grantees in discharge of a liability of the grantor & his wife. The bill of sale contained recitals showing how such liability had arisen:—*Held*: the presence in the bill of sale of the recitals did not cause the bill of sale to be void, as not being made in accordance with the statutory form.—*BRANDON HILL, LTD. v. LANE*, [1915] 1 K. B. 250, 84 L. J. K. B. 347; 112 L. T. 316; 59 Sol. Jo. 75, D. C.

280. — Agreement to perform covenants in recited deed—Covenants not disclosed in bill.]—A bill of sale, after reciting a certain indenture, contained an agreement by the grantor that he would “perform the covenants & stipulations contained in the recited indenture,” but those covenants & stipulations did not appear in the bill of sale:—*Held*: the bill of sale was void under 1882 Act, s. 9.—*LEE v. BARNES* (1886), 17 Q. B. D. 77; 3 W. R. 640, D. C.

See, also, Nos. 208, 209, *ante*.

281. — Second deed varying prior bill.]—By a bill of sale made on Aug. 15, 1913, M. assigned her household furniture to a firm of money-lenders for securing repayment of £700 & interest at the rate of 60 per cent. *per annum*. On Mar. 7, 1914, the money-lenders by indenture, declared to be supplemental to the bill of sale, assigned to P. the principal sum of £700 secured on the bill of sale, & the chattels & things included therein. By an indenture of the same date, which recited the above-mentioned deeds, & that M. & P. had agreed on the interest for the future being at the rate of 27½ per cent. *per annum* & not as mentioned in the bill of sale of Aug. 15, 1913, & that repayment of the mtge. debt should be made by instalments at regular periods, M. agreed to pay off the principal & interest as thereinbefore mentioned. The original bill of sale was filed at the

Central Office in 1913, but the assignment & the contemporaneous deed were refused registration, on the ground that the original bill of sale was still in existence:—*Held*: whether or not the second deed, varying the terms of the original bill of sale, was a defeasance within 1878 Act, s. 10 (3), the true terms were not in the form required by 1882 Act, s. 9, as the original bill of sale no longer expressed the true intent & meaning of the parties thereto.—*CORNELL v. MAY* (1915), 112 L. T. 1085, D. C.

282. Effect of bill not being in statutory form—Avoidance in toto.]—1882 Act, s. 9, in avoiding a bill of sale which is not made in accordance with the statutory form, avoids it *in toto*, not merely as regards the personal chattels comprised in it, so that a covenant contained in it for payment by the grantee of the principal & interest thereby secured is rendered void as against him.—*DAVIES v. REES* (1886), 17 Q. B. D. 408; 55 L. J. Q. B. 363; 54 L. T. 813; 31 W. R. 573; 2 T. L. R. 633, C. A.

Annotations:—Apld. Griffin v. Union Deposit Bank (1887), 3 T. L. R. 608. *Expld. Re Burdett, Ex p. Byrne* (1888), 20 Q. B. D. 310. *Consd. Re London & Lancashire Paper Mills Co.* (1888), 58 L. T. 798. *Distd. Monetary Advance Co. v. Cater* (1888), 20 Q. B. D. 785. *Consd. Heseltine v. Simmons*, [1892] 2 Q. B. 547. *Refd. Smith v. Whiteman*, [1909] 2 K. B. 437. *Mentd. Re Yates, Batchelor v. Yates* (1888), 59 L. T. 47; *Hedges v. Preston* (1899), 80 L. T. 847.

283. — Invalid as licence.]—Where at the date of execution of a bill of sale there was no schedule attached to the bill, & afterwards the grantee entered the grantor's house & seized the goods under the bill:—*Held*: the absence of the schedule vitiated the bill of sale under 1882 Act, s. 9, for all purposes, & the bill did not operate as a leave & licence to the grantee to enter & seize the goods.—*GRIFFIN v. UNION DEPOSIT BANK* (1887), 3 T. L. R. 608.

SUB-SECT. 2.—PARTIES.

284. Description — Of grantee — Assumed or trade name used.]—B., in consideration of a sum of money lent to him by defts., who carried on business under the name of “The C. Investment & Advance Co.,” assigned by deed certain goods of his to the co. to hold as their own proper goods, but, nevertheless, by way of mtge. for securing repayment of the loan, with full power to the mtgees. to sell the goods, & out of the proceeds to reimburse themselves the loan & costs of sale, & to pay the residue, if any, to B.:—*Held*: defts. need not be described in the deed by their christian names or surnames, & the conveyance of the property to the co. as above mentioned, operated as a

l. — Cured by taking

—Omission to declare trust in mortgage.]

—A chattel mtge. made by D. to M. was given to secure a sum made up of debts due to M. & two other persons: M. made the usual affidavit of *bona fides*, asserting that the whole sum was due to him; no trust of any kind appeared upon the mtge., though the intention was that M. should hold it as trustee for the other two. The mtge. was filed within the proper time after its execution. M. assigned the mtge. to plffs., who afterwards obtained judgment against D., & under the execution the sheriff seized the property covered by the mtge. After this seizure plffs. instructed the sheriff to withdraw, & then took & held possession of the property under the mtge. Defts. placed writs of execution against the goods of D. in the hands of the sheriff after plffs. had taken possession under their mtge. D. was solvent when he gave the chattel mtge., but insolvent

when plffs. took possession:—*Held*: the fact that no trust was declared on the face of the mtge. was an informality, & was cured by the taking possession before the rights of creditors had attached on the chattels; & neither the insolvency of the mtgor. at the time of taking possession, nor the fact of the seizure under execution before taking possession, affected the position of plffs.—*BANK OF HAMILTON v. TAMBLYN* (1888), 16 O. R. 247.—**CAN.**

g. Mortgage describing note—Note not attached—Omission immaterial.]—Where a chattel mtge. contains a full description of a promissory note, the fact that the note is not attached to the mtge. as registered is immaterial.—*ROYAL BANK v. WHIELDON* (1915), 52 S. C. R. 254; 9 W. W. R. 776.—**CAN.**

h. Chattel mortgage containing no redemption clause—Implied contract to allow—Mortgagor in possession.]—In a

chattel mtge. containing no redemption clause there may be an implied contract that the mtgor. shall remain in possession until default, of equal efficacy with an express clause to that effect: & such an implied contract necessarily arises from the nature of the instrument, unless it be very expressly excluded by its terms.—*DEDRICK v. ASHDOWN* (1887), 15 S. C. R. 227.—**CAN.**

k. Provision for security of makers & indorsers of paper not due—Property not redeemable—Assignor retaining no interest.]—A provision in an assignment, for the security & indemnity of makers & indorsers of paper not due, for accommodation of debtor, does not make it a chattel mtge. under R. S. N., c. 92, s. 5, the property not being redeemable & the assignor retaining no interest in it.—*KIRK v. CHISHOLM* (1895), 26 S. C. R. 111.—**CAN.**

Sect. 2.—Form of bills of sale by way of security:
Sub-sects. 2, 3 & 4.]

conveyance to defts. on its being ascertained that they were the persons described under the name of such co.—**MAUGHAM v. SHARPE** (1864), 17 C. B. N. S. 443; 4 New Rep. 332; 34 L. J. C. P. 19; 10 L. T. 870; 10 Jur. N. S. 989; 12 W. R. 1057; 144 E. R. 179.

Annotations:—**Apprvd.** *Simmons v. Woodward*, [1892] A. C. 100. **Refd.** *Wray v. Wray*, [1905] 2 Ch. 349. **Mentd.** *Reeves v. Watts* (1866), L. R. 1 Q. B. 412; *Ramsden v. Lupton* (1873), L. R. 9 Q. B. 17; *Re Barrand, Ex p. Cochrane* (1876), 34 L. T. 950; *Johnson v. Diprose*, [1893] 1 Q. B. 512; *Re Smith, Johnson v. Bright-Smith*, [1914] 1 Ch. 937.

285. —.—.—.]—The grantee of a bill of sale was described as “the D. bank . . . of which bank S. of the same place is the sole proprietor.” Reference was made in other parts of the bill of sale to “the bank” as the grantee, & the chattels were assigned to “the bank & its assigns”:—**Held:** there was no ambiguity in the description of the grantee, who was sufficiently identified in the instrument as S.—**SIMMONS v. WOODWARD**, [1892] A. C. 100; 61 L. J. Ch. 252; 66 L. T. 534; 40 W. R. 641; 8 T. L. R. 395, H. L.; *reversg.* S. C. *sub nom.* *Re Heselstine, Woodward v. Heselstine*, [1891] 1 Ch. 464, C. A.

Annotations:—**Follid.** *Monson v. Milner* (1892), 8 T. L. R. 417. **Refd.** *Heselstine v. Simmons*, [1892] 2 Q. B. 547. **Mentd.** *Linfoot v. Pockett*, [1895] 2 Ch. 835; *De Braam v. Ford*, [1900] 1 Ch. 112; *Pettitt v. Lodge & Harper*, [1908] 1 K. B. 744; *Rosefield v. Provincial Union Bank*, [1910] 2 K. B. 781.

286. —.—.—.]—The grantee of a bill of sale was therein described as H. M. The name H. M. was put up at the office & was often mentioned there as the name of the lender, & the business was so conducted as to produce on the grantor's mind the impression that there was a person named H. M. with whom he was dealing. No such person as H. M. existed, the real name of the grantee being H. T.:—**Held:** the name of the grantee of a bill of sale must not be looked upon as part of the statutory form & the identity of F. T. & H. M., financial agent, of the address given, was sufficiently ascertained.—**MONSON v. MILNER** (1892), 8 T. L. R. 417.

287. —.—.— **Omission of address—Company.]**—The omission of the address of the grantee from a bill of sale given by way of security for payment of money renders the bill void, as not being made in accordance with the statutory form, even where the grantee is a limited co., the name of which alone is ordinarily sufficient for purposes of identification.—**ALTREE v. ALTREE**, [1898] 2 Q. B. 267; 67 L. J. Q. B. 882; 78 L. T. 794; 47 W. R. 60; 14 T. L. R. 460; 42 Sol. Jo. 573; 5 Mans. 235, D. C.

— **Of grantor.]**—*Sec* Sect. sub-sect. 5. *post.*

PART V. SECT. 2, SUB-SECT. 2.

1. *Description—Of grantee*—“*Esquire.*”—Where neither the bill of sale itself, nor the affidavit, contained the description of the creditor, who was therein designated as “esquire”:—**Held:** the registration of same was invalid.—*Re O'CONNOR* (1856), 8 Ir. Jur. 198 (B).—**IR.**

288 i. Joint parties—Joint & several assignment—Of property not jointly owned.]—Two persons not in partnership, & not jointly possessed of the chattels comprised in a bill of sale, but each possessing separately a part of them, can join in giving a bill of sale over those chattels.—**ANDREWS v. FAN TU** (1909), 28 N. Z. L. R. 1042.—**N.Z.**

PART V. SECT. 2, SUB-SECT. 3.

m. *Mortgage to secure against indorsements—Indorsements substituted by mortgage.]*—The mtge. was given, as appeared by the recitals in it, to secure pltf. against indorsements for the mtgors., & before the re-filing he had taken up most of the notes & renewed them by his own notes, to which the mtgors. were not parties:—**Held:** the mtge. was not thereby invalidated.—**FRASER v. BANK OF TORONTO** (1860), 19 U. C. R. 381.—**CAN.**

n. *Mortgage to secure against advances—Consideration mainly prior indebtedness.]*—Pltf. claimed goods under a mtge. duly filed. The main question was the consideration for such mtge. Pltf. proved that it arose mainly for

— **Of attesting witnesses.]**—*Sec* Sect. 4, sub-sect. 2, & Sect. 5, sub-sect. 5, *post.*

288. Joint parties—Joint & several assignment—Of property not jointly owned.]—By a bill of sale two persons jointly & severally assigned goods described in a schedule thereto, to secure repayment of an advance. The goods so described did not any of them belong to the grantors jointly, but some belonged to one of them & the rest to the other. The schedule did not specify to which grantor the goods respectively belonged:—**Held:** the bill of sale was void as not being in accordance with the statutory form.—**SAUNDERS v. WHITE**, [1902] 1 K. B. 472; 71 L. J. K. B. 318; 86 L. T. 173; 50 W. R. 325; 18 T. L. R. 280; 9 Mans. 113, C. A.

289. Joinder of unnecessary party.]—The grantor of a bill of sale thereby assigned chattels, which were his sole property, as security for money paid by the grantees in discharge of a liability of the grantor & his wife. The wife of the grantor was named in the bill of sale as a party & she executed it, but she did not join in the assignment of the chattels or the covenant for payment of principal & interest:—**Held:** the joinder of the wife as a party to the bill of sale did not cause the bill of sale to be void as not being made in accordance with the statutory form.—**BRANDON HILL, LTD. v. LANE**, [1915] 1 K. B. 250; 84 L. J. K. B. 347; 112 L. T. 346; 59 Sol. Jo. 75, D. C.

SUB-SECT. 3. CONSIDERATION.

290. Untrue statement—Whether departure from statutory form.]—An untrue statement of the consideration is not a deviation from the statutory form, & does not render the bill wholly void under 1882 Act, s. 9, but only in respect of the personal chattels comprised therein under s. 8.

v. SIMMONS, [1892] 2 Q. B. 517; 62 L. J. Q. B. 567; 67 L. T. 611; 57 J. P. 53; 41 W. R. 67; 8 T. L. R. 768; 36 Sol. Jo. 695; 4 R. 52, C. A.

Annotations:—**Consd.** *Edwards v. Marcus* (1894), 63 L. J. Q. B. 363; *Saunders v. White*, [1902] 1 K. B. 472.

See, further, cases in Sect. 1, ante.

291. Omission of receipt clause.]—The omission of an acknowledgment of the receipt of the consideration by the grantor is a departure from the statutory form which renders the bill of sale void.—**DAVIES v. JENKINS**, [1900] 1 Q. B. 133; 69 L. J. Q. B. 187; 81 L. T. 788; 48 W. R. 286; 44 Sol. Jo. 103; 7 Mans. 149, D. C.

Annotation:—**Consd.** *Buttell v. Thompson*, [1920] 2 K. B. 80.

292. —.—.—.]—A bill of sale stated that in consideration of £250 “now paid by the grantees to” a third person “at the request of the grantor,” the grantor assigned to the grantees certain chattels by way of security for the payment of £250 & interest thereon at the rate of 55 per cent.

goods left in the mtgor.'s possession by pltf.'s grandfather. He subsequently lent the mtgor. various sums of money to secure which the chattel mtge. was executed:—**Held:** pltf. was entitled to succeed.—**HARRINGTON v. MARSH** (1859), 8 C. P. 227.—**CAN.**

o. *Stock mortgage—Valuable consideration for—Forbearance to sue.]*—The mere existence of a debt does not of itself constitute a valuable consideration for a stock mtge. under Instruments Act, 1890, Part VIII. There must be a forbearance to sue, or such circumstances proved as will justify the inference that a forbearance to sue was part of the consideration. The mere possibility that the mtgee. might forbear is not sufficient con-

per annum. The bill of sale, after stating that the £250 was "now paid" by the grantees to the third person, did not add words acknowledging the receipt thereof:—*Held*: the bill of sale was void on the ground, as the receipt clause was omitted, the bill of sale was not in accordance with the statutory form.—*BURCHELL v. THOMPSON*, [1920] 2 K. B. 80; 89 L. J. K. B. 533; 122 L. T. 758; 36 T. L. R. 257; 64 Sol. Jo. 307; [1920] B. & C. R. 7, C. A.

SUB-SECT. 4.—CHATELS CAPABLE OF SPECIFIC DESCRIPTION.

293. After-acquired chattels—Whether bill void absolutely—Former law.—A bill of sale assigned unto the grantees "all the crops now growing, or which shall at any time hereafter during the continuance of this security be growing in or upon" certain farmlands in the grantor's occupation, "& also all horses, cattle, carts, carriages, implements of husbandry, farming machinery, tools, utensils, hay, straw, consumable stores, live & dead stock, furniture, & household effects, which now are, or at any time hereafter during the continuance of this security shall be, in, upon, or about the same farm, or the farmhouse, barns, stables, or other buildings or erections thereon, & all which crops, stock, implements, furniture, & effects are intended to be specifically described in the schedule hereunder written, but the schedule is not to abridge the other words of description contained in these presents." The schedule to the bill of sale contained a list of live stock, & the words "household furniture & effects," without any list or inventory thereof, & also under the heading "crops" a list of fields with their names, acreage, & the nature of the crops growing thereon:

—*Held*: the grant of the after-acquired property did not invalidate the grant of the existing property, but the bill of sale was void as against execution creditors of the grantor in respect of any property afterwards acquired by the grantor.

ROBERTS v. ROBERTS (1884), 13 Q. B. D. 794; 53 L. J. Q. B. 313; 50 L. T. 351; 32 W. R. 605, C. A.

Annotations:—*Folld.* *Bouchette v. Attenborough* (1887), 3 T. L. R. 813. *Distd.* *Witt v. Banner* (1887), 19 Q. B. D. 276. *Apprvd.* *Witt v. Banner* (1887), 20 Q. B. D. 114. *Consd.* *Kelly v. Kellond* (1888), 20 Q. B. D. 569. *Refd.* *Thomas v. Kelly* (1888), 13 App. Cas. 506; *Carpenter v. Deen* (1889), 23 Q. B. D. 566. *Mentd.* *Mayer & Fulda v. Mindlevich* (1888), 59 L. T. 400; *Davies v. Jenkins* (1899), 48 W. R. 286.

294. — — — — —.]—A bill of sale to secure an advance, which contains a clause purporting to assign by way of security property which during the continuance of the security may be brought

sideration upon which to found a stock mtge.—*ELDER, SMITH & CO., LTD. v. MCKELLAR* (1895), 21 V. L. R. 664.—**AUS.**

PART V. SECT. 2, SUB-SECT. 4.

293 i. After-acquired chattels—Whether bill void absolutely Chattels not mentioned in original agreement.—*BROWN v. LAMONTAGUE*, 26 C. L. J. N. S. 306.—**CAN.**

293 ii. — — — — —.]—*Rectification.*—In an action to strike out of a mtge. a clause as to property "after acquired":—*Held*: if it could be shown that the agreement in writing to give such a mtge. did not contemplate such a clause it must be deleted, but that the irrefragable evidence necessary had not been adduced.—*COTTONWOOD TIMBER CO. v. MOLSONS BANK* (1916), 34 W. L. R. 909.—**CAN.**

293 iii. — — — — —.]—*Registration omission in notice of intention to file.*—The provisions of Instruments Act, 1890, with regard to bills of sale are applicable only to chattels capable of complete transfer by delivery, & not to after-acquired chattels.

The inclusion of after-acquired goods in a bill of sale does not invalidate the instrument, which, as far as these goods are concerned, does not require registration.

The notice of intention to file a bill of sale made no reference to the inclusion of after-acquired property in the bill of sale. The bill of sale did include after-acquired property:—*Held* the omission to include the after-acquired property in the notice of intention did not make the bill of sale void.—*BRUCE & SONS v. MCC* (1895), 21 V. L. R. 262.—**AUS.**

upon the premises in addition to or in substitution of that specifically assigned by it, is void as not being in accordance with the statutory form.—*LEVY v. POLACK* (1885), 52 L. T. 551, D. O.

Annotation:—*N.F. Crosser & Long v. Maxwell*, [1885] W. N. 95.

295. — — — — —.]—A bill of sale, which was given by way of security for an advance, assigned not only specific goods upon certain premises enumerated in an inventory, but also "all other chattels & things which during the continuance of the security might be brought upon the premises or substituted for any of the chattels or things for the time being subject thereto":—*Held*: the bill of sale was not void absolutely.—*CROSSER & LONG v. MAXWELL (J.) & Co.*, [1885] W. N. 95, C. A.

296. — — — — —.]—A bill of sale conveyed not only the goods on certain premises but also, "all goods which may at any time be substituted for the same, or which may hereafter be brought upon the premises by the mtgee. by way of security":—*Held*: the bill of sale was not void absolutely.—*BOUCHETTE v. ATTENBOROUGH* (1887), 3 T. L. R. 813, D. O.

297. — — — — —.]—A bill of sale assigned by way of security for payment of money chattels specifically described in the schedule to the bill of sale, "together with all other chattels & things the property of the mtgor. now in & about the premises [described], & also all chattels & things which may at any time during the continuance of this security be in or about same or any other premises of the mtgor., to which the chattels or things or any part thereof may have been removed, whether brought there in substitution for or renewal of or in addition to the chattels & things hereby assigned by way of security for the payment of the" money:—*Held*: the bill was not in accordance with the statutory form, & was altogether void, notwithstanding 1882 Act, ss. 4, 5, & 6.—*THOMAS v. KELLY* (1888), 13 App. Cas. 506; 58 L. J. Q. B. 66; 60 L. T. 111; 37 W. R. 353; 4 T. L. R. 683, H. L.; *affy.* *S. C. sub nom. KELLY & Co. v. KELLOND*, 20 Q. B. D. 569, C. A.

Annotations:—*Consd.* *Seed v. Bradley*, [1891] 1 Q. B. 319. *Refd.* *Bouchette v. Attenborough* (1887), 3 T. L. R. 813; *Hadden, Best v. Oppenheim* (1889), 60 L. T. 962; *Heseltine v. Simmons*, [1892] 2 Q. B. 547; *Saunders v. White*, [1902] 1 K. B. 472; *Coates v. Moore*, [1903] 2 K. B. 140; *Brandon Hill v. Lane*, [1915] 1 K. B. 250. *Mentd.* *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; *Parsons v. Brand, Coulson v. Dickson* (1890), 25 Q. B. D. 110; *Bird v. Davey*, [1891] 1 Q. B. 29; *Re Heseltine, Woodward v. Heseltine*, [1891] 1 Ch. 464; *Re Tweedale, Ex p. Tweedale*, [1892] 2 Q. B. 216; *Peace v. Brookes*, [1895] 2 Q. B. 451; *Sims v. Trollope* (1896), 75 L. T. 351; *De Braam v. Ford*, [1900] 1 Ch. 142; *Lysons v. Knowles, Stuart v. Nixon & Bruce*, [1901] A. C. 79; *Mourmand v. Le Clair* (1903), 51 W. R. 589; *Ball v. Hunt*, [1912] A. C. 496; *Ryan v. Oceanic Steam Navigation Co.*,

293 iv. — — — — —.]—*As against Official Assignee in bankruptcy.*—An instrument which purports to assign goods acquired after the execution thereof does not require registration in order to give it validity as against the official assignee in bkpey. of the grantor.—*MALICK v. LLOYD (OFFICIAL ASSIGNEE)* (1913), 16 C. L. R. 483.—**AUS.**

q. Indivisible chattel—Not within Act.—A., having purchased from B. a half interest in a celebrated brood mare, paid in his purchase money \$50 more than the half interest was worth, on the understanding that B. was to keep & take care of the mare for a year, when A. was to have her, & her expenses were thereafter to be shared equally between them. The bargain was that they were to keep her for breeding purposes & share the profits equally.

Sect. 2.—Form of bills of sale by way of security:
Sub-sects. 4 & 5.]

O'Connell v. Same, Scanlon v. Same, O'Brien v. Same, [1914] 3 K. B. 731; Burchell v. Thompson, [1920] 2 K. B. 80.

298. ——— No covenant limiting extent of substitution.]—A bill of sale assigned, by way of security for payment of money, chattels specifically described in the schedule, & "also all chattels & things which may at any time during the continuance of the security be substituted for them, or any of them, pursuant to the covenant hereinafter contained." No such covenant was inserted:—*Held*: the bill of sale was not in accordance with the statutory form, & was void.—HADDEN, BEST & CO. v. OPPENHEIM (1889), 60 L. T. 962, D. C.

—— **Whether subject to seizure.]—**See Part VI., Sect. 3, sub-sect. 2, A, *post*.

299. Chattels real.]—A bill of sale assigned to the mtgee. as security for an advance to the mtgor., a farmer, all the furniture & other personal chattels specifically described in the schedule thereto annexed "now in & about the premises known as P. farm, together with all the tenant-right valuation, goodwill, tillages, & interest of the mtgor. in & to the farm lands & premises." The schedule contained a specific enumeration of all the articles of furniture & other personal chattels comprised in the deed, with the addition of the above words "together with all the tenant-right valuation, etc.":—*Held*: inasmuch as the schedule comprised chattels real as well as personal chattels, the bill of sale was not made in accordance with the statutory form, & was void.

Chattels real are not within [1882] Act; it does not apply to them, & as regards them you are not subject to the fetter imposed by s. 9 upon the form of a bill of sale (LORD ESHER, M.R.).—COCHRANE v. ENTWISTLE (1890), 25 Q. B. D. 116; 59 L. J. Q. B. 418; 62 L. T. 852; 38 W. R. 587; 6 T. L. R. 319, C. A.

Annotations:—**Consd.** Swanley Coal Co. v. Denton, [1906] 2 K. B. 873. **Mentd.** Thomas v. Scarles, [1891] 2 Q. B. 408; *Re Isaacson, Ex p. Mason*, [1895] 1 Q. B. 333.

300. Title deeds to land—Whether personal chattels.]—By a bill of sale the mtgor. assigned to the mtgees. as security for an advance "the chattels & things" specifically described in the schedule thereto "& now being in & about the dwelling-house & premises known as the L. hotel." The schedule contained a list of articles about the premises, & it concluded with the following item: "Assignment dated Jan. 24, 1902" (the parties being stated), "of lease dated Nov. 13, 1891, of the L. hotel & all the muniments of title referred to in the assignment":—*Held*: the bill of sale did not create a charge upon the leasehold interest, & it was made in accordance with the statutory form.—SWANLEY COAL CO. v. DENTON, [1906] 2 K. B. 873; 75 L. J. K. B. 1009; 95 L. T. 659; 22 T. L. R. 766; 50 Sol. Jo. 707; 13 Mans. 353, C. A.

301. Assignment of personal chattels—Severable from — Assignment of gas engine.]—Where personal chattels & other property are mortgaged

During the year, & while in possession, she was seized & sold by the sheriff under an execution B., but notice of A.'s claim was given to the sheriff & publicly at the sale. Subsequently the mare had a colt which was in *gremio* at the time of the sale.

In an action by A. against C., the purchaser at the sheriff's sale, C. contended that R. S. O., c. 119, avoided pltf.'s title as against the execution:—

Held: the Act was intended to apply to personal chattels susceptible of specific ascertainment & of accurate description, & capable of being transferred & possessed in specie, & did not apply to an indivisible chattel, like that in the present case.—GUNN v. IS (1884), 5 O. R. 685.—CAN.

PART V. SECT. 2, SUB-SECT. 5.

r. Advances in goods — Whether

by a deed, which is not made in accordance with the statutory form of a bill of sale, & is, by 1882 Act, s. 9, void as regards the personal chattels, such deed is valid as to the other property comprised in it, if it is possible to sever the security upon the personal chattels from that upon the other property.

A deed assigned to the grantee as security for a debt, "the several chattels & things specifically described" in a schedule to the deed. The schedule comprised personal chattels, & also a gas engine, which did not come within the definition of personal chattels contained in 1878 Act, s. 4. The deed was not made in accordance with the statutory form:—*Held*: the deed was, under 1882 Act, s. 9, void as to the personal chattels, but it remained valid as to the gas engine.—*Re BURDETT, Ex p. BYRNE* (1888), 20 Q. B. D. 310; 57 L. J. Q. B. 263; 58 L. T. 708; 36 W. R. 345; 4 T. L. R. 260; 5 Morr. 32, C. A.

Annotations:—**Expld.** Monetary Advance Co. v. Cater (1888), 57 L. J. Q. B. 463. **Consd.** *Re Yates, Batchelor v. Yates* (1888), 38 Ch. D. 112. **Expld.** *Climpson v. Coles* (1889), 23 Q. B. D. 465; *Cochrane v. Entwistle* (1890), 25 Q. B. D. 116. **Consd.** *Mumford v. Collier* (1890), 25 Q. B. D. 279; *Small v. National Provincial Bank of England*, [1894] 1 Ch. 686. **Appld.** *Re Isaacson, Ex p. Mason*, [1895] 1 Q. B. 333. **Refd.** *Re London & Lancashire Paper Mills Co.* (1888), 58 L. T. 798; *Stevens v. Marston* (1890), 60 L. J. Q. B. 192; *Swanley Coal Co. v. Denton* (1906), 95 L. T. 659. **Mentd.** *Davis v. Petrie* (1905), 93 L. T. 511.

302. ——— Assignment of hire-purchase agreement.]—By one deed the owner of a piano assigned, by way of security for money, the piano, & also the benefit of a hire-purchase agreement, into which he had entered respecting it:—*Held*: the assignment of the agreement was severable from that of the piano, & the deed was not void *in toto*, or because it was not in the statutory form.—*Re ISAACSON, Ex p. MASON*, [1895] 1 Q. B. 333; 64 L. J. Q. B. 191; 71 L. T. 812; 43 W. R. 278; 11 T. L. R. 101; 39 Sol. Jo. 169; 2 Mans. 11; 14 R. 41, C. A.

SUB-SECT. 5.—SUM SECURED, REPAYMENT, AND INTEREST.

303. Sum secured uncertain—Grantee surety for grantor.]—A bill of sale given, "in consideration of the grantee having at the request of the grantor become guarantee, & having signed a promissory note for payment of £15 obtained by the grantor from B., of which £32 or thereabouts is now owing," & further expressed to assign the chattels "by way of security for payment of any money the grantee may be called upon to pay in respect of the guarantee, & interest thereon at the rate of 5 per cent. *per annum*," is void, as not being in accordance with the statutory form, by reason of the amount payable by the grantee under the guarantee being uncertain.—HUGHES v. LITTLE (1886), 18 Q. B. D. 32; 56 L. J. Q. B. 96; 55 L. T. 476; 35 W. R. 36; 3 T. L. R. 14, C. A.

Annotations:—**Appld.** *Cook v. Taylor* (1887), 3 T. L. R. 800. **Foll.** *Re Hill, Official Receiver v. Ellis* (1895), 2 Mans. 208. **Refd.** *Pulbrook v. Ashby* (1887), 56 L. J. Q. B. 376; *De Braam v. Ford* (1899), 69 L. J. Ch. 82. **Mentd.**

*included in Act.]—*Seem: C. S. U. C., c. 45, extends to advances either in money or goods, & a mtgo. to secure advances in flour is within s. 5.—SUTHERLAND v. NIXON (1862), 21 U. C. R. 629.—CAN.

s. — — —.]—The "advances" referred to in R. S. O., 1877 (c. 119), s. 6, need not be pecuniary.—GOULDING v. DEEMING (1887), 15 O. R. 201.—CAN.

Stevens v. Marston (1890), 60 L. J. Q. B. 192; *McNair v. Audenshaw Paint & Colour Co.*, [1891] 2 Q. B. 502.

304. ———.]—A bill of sale given to secure a surety for a debt of the grantor against loss will, if uncertain in its provisions as to amount, be bad as not in accordance with the statutory form.—*Re HILL, OFFICIAL RECEIVER v. ELLIS* (1895), 2 Mans. 208, D. C.

305. ——— **Bill to secure future advances.**—A bill of sale was given to secure an advance any sums which might thereafter be advanced:—*Held*: the bill was not in accordance with the statutory form, as it did not state the amount advanced.—*COOK v. TAYLOR* (1887), 3 T. L. R. 800, D. C.

306. Whether time of repayment certain—“Forthwith.”—A bill of sale contained a covenant to repay the principal sum “forthwith”:—*Held*: the bill of sale was not in accordance with the statutory form.—*Re WILLIAMS, Ex p. PEARCE* (1883), 25 Ch. D. 656; 53 L. J. Ch. 500; 49 L. T. 475; 32 W. R. 187.

Annotations:—**Consd.** *Melville v. Stringer* (1884), 13 Q. B. D. 392; *Hughes v. Little* (1886), 17 Q. B. D. 204.

307. ——— **“On demand.”**—A bill of sale, given by way of security for payment of money, contained an agreement by the grantor to pay the sum advanced & interest upon demand made in writing:—*Held*: the agreement to pay the money on demand was not an agreement to pay it at a stipulated time in accordance with the statutory form.—*HEATHERINGTON v. GROOME* (1884), 13 Q. B. D. 789; 53 L. J. Q. B. 576; 51 L. T. 412; 33 W. R. 103, C. A.

Annotations:—**Consd.** *Bishop v. Beale* (1884), 1 T. L. R. 140. **Folld.** *Clemson v. Townsend* (1884), Cab. & El. 418. **Distd.** *Re Barber, Ex p. Stanford* (1885), 55 L. J. Q. B. 339. **Expld. & Apld.** *Sibley v. Higgs* (1885), 15 Q. B. D. 619. **Consd.** *Re Barber, Ex p. Stanford* (1886), 17 Q. B. D. 259. **Expld. & Apld.** *Hughes v. Little* (1886), 18 Q. B. D. 32. The ground upon which *Hetherington v. Groome* was decided was that, as it was uncertain when the demand for payment might be made, the time for payment was uncertain, & as the statutory form provided for payment of a certain sum upon a certain day, the bill of sale was not in accordance with the form (LORD ESHER, M.R.). **Folld.** *Mackay v. Merritt* (1886), 34 W. R. 433. **Consd.** *Lumley v. Simmons* (1887), 34 Ch. D. 698. **Folld.** *Furnivall v. Hudson* (1892), 68 L. T. 378. **Refd.** *De Braam v. Ford* (1899), 81 L. T. 568.

308. ———.]—*Seemle*: the sum secured should be made payable on a specified day, & a bill of sale making it payable on demand is contrary to the statutory form.—*MELVILLE v. STRINGER* (1884), 13 Q. B. D. 392; 53 L. J. Q. B. 482; 50 L. T. 771; 32 W. R. 890, C. A.

Annotations:—**Consd.** *Hughes v. Little* (1886), 17 Q. B. D. 204. **Refd.** *Davies v. Usher* (1884), 51 L. T. 297. **Mentd.** *Consolidated Credit & Mortgage Corp. v. Gosney* (1885), 16 Q. B. D. 24; *Re Barber, Ex p. Stanford* (1886), 17 Q. B. D. 259; *Goldstrom v. Tallerman* (1886), 17 Q. B. D. 80; *Haslewood v. Consolidated Co.* (1890), 60 L. J. Q. B. 12; *Peace v. Brookes*, [1895] 2 Q. B. 451; *Saunders v. White*, [1902] 1 K. B. 472; *Brandon Hill v. Lane*, [1915] 1 K. B. 250.

309. ———.]—A bill of sale, which provides for repayment of the loan on demand, is void.—*MACKAY v. MERRITT* (1886), 34 W. R. 433.

310. ———.]—An agreement in a bill of sale to pay on demand is not an agreement to

pay at a stipulated time in accordance with the statutory form.—*FURNIVALL v. HUDSON*, [1893] 1 Ch. 335; 62 L. J. Ch. 178; 68 L. T. 378; 41 W. R. 358; 3 R. 230.

Annotations:—**Mentd.** *Dennison v. Jeffs*, [1896] 1 Ch. 611; *Re Wilson*, [1916] 1 K. B. 382.

311. ——— **Within specified time “after demand.”**—A bill of sale, which provides for the repayment of the principal forty-eight hours after demand is void, under 1882 Act, s. 9.—*BISHOP v. BEALE* (1884), 1 T. L. R. 140.

312. ———.]—A bill of sale given by way of security for payment of money contained an agreement by the grantor to pay principal & interest up to demand within twenty-four hours after demand in writing:—*Held*: the bill of sale was void, as not being in accordance with the statutory form, the agreement to pay twenty-four hours after demand not being an agreement to pay within a stipulated time.—*CLEMSON v. TOWNSEND* (1884), 1 Cab. & El. 418.

313. ———.]—A bill of sale was given by way of indemnity to the grantee on his becoming security for the payment by the grantor of a sum of money, being an instalment of a composition due by him to his creditors. The grantor agreed that he would pay the sum of money to his creditors on a given day, & the bill of sale provided that if he did not pay the money on the day named, & the grantee should be obliged to pay same, the grantor would repay to the grantee the amount within seven days after demand in writing, with power in default to the grantee to seize & sell the goods:—*Held*: the bill of sale did not contain an agreement to pay the money secured at a stipulated time in accordance with the statutory form.—*SIBLEY v. HIGGS* (1885), 15 Q. B. D. 619; 54 L. J. Q. B. 748; 1 T. L. R. 576, D. C.

Annotations:—**Expld. & Apld.** *Hughes v. Little* (1887), 18 Q. B. D. 32. **Refd.** *De Braam v. Ford* (1899), 81 L. T. 568. **Mentd.** *Re Barber, Ex p. Stanford* (1886), 17 Q. B. D. 259.

314. ——— **Grantee surety for grantor—On specified day after grantee’s obligation to pay creditor.**—A bill of sale given, “in consideration of the grantee having at the request of the grantor become guarantee, & having signed a promissory note for payment of £15 obtained by the grantor from B.,” & further expressed to assign the chattels “by way of security for payment of any money the grantee may be called upon to pay in respect of the guarantee, & interest thereon at the rate of 5 per cent. *per annum*,” & the grantor further agreeing “to pay the principal sum, & any further sums together with interest then due, by monthly payments of £2 on the first of every month,” is void, as not being in accordance with the statutory form, by reason of the time when the amount payable by the grantee under the guarantee would become payable being uncertain.—*HUGHES v. LITTLE* (1886), 18 Q. B. D. 32; 56 L. J. Q. B. 96; 55 L. T. 476; 35 W. R. 36; 3 T. L. R. 14, C. A.

Annotations:—**Folld.** *Re Hill, Official Receiver v. Ellis*

305 i. Sum secured uncertain—Bill to secure future advances—Mortgagee not estopped by recital from claiming larger amount.—A bill of sale contained a recital that a certain sum was due from the mtgor. to the mtgee., & a covenant by the mtgor. to pay that sum & also any other sum which on taking an account might appear to be due thereon:—*Held*: the mtgee. was not estopped by the recital from claiming that the debt due at the date of the bill of sale was larger than the sum therein named.—*RITCHIE v. B* (1897), 5 B. C. R. 457.—**CAN.**

a. Whether time of repayment certain—Covenant to pay on fixed dates—Without stating year.—Where, in a bill of sale, dated Jan. 5, 1887, the grantor covenanted to pay the principal sum, with interest then due, by equal payments on July 5, & Jan. 5 (without stating the year):—*Held*: the date of repayment was sufficiently stated under 46 & 47 Vict. c. 7, s. 9, & should be read as July 5 & Jan. 5 next ensuing the date of the bill of sale.—*GRANNELL v. MONCK* (1889), 24 L. R. Ir. 241.—**IR.**

b. Future advances at speci-

times—Departure from agreement.—Where advances were to be made in sums & at times specified, & a mtge. taken to secure their payment:—*Held*: a departure from the agreement in the times & manner of such advances could not alone defeat the mtge., though it might be urged to the jury as against the *bona fides* of the transaction.—*STRANGE v. DILLON* (1862), 22 U. C. R. 223.—**CAN.**

c. Time for repayment—Limited to twelve months.—*O’NEILL v. SMALL*, 15 C. L. J. N. S. 114.—**CAN.**

Sect. 2.—Form of bills of sale by way of security:
Sub-sect. 5.]

(1895), 2 Mans. 208. **Refd.** *Pulbrook v. Ashby* (1887), 56 L. J. Q. B. 376; *De Braam v. Ford* (1899), 69 L. J. Ch. 82. **Mentd.** *Stevens v. Marston* (1890), 60 L. J. Q. B. 192; *McNair v. Audenshaw Paint & Colour Co.*, [1891] 2 Q. B. 502.

315. ———— .]—A bill of sale given to secure a surety for a debt of the grantor against loss will, if uncertain in its provisions as to time of payment, be bad as not in accordance with the statutory form.—*Re Hill, Official Receiver v. Ellis* (1895), 2 Mans. 208, D. C.

316. ——— Bill to secure future advances.]—A bill of sale given to secure an advance & any sums which might thereafter be advanced, contained a covenant by the grantor to pay the sums intended to be secured with interest:—**Held:** the bill was not in accordance with the statutory form, as it did not state the time for repayment of any future advances, nor for payment of the interest on them.—*Cook v. Taylor* (1887), 3 T. L. R. 800, D. C.

317. ——— Unpaid principal & interest repayable—On failure to pay instalment.]—A bill of sale of personal chattels granted in 1884 to secure £80 stated the stipulated times or time of payment of principal & interest as “by equal monthly payments of £8, the first payment to be made on Mar. 1 next, but if default be made in any payment when it becomes due, then the whole of the principal unpaid & the interest then due shall be at once payable”:—**Held:** the bill was in accordance with the statutory form & was valid.—*Lumley v. Simmons* (1887), 34 Ch. D. 698; 56 L. J. Ch. 329; 56 L. T. 134; 35 W. R. 422, C. A. **Annotation:**—**Refd.** *Re Wood, Ex p. Woolfe*, [1894] 1 Q. B. 605.

318. ——— Payment in one entire sum. A bill of sale, given as security for money, by which the mtge. debt is made payable in one entire sum, is in accordance with the statutory form.—*Watkins v. Evans* (1887), 18 Q. B. D. 386; 56 L. J. Q. B. 200; 56 L. T. 177; 35 W. R. 313, C. A. **Annotation:**—**Consd.** *Calvert v. Thomas* (1887), 19 Q. B. D. 204.

319. ——— Alternatively by instalments.]—A bill of sale provided that the grantor should pay to the grantee the principal sum & interest then due on June 1, provided that if the grantor should not break any of the covenants, & should not become bkpt., & should pay to the grantee the principal sum with interest by equal monthly instalments of three guineas, then, & in that case, the grantee should accept payment by such instalments:—**Held:** the provision as to payment by instalments was a provision in ease of debtor, & did not render the bill of sale invalid.—*Re Cotton, Ex p. Payne* (1887), 56 L. T. 571; 35 W. R. 476; 4 Morr. 90, D. C.

320. ——— Payment by unequal instalments at fixed times.]—The statutory form is, in respect

d. ——— May be extended in case of mortgage to secure debt.]—**Kerry v. James** (1894), 21 A. R. 338. —**CAN.**

e. ——— Mortgage to secure against indorsements.]—Plff. claimed certain goods under two chattel mtges. made by deft. to him. The first one was to secure plff. in respect of four promissory notes made by deft. & indorsed by plff., payable in six, twelve, fifteen & eighteen months:—**Held:** as the time of credit extended over twelve months the chattel mtge. was invalid.—*May v. Security Loan & Savings Co.* (1881), 45 U. C. R. 106.—**CAN.**

f. ——— Present & future

advances To enable borrower to carry on business.]—The mtge., besides being a security for \$1,400 actually advanced, provided that it should also be a security for further advances, if necessary, of goods & merchandise to enable the mtgor. “to carry on business”—not “to enter into & carry on” as in the statute—which should “be repaid on demand at any time within one year from the date hereof, or such other time as the parties may agree thereto”:—**Held:** the omission of the words “to enter into” could not render it unnecessary to register the mtge., as regarded the \$1,400.

Qu.: whether the clause for future advances was not void as enabling pay-

of the covenant by the grantor to pay the principal sum secured “by equal payments” at specified times, directory & not obligatory, & a covenant to pay the principal sum by unequal payments at the specified times does not render a bill of sale void.—*Re Cleaver, Ex p. Rawlings* (1887), 18 Q. B. D. 489; 56 L. J. Q. B. 197; 56 L. T. 593; 35 W. R. 281; 3 T. L. R. 315, C. A.

Annotation:—**Refd.** *Haslewood v. Consolidated Credit Co.* (1890), 25 Q. B. D. 555.

321. ——— Date ascertained by calculation—Right of grantor to redeem before due date.]—Where the principal & interest advanced on a bill of sale is to be repaid by regular instalments of a specified amount, the holder is in the same position as if the date of repayment, which can be gathered by calculation, had been inserted in the bill of sale, & can only be redeemed by payment of interest to that date.—*Re Davies, Ex p. Equitable Investment Co., Ltd.* (1897), 77 L. T. 567; 4 Mans. 358.

Annotations: **Mentd.** *Barron v. Potter* (1914), 84 L. J. K. B. 751; *Parsons v. Equitable Investment Co.*, [1916] 2 Ch. 527.

322. ——— Repayment on or before certain date—Agreement to repay on named date—With proviso for defeasance.]—By a bill of sale, given as security for money, the grantor agreed to pay the principal “on or before” Nov. 1:—**Held:** that amounted to an agreement to pay on a fixed day, with a provision for the defeasance of the security, at the option of the grantor, on payment at an earlier date, & the bill of sale was in accordance with the statutory form & was valid.

The provision in the statutory form that there must be a “stipulated” time of payment means that the time at which payment is to become obligatory upon the grantor must be fixed.—*De Braam v. Ford*, [1900] 1 Ch. 142; 69 L. J. Ch. 82; 81 L. T. 568; 16 T. L. R. 69; 44 Sol. Jo. 87; 7 Mans. 28, C. A.

323. ——— Instalments to keep down interest—Without reducing principal.]—A bill of sale dated Mar. 1, 1898, was expressed to be made, “by way of security for payment of £200 & interest thereon at the rate of 60 per cent. *per annum*,” & proceeded as follows: “& the mtgors. do further agree & declare that they will duly pay to the mtgee. the principal sum aforesaid together with the interest then due as follows: £10 on Apr. 1, 1898, on account of interest & principal, & the like sum of £10 on account as aforesaid on the 1st day of each & every succeeding month thereafter”:—**Held:** as the monthly payment was the exact amount of the interest for the month & the payments would only keep down the interest, leaving the principal, which would thus remain unpaid indefinitely, & there was no stipulated time of payment & the bill of sale was not in accordance with the statutory form & was void.—*Cohen v. Milner* (1901), 106 L. T. Jo. 14.

324. ——— Proviso for payment of insurance

ment to be delayed beyond the year.—*McLean v. Pinkerton* (1882), 7 A. R. 490.—**CAN.**

g. ——— Limited to two years—Future advances To enable borrower to enter & carry on business.]—R. O., c. 431, s. 8, provides for the taking of a mtge. for future advances, in case of an agreement in writing for the same to enable the borrower to enter into & to carry on business, & that the liability under such a mtge. shall not extend beyond two years from its date:—**Held:** (1) it was not essential that the advances should be made for the purpose of enabling the mtgor. to enter into business as well as to carry

money recovered—In discharge of money secured.]

—Where there is a provision for insurance of the chattels by the grantor of a bill of sale, & “that he will expend any money paid in consequence of loss or damage by fire under such policy in discharge of the money secured by these presents,” it does not vitiate the bill of sale as making uncertain the time for payment of the money lent contrary to the statutory form. *NEVERSON v. SEYMOUR* (1907), 52 Sol. Jo. 12, D. C.
Annotation:—Mentd. *Barron v. Potter* (1914), 84 L. J. K. B. 751.

325. Interest—Lump sum.]—A bill of sale was given by way of security for payment of £100, being the amount advanced, & £76, being the interest agreed to be paid for the advance, & the mtgors. agreed to pay to the mtgee. the principal sum, together with the agreed interest thereon, by sixteen equal consecutive quarterly instalments of £11 each:—*Held*: it was not necessary to state specifically in the bill of sale the actual rate of interest secured.—*WILSON v. KIRKWOOD* (1883), 48 L. T. 821.

Annotation:—Dbtd. *Blankenstein v. Robertson* (1890), 24 Q. B. D. 543.

326. ——— On failure to pay instalment.]

By a bill of sale, chattels specified in the schedule were assigned, by way of security, for £300 & interest as follows: In consideration of the advance of £300 the grantor assigned the goods “to secure payment of the £300, & of the capitalised interest thereon as hereinafter mentioned, being at the rate of 60 per cent. *per annum*,” & agreed to pay £480, being the £300 & £180 for the capitalised interest in certain instalments at certain dates. The deed provided that if the grantor should break any of the covenants set forth, then all money secured by the bill of sale should immediately become payable:—*Held*: the bill of sale was void, because the clause as to capitalised interest, which made the whole interest payable at any time upon a breach of covenant, was not in accordance with the statutory form.—*DAVIS v. BURTON* (1883), 11 Q. B. D. 537; 52 L. J. Q. B. 636; 32 W. R. 123, C. A.

Annotations:—Distd. *Duff v. Valentine*, [1883] W. N. 225. *Consd.* *Re Williams, Ex p. Pearce* (1883), 25 Ch. D. 656. *Expld.* *Melville v. Stringer* (1884), 13 Q. B. D. 392. *Distd.* *Thorpe v. Cregeen* (1885), 55 L. J. Q. B. 80; *Hughes v. Little* (1886), 17 Q. B. D. 204. *Appld.* *Myers v. Elliott* (1886), 16 Q. B. D. 526. *Consd.* *Lamley v. Simmons* (1887), 34 Ch. D. 698. *Folld.* *Roe v. Mutual Loan Fund Assocn.* (1887), 56 L. T. 631. *Refd.* *Goldstrom v. Tallermann* (1886), 17 Q. B. D. 80; *Barr v. Kingsford* (1887), 56 L. T. 861; *Haslewood v. Consolidated Co.* (1890), 60 L. J. Q. B. 12. *Mentd.* *Hammond v. Hocking* (1884), 12 Q. B. D. 291; *Roberts v. Roberts* (1884), 13 Q. B. D. 794; *Consolidated Credit & Mortgage Corpn. v. Gosney* (1885), 54 L. T. 21; *Turner v. Culpan* (1888), 58 L. T. 340; *Weardale Coal & Iron Co. v. Hodson* (1894), 9 R. 844; *Saunders v. White*, [1902] 1 K. B. 472.

327. ——— ———.]—Where £90 was advanced on the security of a bill of sale, which provided for repayment of the money by monthly instalments, & in which the interest was calculated

in a lump sum, the whole to be due & payable upon failure in payment of any instalment:—*Held*: the bill of sale was bad.—*Re JOHNSTONE, Ex p. ABRAMS* (1881), 50 L. T. 184; 1 Morr. 32.

328. ——— ———.]—A bill of sale provided for payment to the grantor of £30, & £5 as interest, by five equal monthly payments:—*Held*: the fact of the amount of interest having been stated as a lump sum did not render the instrument void under 1882 Act.—*THORPE v. CREGEEN* (1885), 55 L. J. Q. B. 80; 33 W. R. 844, D. C.

Annotations:—Dbtd. *Myers v. Elliott* (1886), 16 Q. B. D. 526. *N.F.* *Blankenstein v. Robertson* (1890), 24 Q. B. D. 543.

329. ——— ———.]—A bill of sale given on June 19, 1885, to secure the repayment of a principal sum of £80 & interest at the rate of 27 per cent. *per annum*, provided that the grantor would duly pay to the grantees the principal sum, together with the interest due, by eight equal payments of £13 on Sept. 19, then next, & on the 19th day in every succeeding third month, & that in case of default being made in any one of the instalments, then he would immediately thereafter pay to the grantees the whole amount remaining unpaid upon the security. The sum of £13 was arrived at by lumping together the principal & interest, & making the whole repayable over a certain number of months by instalments amounting in all to £104. The grantor made default in payment of his first instalment. In an action by the grantor against the grantees for entering & seizing the goods under the bill of sale:—*Held*: the bill of sale was void on the ground that it made interest payable on a day certain, irrespective of the period at which the interest would become due according to the ordinary course of events.—*ROE v. MUTUAL LOAN FUND* (1887), 56 L. T. 631; *reversd.* on other grounds 19 Q. B. D. 347, C. A.

Annotations:—Mentd. *Godfrey v. Lazarus* (1887), 1 T. L. R. 101; *Re Deehurst, Ex p. Seaton* (1891), 60 L. J. Q. B. 411; *Re Hobbins, Ex p. Official Receiver* (1899), 6 Mans. 212; *Comitti v. Maher* (1905), 94 L. T. 158; *Re Wilson*, [1916] 1 K. B. 382; *Re Lee, Ex p. Grunwaldt*, [1920] 2 K. B. 200.

330. Sum described as interest & bonus—Amount of each not stated.]—A bill of sale, given to secure repayment of money, provided that the sum advanced, together with for agreed interest & bonus thereon, making in all £130, should be paid by monthly instalments of £10 16s. 8d.:—*Held*: the bill of sale was void as substantially deviating from the statutory form, because the bill of sale not stating how much of the £15 was bonus & how much interest, it was impossible to tell from its terms what was to be paid for interest. *Semble*: even if the whole £15 were to be regarded as interest, the bill of sale was void because it did not show the rate of interest to be paid as required by the statutory form.—*MYERS v. ELLIOTT* (1886), 16 Q. B. D.

it on; that (2) in computing the two years the day of the date of the mtge. should be excluded; (3) the agreement in writing is sufficient if merely recited in the mtge. & the making of the affidavit of *bona fides* by the mtgee. makes the recitals binding upon him.—*NEWLANDS v. HIGGINS* (1907), 7 W. L. R. 59; 1 Alta. L. R. 18.—**CAN.**

h. Interest—Present advance.]—*Bkpey. Act*, 1892, s. 79 (2), does not render null & void a contract in a bill of sale to pay interest on a present advance.—*Re GORE* (1895), 13 N. Z. L. R. 710.—**N.Z.**

k. ——— Omission to state rate of—Waiver of Interest Act.]—A chattel

mtge. provided for the payment of \$125, the principal money, in consecutive monthly instalments of \$5 each, & for payment of \$5 more with each instalment, for interest. The yearly rate to which this was equivalent was not stated, but there was a clause in the mtge. waiving in explicit terms the necessity for stating the yearly rate & waiving also the benefit of Interest Act, 1897:—*Held*: application of the Act could not be waived, & the mtgee. was entitled to interest only at the legal rate.—*DUNN v. MALONE* (1903), 23 C. L. T. 328; 6 O. L. R. 484; 2 O. W. R. 1036.—**CAN.**

From recital of col-

lateral note—Where a chattel mtgo. omits the rate of interest from the recital of the collateral promissory note, the registration is defective because it cannot be said that the whole assurance was registered.—*ROYAL BANK v. WHITLEDON* (1915), 52 S. C. R. 254; 9 W. W. R. 776.—**CAN.**

m. ——— Mortgagee disputing rate of—Oral evidence inadmissible.]—The mtge. provided for payment of interest at 8 per cent. The mtgee. alleged an agreement by the mtgor. to pay 10 per cent.:—*Held*: oral evidence was not admissible to vary the written document.—*COLLINS v. EATON* (1911), 19 W. L. R. 608; 1 W. W. R. 45.—**CAN.**

Sect. 2.—Form of bills of sale by way of security:
Sub-sects. 5 & 6, A. & B.]

526; 55 L. J. Q. B. 233; 54 L. T. 552; 34 W. R. 338; 2 T. L. R. 312, C. A.

Annotations:—*Distd.* Hughes v. Little (1886), 17 Q. B. D. 204; Lumley v. Simmons (1887), 34 Ch. D. 698. **Fold.** Roe v. Mutual Loan Fund Assocn. (1887), 56 L. T. 631; Blankenstein v. Robertson (1890), 24 Q. B. D. 543. **Distd.** Wood, *Ex p.* Woolfe, [1894] 1 Q. B. 605. **Consd.** Burchell v. Thompson, [1920] 2 K. B. 80.

331. — Inconsistent terms of repayment.]—A bill of sale provided that £50, & interest thereon at the rate of £17 10s. for three years, should be payable by thirty-six equal monthly instalments:—*Held*: the rate of interest was not specified, & the bill of sale was not in accordance with the statutory form. —**BLANKENSTEIN v. ROBERTSON** (1890), 24 Q. B. D. 543; 59 L. J. Q. B. 315; 62 L. T. 732; 6 T. L. R. 178, D. C.

Annotations:—*Refd.* Burchell v. Thompson, [1920] 2 K. B. 80. **Mentd.** Bird v. Davey (1890), 59 L. J. Q. B. 473.

332. — Repayment by instalments—Whether interest payable on interest—"Instalment."]—By a bill of sale goods were assigned as security for repayment of £500 & interest thereon at the rate of 60 per cent. *per annum*, & the grantor agreed to "pay the principal sum aforesaid, together with the interest then due, by twelve equal monthly payments of £41 13s. 4d., until the whole of the sum & interest shall be fully paid," & that in default of payment of any "instalment" the grantor would pay interest thereon at the rate aforesaid from the date when such instalment should become due until full payment thereof:—*Held*: interest upon interest was not reserved, the word "instalment" referred only to the monthly payments of principal.—**GOLDSTROM v. TALLERMAN** (1886), 18 Q. B. D. 1; 56 L. J. Q. B. 22; 55 L. T. 866; 35 W. R. 68; 3 T. L. R. 89, C. A.

Annotations:—*Distd.* Real & Personal Advance Co. v. Cleurs (1888), 20 Q. B. D. 301. **Consd.** Haslewood v. Consolidated Credit Co. (1890), 25 Q. B. D. 555; Edwards v. Marston, [1891] 1 Q. B. 225. **Appld.** Monson v. Milner (1892), 8 T. L. R. 447. **Consd.** *Re* Barges, *Ex p.* Hasluck, [1894] 1 Q. B. 444; Linfoot v. Pockett, [1895] 2 Ch. 835; Rosefield v. Provincial Union Bank, [1910] 2 K. B. 781. **Refd.** Weardale Coal & Iron Co. v. Hodson (1894), 63 L. J. Q. B. 391. **Mentd.** Turner v. Culpan (1887), 36 W. R. 278; Topley v. Corsbie (1888), 20 Q. B. D. 350.

333. — "The said debt."]—A bill of sale to secure £200 & interest at 60 per cent. contained the following clause: "& will, so long as the principal sum as aforesaid or any part thereof shall remain unpaid at the times hereinbefore appointed for payment of the instalments of the principal sum, pay interest after the rate aforesaid upon the said debt, or so much as shall for the time being remain unpaid":—*Held*: the word "debt" included the principal sum & interest due thereon, & the covenant amounted to payment of interest on interest, & the bill of sale was void.—**DRESSER v. TOWNSEND** (1886), 81 L. T. Jo. 23.

334. —]—The grantor of a bill of sale covenanted that so long as the principal sum or any part thereof should remain unpaid at the time appointed for payment of the instalments he would pay interest on the said debt, or upon so much as should for the time being remain unpaid: *Held*: the covenant did not operate so as to make interest payable on any overdue sum of interest, as the words "the said debt" referred only to the principal sum or any part thereof remaining unpaid. *Re* CLEAVER, *Ex p.* RAWLINGS (1887), 18 Q. B. D. 489; 56 L. J. Q. B. 197; 56 L. T. 593; 35 W. R. 281; 3 T. L. R. 315, C. A.

Annotation:—**Consd.** Haslewood v. Consolidated Credit Co. (1890), 25 Q. B. D. 555.

335. — Whether interest payable on whole sum—Or on instalment.]—By a bill of sale ptfs. assigned to defts. certain chattels as security for repayment of "£30, with interest thereon at the rate of 60 per cent. *per annum*," & ptfs. agreed to pay "the principal sum aforesaid" by monthly instalments, & on the day fixed for payment of the last instalment to "pay the interest which shall have accrued at the rate aforesaid upon the principal sum, & in case default shall be made in payment of any of the instalments of the principal sum, the same shall, until payment, continue to bear interest at the rate aforesaid":—*Held*: (1) the words "the same" must be taken to refer to the "instalments" & not to the whole "principal sum," & any instalment unpaid on the day fixed bore interest until the day of payment only, & not afterwards; (2) the bill of sale was not, in point of form, such a departure from the statutory form as to render it void.—**HASLEWOOD v. CONSOLIDATED CREDIT CO.** (1890), 25 Q. B. D. 555; 60 L. J. Q. B. 12; 63 L. T. 71; 39 W. R. 51; 6 T. L. R. 315, C. A.; *reversg.* S. C. *sub nom.* CONSOLIDATED CREDIT CO. v. WITHERS, 6 T. L. R. 218, D. C.

Annotation:—**Consd.** Weardale Coal & Iron Co. v. Hodson, [1894] 1 Q. B. 598.

336. — Or on reduced sum.]—Where a bill of sale contains a covenant by the grantor to pay the principal sum by equal yearly payments until the whole of that sum & interest is fully paid, & a further covenant to pay interest quarterly "on the said sum" at a certain rate *per annum*, it must be construed to mean that interest is payable only on the money from time to time due, & is within the statutory form.—**WEARDALE COAL & IRON CO. v. HODSON**, [1894] 1 Q. B. 598; 63 L. J. Q. B. 391; 70 L. T. 632; 42 W. R. 424; 1 Mans. 396; 9 R. 844, C. A.

337. — Whether payments referable to principal or interest.]—The grantor of a bill of sale assigned certain chattels to secure £50 advanced to him by the grantees, & agreed to pay the principal sum & interest then due on Oct. 26, 1887, & the like sum on the same day in every succeeding month thereafter until Sept. 26, 1889, "then the balance & interest as aforesaid is to be paid":—*Held*: (1) the bill of sale was valid as being in accordance with the statutory form; (2) monthly instalments were payable in respect of interest & not principal, & the balance to be paid at the end of two years was the principal, & any interest then due.—**EDWARDS v. MARSTON**, [1891] 1 Q. B. 225; 60 L. J. Q. B. 202; 61 L. T. 97; 39 W. R. 165; 7 T. L. R. 127, C. A.

Annotations:—**Consd.** Rosefield v. Provincial Union Bank, [1910] 2 K. B. 781. **Refd.** Linfoot v. Pockett, [1895] 2 Ch. 835.

338. — Whether payments of interest of equal amount necessary.]—The statutory form does not require that payments of interest should be always of equal amount, & a bill of sale is not void on the ground that the payments of interest will vary in amount from time to time.—**GOLDSTROM v. TALLERMAN**, No. 332, *ante*.

339. — Involving calculation as to number & amount of instalments.]—In a bill of sale, the grantor agreed to pay the principal sum, £500, together with the interest then due "by monthly payments of £30 on the 18th day of every month." Objection to the bill of sale having been raised, on the ground that the amount of the last instalment, being less than £30, was not accurately stated:—*Held*: the objection was groundless, & the provision for payment of instalments followed the statutory form.—**SIMMONS v.**

WOODWARD, [1892] A. C. 100; 61 L. J. Ch. 252; 66 L. T. 534; 40 W. R. 641; 8 T. L. R. 395, H. L.; *reusq.* S. C. *sub nom.* *Re HESELTINE, WOODWARD v. HESELTINE*, [1891] 1 Ch. 464, C. A.

Annotations:—**Consd.** *Rosefield v. Provincial Union Bank*, [1910] 2 K. B. 781. **Refd.** *Linfoot v. Pockett*, [1895] 2 Ch. 835; *Pettit v. Lodge & Harper*, [1908] 1 K. B. 741. **Mentd.** *Heseltine v. Simmons*, [1892] 2 Q. B. 547; *Monson v. Milner* (1892), 8 T. L. R. 447; *De Braam v. Ford*, [1900] 1 Ch. 142.

340. ———. ———.]—The grantor of a bill of sale assigned his household effects as security for £200 & interest at the rate of 6d. in the pound per month, & agreed to pay the principal & interest by weekly payments of £2 6s. 2d. There was no default clause:—*Held*: (1) the bill of sale could not be avoided on the ground that it did not comply with the statutory form, for although the weekly instalment was not an aliquot part of the principal, & the instrument did not indicate the number of instalments necessary to satisfy the amount secured, yet it might be an aliquot part of the principal plus the varying sums for the diminishing interest, as the proper proportion of each weekly instalment was appropriated to the payment off of principal; (2) the statutory form appeared to necessitate such a calculation.—*Re BARGEN, Ex p. HASLUCK*, [1894] 1 Q. B. 444; 69 L. T. 763; 10 T. L. R. 55; 10 Morr. 301; 10 R. 74; *sub nom.* *Re VON BARGIN, Ex p. HASLUCK*, 63 L. J. Q. B. 209.

Annotations:—**Consd.** *Linfoot v. Pockett*, [1895] 2 Ch. 835; *Attia v. Finch* (1901), 91 L. T. 70.

341. ———. ———.]—By a bill of sale to secure a debt of £100 with interest at 5 per cent. per month the mtgor. agreed to pay to the mtgee. the principal sum aforesaid with the interest then due by monthly instalments of £6 "on account of interest & principal":—*Held*: the stipulation providing for repayment by instalments made up of principal & interest together was not such a departure from the statutory form as to render the bill of sale void.—*LINFOOT v. POCKETT*, [1895] 2 Ch. 835; 64 L. J. Ch. 752; 73 L. T. 197; 44 W. R. 66; 11 T. L. R. 590; 39 Sol. Jo. 721; 2 Mans. 482; 12 R. 501, C. A.

Annotations:—**Consd.** *Attia v. Finch* (1901), 91 L. T. 70; *Rosefield v. Provincial Union Bank*, [1910] 2 K. B. 781. **Mentd.** *Smith v. Whiteman*, [1909] 2 K. B. 437; *Lester v. Hickling*, [1916] 2 K. B. 302.

342. ———. ———.]—A bill of sale assigned certain chattels "by way of security for payment of £50." The grantor further agreed that he would pay "the principal sum with interest thereon after the rate of 5 per cent. *per annum* by the following instalments, *viz.*, £10 on Dec. 25, 1903, & the like sum of £10 on Mar. 25, June 24, & Sept. 29, & Dec. 25 in each year succeeding, until the whole amount be duly paid":—*Held* the bill of sale was not in accordance with the statutory form.—*ATTIA v. FINCH* (1901), 91 L. T. 70, D. C.

343. ———. ———.]—By a bill of sale goods were assigned to the grantee to secure an advance of £30 made by him to the grantor, with interest thereon at the rate of 10d. in the pound per month, & the grantor further agreed & declared that he would pay to the grantee the principal sum aforesaid, together with the interest then due, by monthly payments of £2 on the 9th day of every month succeeding the date of the bill of sale, the first payment to be made on Nov. 9 then next, & that, in default of payment of any instalment of the principal sum, he would pay

interest on such instalment at the rate aforesaid from the date when the same should become due until payment thereof. The real bargain between the parties was that the payment of both the principal & the interest should be made by monthly payments of £2:—*Held*: the bill of sale expressed the real bargain between the parties, & it was not void as not being in accordance with the statutory form.—*ROSEFIELD v. PROVINCIAL UNION BANK*, [1910] 2 K. B. 781; 79 L. J. K. B. 1150; 103 L. T. 378; 17 Mans. 319, C. A.

344. ———. **Terms calculated to deceive.**—The grantor of a bill of sale covenanted to pay £350, including interest, at the rate of 15 per cent. *per annum*, then due, by equal weekly payments of £5, & so long as any of the principal sum should remain unpaid, to pay interest thereon at the aforesaid rate on the 4th day of each month after the principal sum should become due:—*Held*: the bill was not in the statutory form, & its provisions were calculated to deceive.—*CURTIS v. NATIONAL BANK OF WALES* (1889), 5 T. L. R. 338, C. A.

Whether provisions in nature of penalty.—*See* MORTGAGE.

SUB-SECT. 6.—TERMS FOR MAINTENANCE OR DEFEASANCE OF SECURITY.

A. In General.

345. "Necessary for maintaining security."—The expression "necessary for maintaining the security" means, not the maintenance of a sufficient security less than that agreed to be given, but the maintenance of the security created by the bill of sale, & the security is maintained only when the subject-matter of the charge, & the grantee's title to it, & preserved in as good plight & condition as at the date of the bill of sale. If a stipulation is not necessary for the maintenance of the security, it cannot be made so by the agreement of the parties.—*FURBER v. COBB* (1887), 18 Q. B. D. 494; 56 L. J. Q. B. 273; 56 L. T. 689; 35 W. R. 398; 3 T. L. R. 456, C. A.; *affg.*, on another point, (1886), 17 Q. B. D. 459.

Annotations:—**Consd.** *Watson v. Strickland* (1887), 56 L. J. Q. B. 594; *Topley v. Corsbie* (1888), 20 Q. B. D. 350; *Turner v. Culpan* (1888), 58 L. T. 340; *Carpenter v. Deen* (1889), 23 Q. B. D. 566. **Distd.** *Re Paxton, Ex p. Pope* (1889), 60 L. T. 428. **Consd.** *Seed v. Bradley*, [1894] 1 Q. B. 319. **Refd.** *Blaiberg v. Beckett* (1886), 3 T. L. R. 17; *Bourne v. Wall* (1891), 64 L. T. 530; *Wear-dale Coal & Iron Co. v. Hodson*, [1894] 1 Q. B. 598.

346. Insertion of wider terms than necessary—No power of seizure other than statutory powers.—The insertion in a bill of sale of terms agreed to by the parties for the maintenance of the security, but which are not necessary for maintaining the security within 1882 Act, s. 7, does render the bill of sale void, provided power is not given to the grantee to seize the goods for default in the performance of any covenant or agreement not necessary for maintaining the security.—*TOPILEY v. CORSBIE* (1888), 20 Q. B. D. 350; 57 L. J. Q. B. 271; 58 L. T. 342; 36 W. R. 352, D. C.

Annotation:—**Folld.** *Harrison v. Shallis* (1909), 25 T. L. R. 661.

Effect of proviso limiting power of seizure.—*See* Nos. 369–372,

B. Power of Seizure.

See 1882 Act, s. 7.

347. On default in payment—Of sum secured—& payments for insurance.—By a bill of sale,

PART V. SECT. 2, SUB-SECT. 6.—A.

n. Covenant for repayment—Inconsistent with terms of agreement—Illiterate grantor.—*CHRISTISON v. WARREN*, [1903] S. R. Q. 186.—**AUS.**

Sect. 2.—Form of bills of sale by way of security:
Sub-sect. 6, B.]

the mtgor. agreed to insure the property assigned in offices in London or Westminster, to be approved by the mtgee., in default whereof it should be lawful for the mtgee. to insure & add the premiums paid by him to the security. The bill of sale empowered the mtgee., on breach of any of the mtgor.'s covenants, to seize, etc., & also provided that the property should not be liable to seizure for any cause other than those specified in 1882 Act, s. 7:—*Held*: the bill of sale was not void as failing to comply with the statutory form.—*FURBER v. ABREY* (1883), 1 Cab. & El. 186.

348. ————.]—A bill of sale contained a stipulation that the grantor should insure the chattels, & pay the premiums, & that in case of default the grantee might keep up the insurance, & that all money expended by the grantee for that purpose should be repaid on demand, & should be a charge on the chattels. The bill conferred a power of seizure, following the language of 1882 Act, s. 7 (1), & it concluded with a proviso that the chattels should not be liable to seizure for any cause other than those specified in s. 7:—*Held*: the power of seizure was confined to default in payment of the principal & interest, & the bill complied with the statutory form.—*BRIGGS v. PIKE* (1892), 61 L. J. Q. B. 418; 66 T. 637, C. A.

349. — & payments for rent, rates, & taxes.]—By a bill of sale, given by way of security, it was provided that, if the mtgor. did not pay the rent, rates, taxes, & outgoings of the premises on which the goods assigned might be within seven days after the same respectively became payable, the mtgees. might pay such rent, rates, taxes, & outgoings, & all sums of money so paid by the mtgees., with interest thereon, should be charged on the goods assigned, & be recoverable in the same manner as the principal moneys & interest secured by the bill of sale. The bill of sale contained a proviso that the goods should not be liable to seizure or to be taken possession of by the mtgees. for any cause other than those specified in 1882 Act, s. 7:—*Held*: such bill of sale was void as not being in accordance with the statutory form.—*BIANCHI v. OFFORD* (1886), 17 Q. B. D. 484; 55 L. J. Q. B. 486; 2 T. L. R. 875.

Annotations:—*Folld.* Real & Personal Advance Co. v. Clears (1888), 20 Q. B. D. 304. *Consd.* Topley v. Corsbie (1888), 20 Q. B. D. 350. *Refd.* Turner v. Culpan (1888), 58 L. T. 340.

350. ————.]—By a bill of sale given by way of security, it was provided that, if the mtgor. did not pay the rent, rates, taxes, & outgoings of the premises on which the goods assigned might be within seven days after the same should respectively become payable, the mtgees. might pay such rent, rates, taxes, & outgoings, & all sums of money so paid by the mtgees., together with interest thereon, should be charged on the goods assigned, & should be recoverable in the same manner as the principal moneys & interest; & it was further provided that the goods assigned should be liable to seizure for any of the causes specified in 1882 Act, s. 7, but should not be liable to seizure for any other cause:—*Held*: such bill of sale was void, on the ground that it contained terms importing a power of seizure in contravention of s. 7.—*REAL & PERSONAL ADVANCE CO. v. CLEARS* (1888), 20 Q. B. D. 304; 57 L. J. Q. B. 164; 58 L. T. 610; 36 W. R. 256; 4 T. L. R. 211, C. A.

Annotations:—*Consd.* Topley v. Corsbie (1888), 20 Q. B. D. 350. *Distd.* Briggs v. Pike (1892), 61 L. J. Q. B. 418. *Consd.* Harrison v. Shallis (1909), 25 T. L. R. 664. *Refd.*

Macey v. Gilbert (1888), 57 L. J. Q. B. 461; *Turner v. Culpan* (1888), 58 L. T. 340.

351. ———— & all expenses.]—A bill of sale provided that the grantor will regularly pay all rates & taxes & water rate & all outgoings whatsoever in respect of the house & premises, in default of which the grantee shall pay same & charge the amount to the grantor & all expenses which he may be put to, & which sums shall be added to & form part of this security. The bill of sale also provided that the goods should not be seized for any other cause than those allowed by 1882 Act, s. 7:—*Held*: the amount originally secured was no longer the sum secured, but that amount, or any balance left unpaid, together with any expenses incurred, & the bill of sale was void.—*MACEY v. GILBERT* (1888), 57 L. J. Q. B. 461; 4 T. L. R. 450, D. C.

See, also, Nos. 391–393, 401–403, *post*.

352. On bankruptcy of grantor—Whether power wider than statutory power.]—A bill of sale empowered the grantee to seize the property in case the grantor “shall do or suffer any matter or thing whereby he shall become a bkpt.”:—*Held*: that event was in substance equivalent to the event “if the grantor shall become bkpt.” in which, by 1882 Act, s. 7, a grantee was permitted to seize under a bill of sale, & the bill of sale was not void.—*Re MUNDAY, Ex p. ALLAM* (1884), 14 Q. B. D. 43; 33 W. R. 231, D. C.

Annotations:—*Distd.* Gilroy v. Bowey (1888), 59 L. T. 223. *Mentd.* *Re Smith, Ex p. Tarbuck* (1894), 72 L. T. 59; *Re Rouard, Ex p. Trustee* (1915), 85 L. J. K. B. 393.

353. ————.]—The grantor of a bill of sale agreed therein with the grantee that in case the borrower should at any time enter into liquidation for the benefit of, or compound with, his creditors, the principal & interest should become immediately payable without the necessity for any demand of payment, provided that the chattels assigned should not be liable to seizure for any cause other than those specified in 1882 Act, s. 7:—*Held*: the bill of sale was not in accordance with the statutory form, & was void.—*BARR v. KINGSFORD* (1887), 56 L. T. 861; 3 T. L. R. 524, D. C.

Annotation:—*Distd.* Cartwright v. Regan, [1895] 1 Q. B. 900.

354. ————.]—A bill of sale contained a proviso giving power to the grantees to seize the chattels granted by the instrument if the “mtgors. should take the benefit of any Bkpcy. Act.” Bkpcy. Act, 1883 (c. 52), enabled a person not only to become a bkpt. but to effect a composition with his creditors:—*Held*: the bill of sale was bad, as it conferred upon the grantees the power to seize on the grantor taking benefit of any Bkpcy. Act, which was a larger power than the statutory power to seize conferred by 1882 Act, which was limited to the event of a grantor becoming a bkpt.—*GILROY v. BOWEY* (1888), 59 L. T. 223, D. C.

355. ————.]—By a bill of sale the grantor covenanted that he would not do anything whereby he might become a bkpt. or have execution levied, but would preserve & keep the chattels safe as long as the money was unpaid, provided, that if the grantor should become bkpt., then the chattels should be liable to seizure, or to be taken in possession, provided that the chattels & things should be held & possessed without any let or hindrance from the grantee until same should be taken possession of by the grantee in consequence of the breach of any of the covenants, & that same should not be liable to seizure, or be taken possession of by the grantee for any other cause than those specified in 1882 Act, s. 7:—*Held*:

the covenant not to do anything whereby the grantor might become a bkpt., was necessary for maintaining the security.—*Re PAXTON, Ex p. POPE* (1889), 60 L. T. 428, D. C.

Annotation:—Expld. Re Bullock, Ex p. Ward, [1899] 2 Q. B. 517.

356. On distress.]—By a bill of sale the grantor covenanted that he would not suffer a distress, provided, that if the grantor should suffer the goods to be distrained, then the chattels should be liable to seizure, or to be taken in possession, provided that the chattels & things should be held & possessed without any let or hindrance from the grantee until same should be taken possession of by the grantee in consequence of the breach of any of the covenants, & that same should not be liable to seizure, or be taken possession of by the grantee for any other cause than those specified in 1882 Act, s. 7:—*Held*: the covenant not to suffer a distress to be levied was necessary for maintaining the security.—*Re PAXTON, Ex p. POPE* (1889), 60 L. T. 428, D. C.

Annotation:—Expld. Re Bullock, Ex p. Ward, [1899] 2 Q. B. 517.

357. On fraudulent removal—Or on deterioration & failure to replace.] A bill of sale, given as security for money, assigned to the grantees the chattels specifically described in a schedule, & which were stated to be then in a certain house. The grantor covenanted that he would not remove the chattels from the premises where they then were, without the previous consent in writing of the grantees, & that he would not permit the chattels, or any part thereof, to be destroyed or injured, or to deteriorate in a greater degree than they would deteriorate by reasonable use & wear thereof, & would, whenever any of the chattels were destroyed, injured, or deteriorated, forthwith replace, repair, & make good the same; & it was agreed that, in case default should be made by the grantor in the performance of any of the covenants, all of which covenants were thereby declared & agreed to be necessary for the maintenance of the security thereby created, it should be lawful for the grantees after any such default without notice, immediately or whenever they should think fit, to seize & take possession of the chattels, & after the expiration of five clear days, to sell same. At the end of the deed was a proviso that the chattels should not be liable to seizure or to be taken possession of by the grantees for any cause other than those specified in 1882 Act, s. 7:—*Held*: (1) the covenant to replace & repair articles destroyed, injured, or deteriorated, was necessary for maintaining the security, & the bill of sale was not void because power was given to seize on a breach of that covenant; (2) the covenant not to remove the chattels without the consent of the grantees, was necessary for maintaining the security.—*FURBER v. COBB* (1887), 18 Q. B. D. 494; 56 L. J. Q. B. 273; 56 L. T. 689; 35 W. R. 398; 3 T. L. R. 456, C. A.; *affg.*, on another point (1886), 17 Q. B. D. 459.

Annotations:—Consd. Watson v. Strickland (1887), 56 L. J. Q. B. 594; *Topley v. Corsbie* (1888), 20 Q. B. D. 350; *Turner v. Culpan* (1888), 58 L. T. 340; *Carpenter v. Deen* (1889), 23 Q. B. D. 566. *Distd. Re Paxton, Ex p. Pope* (1889), 60 L. T. 428. *Consd. Seed v. Bradley*, [1894] 1 Q. B. 319. *Refd. Blalberg v. Beckett* (1886), 3 T. L. R. 17; *Bourne v. Wall* (1891), 64 L. T. 530; *Wear-dale Coal & Iron Co. v. Hodson*, [1894] 1 Q. B. 598.

358. ———.]—By a bill of sale the grantor covenanted that he would not, without consent,

remove, or suffer to be removed, any of the chattels, or do or suffer any act or thing whereby they might be prejudicially affected, provided, that if the grantor should fraudulently remove the chattels or suffer them to be removed, then the chattels should be liable to seizure, or to be taken in possession, provided that the chattels & things should be held & possessed without any let or hindrance from the grantee until same should be taken possession of by the grantee in consequence of the breach of any of the covenants, & that same should not be liable to seizure, or be taken possession of by the grantee for any other cause than those specified in 1882 Act, s. 7:—*Held*: the covenant not to remove the goods, or suffer them to be removed, or do or suffer any act whereby they might be prejudicially affected was necessary for maintaining the security.—*Re PAXTON, Ex p. POPE* (1889), 60 L. T. 428, D. C.

Annotation:—Expld. Re Bullock, Ex p. Ward, [1899] 2 Q. B. 517.

— **No express power of seizure.]**—See Nos. 397 400, *post*.

359. On non-production of receipts—After demand in writing.]—A bill of sale provided that if the mtgor. should not without reasonable excuse upon demand in writing produce to the mtgee. the last receipts of the mtgor. for rent, rates, & taxes, or the policy of insurance, or the receipt for the current premiums thereon, it should be lawful for the mtgee. to enter & seize the chattels. The bill of sale also provided that the chattels should not be liable to seizure or to be taken possession of by the mtgee. for any causes other than those specified in 1882 Act, s. 7:—*Held*: the bill of sale was good. *DUFF v. VALENTINE* (1883), Bitt. Rep. in Ch. 115.

360. ———.]—By a bill of sale the mtgor. agreed on demand in writing to produce & show to the mtgee. the receipts for the rent, rates, & taxes. The bill of sale empowered the mtgee., on breach of any of the mtgor.'s covenants, to seize, & also provided that the property should not be liable to seizure for any cause other than those specified in 1882 Act, s. 7:—*Held*: the bill of sale was not void, as failing to comply with the statutory form.—*FURBER v. ABBEY* (1883), 1 Cab. & El. 186.

361. ———.]—A bill of sale, given as security for money, assigned to the grantees the chattels specifically described in a schedule, & which were stated to be then in a certain house. The grantor covenanted that he would, on demand in writing, produce to the grantees his last receipt or receipts for the rents, rates, & taxes in respect of the premises where the chattels then were; & it was agreed that, in case default should be made by the grantor in the performance of any of the covenants, all of which covenants were thereby declared & agreed to be necessary for the maintenance of the security thereby created, it should be lawful for the grantees after any such default without notice, immediately or whenever they should think fit, to seize & take possession of the chattels, & after the expiration of five clear days, to sell same. At the end of the deed was a proviso that the chattels should not be liable to seizure or to be taken possession of by the grantees for any cause other than those specified in 1882 Act, s. 7. *Semble*: the unqualified covenant to

Held: this proviso only prohibited the sale of goods other than in the ordinary course of business.—*DEBRIK v. ASHDOWN* (1887), 15 S. C. R. 227.—**CAN.**

PART V. SECT. 2, SUB-SECT. 6. —B.

358 i. On fraudulent removal—Mort-gage of stock-in-trade—What goods ex-cepted.]—In a chattel mtge. of the

stock-in-trade & business effects of a trader there was a proviso to the effect that if the mtgor. should attempt to sell or dispose of the said goods the mtgee. might take possession of the same as in case of default of payment:

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produce the receipts for rents, rates, & taxes on demand was necessary for maintaining the security.—*FURBER v. COBB* (1887), 18 Q. B. D. 494; 56 L. J. Q. B. 273; 56 L. T. 689; 35 W. R. 398; 3 T. L. R. 456, C. A.; *affg.*, on another point (1886), 17 Q. B. D. 459.

Annotations:—**Consd.** *Watson v. Strickland* (1887), 56 L. J. Q. B. 594; *Topley v. Corsbie* (1888), 20 Q. B. D. 350; *Turner v. Culpan* (1888), 58 L. T. 340; *Carpenter v. Deen* (1889), 23 Q. B. D. 566. **Distd.** *Re Paxton, Ex p. Pope* (1889), 60 L. T. 428. **Consd.** *Seed v. Bradley*, [1894] 1 Q. B. 319. **Refd.** *Blaiberg v. Beckett* (1886), 3 T. L. R. 17; *Bourne v. Wall* (1891), 64 L. T. 530; *Weardale Coal & Iron Co. v. Hodson*, [1894] 1 Q. B. 598.

362. — After verbal demand.]—By a bill of sale the grantor covenanted that she would deliver to the grantee the receipts for rent, rates, & taxes, in respect of the premises on which the goods assigned might be, when demanded in writing or otherwise, & it was provided that the chattels assigned should not be liable to seizure for any other cause than those specified in 1882 Act:—**Held:** the bill of sale could not be supported, inasmuch as it enabled the grantee to seize the goods upon a failure by the grantor to produce the receipts for rent, rates, & taxes, after a verbal demand.—*DAVIS v. BURTON* (1883), 11 Q. B. D. 537; 52 L. J. Q. B. 636; 32 W. R. 423, C. A.

Annotations:—**Distd.** *Duff v. Valentine*, [1883] W. N. 225. **Fold.** *Re Williams, Ex p. Pearce* (1883), 25 Ch. D. 656. **Distd.** *Hughes v. Little* (1886), 17 Q. B. D. 204. **Apld.** *Myers v. Elliott* (1886), 16 Q. B. D. 526; *Roe v. Mutual Loan Fund Assn.* (1887), 56 L. T. 631. **Refd.** *Barr v. Kingsford* (1887), 56 L. T. 861; *Lumley v. Simmons* (1887), 34 Ch. D. 698; *Turner v. Culpan* (1888), 58 L. T. 340. **Mentd.** *Hammond v. Hocking* (1884), 12 Q. B. D. 291; *Melville v. Stringer* (1884), 13 Q. B. D. 392; *Roberts v. Roberts* (1884), 13 Q. B. D. 791; *Thorpe v. Cregeen* (1885), 55 L. J. Q. B. 80; *Consolidated Credit & Mortgage Corp. v. Gorney* (1886), 51 L. T. 21; *Goldstrom v. Tallermann* (1886), 17 Q. B. D. 80; *Haslewood v. Consolidated Co.* (1890), 60 L. J. Q. B. 12; *Weardale Coal & Iron Co. v. Hodson* (1894), 9 R. 844; *Saunders v. White*, [1902] 1 K. B. 472.

363. — — —.]—The grantor of a bill of sale agreed that during the continuance of the security he would, on demand, produce his last receipts for rent, rates, & taxes, & would keep the assigned chattels insured, & on demand, produce to the grantee the current receipt for such insurance, & that, in case the borrower should at any time make default in performance of any of the covenants, the principal & interest should become immediately payable without the necessity for any demand of payment, provided that the chattels assigned should not be liable to seizure for any cause other than those specified in 1882 Act, s. 7:—**Held:** the bill of sale was not in accordance with the statutory form.—*BARR v. KINGSFORD* (1887), 56 L. T. 861; 3 T. L. R. 524, D. C.

Annotation:—**Distd.** *Cartwright v. Regan*, [1895] 1 Q. B. 900.

364. — — —.]—By a bill of sale the grantor covenanted to produce “when called upon” the last receipt for the rent, rates, & taxes of the premises where the chattels were, & the deed provided that the chattels thereby assigned should not be liable to seizure or to be taken possession of by the grantee for any cause other than those specified in 1882 Act, s. 7, the sect. being set out, & then followed a further proviso that if the chattels thereby assigned should be seized or taken possession of by the grantee “in consequence of the

breach of any of the covenants therein contained,” he should be at liberty to sell same. The trustee in bkpcy. of the grantor contended that the bill of sale was void because the second proviso enabled the grantor to seize on non-production of receipts for rent, etc., on an oral demand, whereas the Act required the demand to be made in writing:—**Held:** the deed considered as a whole substantially complied with the Act, & was valid.—*Re BULLOCK, Ex p. WARD*, [1899] 2 Q. B. 517; 68 L. J. Q. B. 953; 81 L. T. 268; 48 W. R. 46; 43 Sol. Jo. 645; 6 Mans. 367.

— **No express power of seizure.]**—*See* Nos. 394–396, *post*.

365. On grantor allowing himself to be sued for just debts.]—By a bill of sale the mtgor. agreed not to permit or suffer himself to be sued for any debt or debts justly due or owing. The bill of sale empowered the mtgee., on breach of any of the mtgor.’s covenants, to seize, & also provided that the property should not be liable to seizure for any cause other than those specified in 1882 Act, s. 7:—**Held:** the bill was not void as failing to comply with the statutory form.—*FURBER v. ABREY* (1883), 1 Cab. & El. 186.

366. Right to break open doors & windows.]—Where a bill of sale of furniture empowered the grantee to enter the grantor’s house & seize the furniture, as scheduled, in case of default, & the grantee broke into the premises in his absence:—**Held:** a bill of sale could only give the right of entering upon the premises in a lawful manner & not otherwise.—*WINNALL v. SIMMONS* (1886), 2 T. L. R. 434.

367. — — — Express power.]—An express power was given in a bill of sale to seize the chattels for any of the causes specified in 1882 Act, s. 7, but for no other cause, & for that purpose to break open the doors & windows of the premises where the chattels might be:—**Held:** the bill of sale was not made void by s. 9.—*Re MORRITT, Ex p. OFFICIAL RECEIVER* (1886), 18 Q. B. D. 222; 56 L. J. Q. B. 139; 56 L. T. 42; 35 W. R. 277; 3 T. L. R. 266, C. A.

Annotations:—**Mentd.** *Calvert v. Thomas* (1887), 19 Q. B. D. 204; *Re Cleaver, Ex p. Rawlings* (1887), 18 Q. B. D. 489; *Lumley v. Simmons* (1887), 34 Ch. D. 698; *Watkins v. Evans* (1887), 18 Q. B. D. 386; *Deverges v. Sandeman, Clark*, [1902] 1 Ch. 579; *The Ningehow*, [1916] P. 221.

368. — — —.]—A bill of sale of personal chattels contained a power, in case the grantee became entitled to seize the chattels, to break open doors & windows in order to obtain admission:—**Held:** the bill was not void, as failing to comply with the statutory form.—*LUMLEY v. SIMMONS* (1887), 34 Ch. D. 698; 56 L. J. Ch. 329; 56 L. T. 134; 35 W. R. 422, C. A.

Annotation:—**Mentd.** *Re Wood, Ex p. Woolfe* [1894] 1 Q. B. 605.

369. Proviso limiting power—Effect of inserting—Whether invalid bill cured.]—By a bill of sale, the grantor, in consideration of £30 cash & £10 by way of bonus, assigned certain chattels by way of security for payment of £10 & interest thereon at 5 per cent. The deed contained the following covenants & provisions; (1) to pay the £10 forthwith; (2) to produce receipts for rents, rates, & taxes forthwith; (3) not to do anything whereby he should become bkpt.; (4) power to the grantee to seize goods, & that the grantor would not remove same; (5) power to seize if

367 i. Right to break open doors & windows—Express power.]—A licence contained in a bill of sale to break & enter the grantor’s premises & to seize the goods on default in payment, is an essential part of the document *quid* bill of sale, & falls with it, if the bill of

sale becomes void.—*BLACK v. ZEVEN-BOOM* (1880), 6 V. L. R. 473.—**AUS.**

367 ii. & violence.]—A clause in a bill of sale gave leave to the holder on default in payment by the giver thereof, to enter & if necessary

break into the latter’s premises & take possession of the goods:—**Held:** the holder was entitled to enter with force & violence to recover the goods, provided no more violence was used than was necessary.—*ABBOTT v. NEW SOUTH WALES MONT DE PIETE CO.*

execution should be or should have been levied; (6) to relinquish & retake possession; (7) to pay 5 per cent. on all money due by way of commission for expenses of taking possession & other expenses. The deed contained a proviso incorporating 1882 Act, s. 7:—*Held*: the instrument was void for not being in accordance with the statutory form, & the invalidity of the provisions could not be cured by the proviso incorporating s. 7. —*Re WILLIAMS, Ex p. PEARCE* (1883), 25 Ch. D. 656; 53 L. J. Ch. 500; 49 L. T. 475; 32 W. R. 187.

Annotations:—*Mentd.* Melville v. Stringer (1884), 13 Q. B. D. 392; Hughes v. Little (1886), 17 Q. B. D. 204.

370. ————*Seemle*: if a bill of sale contains a power to seize in an event not authorised by 1882 Act, the insertion of a proviso that the goods shall not be liable to seizure for any cause other than those specified in s. 7 of the Act will not render the deed valid.—*FURBER v. COBB* (1887), 18 Q. B. D. 494; 56 L. J. Q. B. 273; 56 L. T. 689; 35 W. R. 398; 3 T. L. R. 456, C. A.; *affg.*, on another point (1886), 17 Q. B. D. 459.

Annotations:—*Refd.* Topley v. Corsbie (1888), 20 Q. B. D. 350; Turner v. Culpan (1888), 36 W. R. 278. *Mentd.* Blaiberg v. Beckett (1886), 3 T. L. R. 17; Watson v. Strickland (1887), 56 L. J. Q. B. 594; Carpenter v. Deen (1889), 23 Q. B. D. 566; *Re Paxton, Ex p. Pope* (1889), 60 L. T. 428; Bourne v. Wall (1891), 64 L. T. 530; Seed v. Bradley, [1894] 1 Q. B. 319; Weardale Coal & Iron Co. v. Hodson, [1894] 1 Q. B. 598.

371. ————*—A bill of sale provided that if the grantor should make default in payment, or in performance of any covenant necessary for maintaining the security, or should become bkpt., or suffer the goods to be distrained, or should fraudulently remove or suffer them to be removed, or should not without reasonable excuse produce receipts, or if execution should have been levied, then in any one of such cases the chattels should be liable to seizure, or to be taken in possession, provided that the chattels & things should be held & possessed without any let or hindrance from the grantee until same should be taken possession of by the grantee in consequence of the breach of any of the covenants, & that same should not be liable to seizure, or be taken possession of by the grantee for any other cause than those specified in 1882 Act, s. 7: Held: the second proviso did not authorise a seizure for matters other than those contained in s. 7 of the Act, & the bill of sale was not void.—Re PAXTON, Ex p. POPE* (1889), 60 L. T. 428, D. C.

Annotation:—*Expld.* *Re Bullock, Ex p. Ward*, [1899] 2 Q. B. 517.

372. ————*Effect of omitting—Whether bill void.*—*Seemle*: a bill of sale would be void which omitted the proviso referring to 1882 Act, s. 7, although the omission would not alter the legal effect of the document in the slightest degree or mislead any body (LORD MACNAGHTEN).—*THOMAS v. KELLY* (1888), 13 App. Cas. 506; 58 L. J. Q. B. 66; 60 L. T. 114; 37 W. R. 353; 4 T. L. R. 683, H. L.; *affg.* S. C. *sub nom.* KELLY & Co. v. KELLOND, 20 Q. B. D. 569, C. A.

Annotations:—*Refd.* *Re Heseltine, Woodward v. Heseltine*, [1891] 1 Ch. 464. *Mentd.* Bouchette v. Attenborough (1887), 3 T. L. R. 813; Tailby v. Official Receiver (1888), 13 App. Cas. 523; Hadden, Best v. Oppenheim (1889), 60 L. T. 962; Parsons v. Brand, Coulson v. Dickson (1890), 25 Q. B. D. 110; Bird v. Davey, [1891] 1 Q. B. 29; Heseltine v. Simmons, [1892] 2 Q. B. 547; *Re Tweedale, Ex p. Tweedale*, [1892] 2 Q. B. 216; Seed v.

Bradley, [1894] 1 Q. B. 319; Peace v. Brookes, [1895] 2 Q. B. 451; Sims v. Trollope (1896), 75 L. T. 351; De Braam v. Ford, [1900] 1 Ch. 142; Lysons v. Knowles, Stuart v. Nixon & Bruce, [1901] A. C. 79; Saunders v. White, [1902] 1 K. B. 472; Coates v. Moore, [1903] 2 K. B. 140; Mourmand v. Le Clair (1903), 51 W. R. 589; Ball v. Hunt, [1912] A. C. 496; Ryan v. Oceanic Steam Navigation Co., O'Connell v. Same, Sealon v. Same, O'Brien v. Same, [1914] 3 K. B. 731; Brandon Hill v. Lane, [1915] 1 K. B. 250; Burchell v. Thompson, [1920] 2 K. B. 80.

Whether seizure justified.—*See* Part VII., Sect. 2, sub-sect. 2, A, *post*.

C. Power of Sale.

373. Before expiration of five clear days.—A bill of sale, given by way of security for payment of money, contained an agreement by the grantor to pay the sum advanced & interest upon demand made in writing, & gave power to the grantee to seize & sell the goods on default in payment on demand in writing:—*Held*: the bill of sale was void, on the ground that it gave power to sell on default in payment on demand without waiting for five clear days as required by 1882 Act, s. 13. —*HETHERINGTON v. GROOME* (1884), 13 Q. B. D. 789; 53 L. J. Q. B. 576; 51 L. T. 412; 33 W. R. 103, C. A.

Annotations:—*Mentd.* Bishop v. Beale (1884), 1 T. L. R. 140; Clemson v. Townsend (1884), Cab. & El. 418; Sibley v. Higgs (1885), 15 Q. B. D. 619; *Re Barber, Ex p. Stanford* (1886), 17 Q. B. D. 259; Hughes v. Little (1886), 18 Q. B. D. 32; Mackay v. Merritt (1886), 34 W. R. 433; Lumley v. Simmons (1887), 34 Ch. D. 698; Furnivall v. Hudson (1892), 68 L. T. 378; De Braam v. Ford (1899), 81 L. T. 568.

374. At valuation.—A power given to the grantee of a bill of sale to sell the goods "or to have them valued, & to purchase them at such valuation, & receive the money to arise from such sale or valuation" is not a term for the maintenance of the security & a bill of sale which contains a clause giving such power is void.—*LYON v. MORRIS* (1887), 19 Q. B. D. 139; 56 L. J. Q. B. 378; 56 L. T. 915, D. C.; *affd.*, without touching this point, 19 Q. B. D. 146, C. A.

Annotations:—*Consd.* Bourne v. Wall (1891), 64 L. T. 530. *Refd.* Peace v. Brookes, [1895] 2 Q. B. 451. *Mentd.* Field v. Rivington (1889), 5 T. L. R. 612; *Re Tarn*, [1893] 2 Ch. 280; Van Laun v. Baring, [1903] 2 K. B. 277.

375. By private treaty or auction—On or off premises.—A bill of sale contained a clause giving the grantee "power to sell the goods by private treaty or public auction on or off the premises":—*Held*: the clause was a clause necessary for the maintenance of the security, & did not vitiate the bill of sale.—*BOURNE v. WALL* (1891), 64 L. T. 530; 39 W. R. 510; 7 T. L. R. 428, D. C.

376. Power given by Conveyancing & Law of Property Act, 1881 (c. 41)—Whether applicable.—A bill of sale given to secure payment of money provided that the mtgees. or their agents might at any time, for any of the causes specified in 1882 Act, s. 7, without notice, take possession of the assigned chattels, & it was also provided that the power of sale conferred upon the mtgees. by Conveyancing & Law of Property Act, 1881, should be exercisable by them as if s. 20 thereof were not enacted:—*Held*: the bill of sale was in accordance with the statutory form on the grounds: (1) (COTTON & LINDLEY, L.J.J.) the power to seize the chattels given by the bill of sale, being a provision for the maintenance of the security, was valid,

(1904), 4 S. R. N. S. W. 336.—**AUS.**

o. — *Agent of grantee Not dis-authority.*—By a bill of sale of furniture in a dwelling-house power was given to the grantees & their agent or agents, in a certain event, at any

time or times thereafter to enter in & upon the dwelling-house & seize & sell the furniture. The event having happened, the grantee's agent came to the dwelling-house & demanded admittance by the hall door, & this having been refused, he effected an entrance by opening a window, & then made a

seizure:—*Held*: his entry was illegal & not justified by the power of entry contained in the bill of sale, the agent not having disclosed his authority or stated the purpose for which he demanded admittance.—*ARKINS v.* (1866), 15 L. T. 84.—**IR.**

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& the bill of sale conferred upon the mtgees. a power of sale upon taking possession of the chattels, subject to 1882 Act, ss. 7 & 13, & the power of sale given by the above Act of 1881 did not apply, so that the provision in the bill of sale which erroneously assumed that that power of sale did apply, & excluded the operation of s. 20 of that Act, was superfluous, & where a stipulation was for the maintenance of a security, the mere fact that provisions were inserted which were invalid, but were not contrary to any express provision of 1882 Act, did not make the bill of sale void; (2) (LORD ESHER, M.R., & LOPES, L.J.) the effect of 1882 Act was to exclude the application to bills of sale under it of the powers of sale given to mtgees. by the above Act of 1881, but the importation into the bill of sale of those powers of sale unfettered by s. 20 of that Act, did not alter the legal effect of the statutory form of bill of sale, inasmuch as under the statutory form a power of sale might be expressly given to the mtgee. as a stipulation for the maintenance of the security, so that upon taking possession of the chattels the mtgee. would possess an implied power of sale, subject to 1882 Act, ss. 7 & 13, & 1882 Act itself gave powers to take possession of, sell, or redeem the chattels assigned, & those powers need not be inserted in the statutory form.—*Re MORRITT, Ex p. OFFICIAL RECEIVER* (1886), 18 Q. B. D. 222; 56 L. J. Q. B. 139; 56 L. T. 12 35 W. R. 277; 3 T. L. R. 266, C. A.

Annotations:—Consd. Calvert v. Thomas (1887), 19 Q. B. D. 204; *Watkins v. Evans* (1887), 18 Q. B. D. 386. *Refd. Re Cleaver, Ex p. Rawlings* (1887), 18 Q. B. D. 489; *Lumley v. Simmons* (1887), 34 Ch. D. 698. *Mentd. Deverges v. Sandeman, Clark*, [1902] 1 Ch. 579; *The Ningehow*, [1916] P. 221.

377. ———.]—A bill of sale, given as security for money, was in the statutory form, except that the mtge. debt, instead of being made payable by instalments, was made payable, with interest, in one sum, a month after the date of the deed, & there was a covenant by the grantor, in case the principal money should not be then paid, to pay interest half-yearly on the principal money remaining unpaid:—*Held*: (1) the bill of sale was valid, & interest being in arrear for more than two months, the grantee had power to seize the chattels, & to sell them after the expiration of five days from the seizure; (2) (BOWEN & FRY, L.JJ.) the power of sale was conferred by the above Act of 1881, s. 19, subject to the restrictions imposed by s. 20 of that Act, & by 1882 Act, s. 13; (3) (LORD ESHER, M.R.) the above Act did not apply, but there was an implied power to seize & sell under 1882 Act.—*WATKINS v. EVANS* (1887), 18 Q. B. D. 386; 56 L. J. Q. B. 200; 56 L. T. 177; 35 W. R. 313, C. A.

Annotation:—Consd. Calvert v. Thomas (1887), 19 Q. B. D. 204.

378. ———.]—The provisions of the above Act of 1881, with regard to power of sale, are not incorporated by the statutory form given by 1882 Act.—*CALVERT v. THOMAS* (1887), 19 Q. B. D. 204; 56 L. J. Q. B. 470; 57 L. T. 441; 35 W. R. 616; 3 T. L. R. 684, C. A.

Annotations:—Refd. Ex p. Wickens (1898), 67 L. J. Q. B. 397. *Mentd. Macey v. Gilbert* (1888), 57 L. J. Q. B. 461.

379. Term relieving purchaser from inquiry—As to grantor's default.]—A bill of sale contained a reservation to the grantee of a power of sale which concluded as follows: “& upon any such sale the purchaser shall not be bound to see or inquire whether any such default has been made as aforesaid”:—*Held*: that was an addition to

the statutory form, & the bill of sale was void.—*BLAIBERG v. PARSONS* (1886), 17 Q. B. D. 336; *sub nom. PARSONS v. HARGREAVES*, 55 L. J. Q. B. 408; 34 W. R. 717; 2 T. L. R. 706, D. C.

Annotation:—Apprvd. Blaiberg v. Beckett (1886), 18 Q. B. D. 96.

380. ———.]—A bill of sale contained powers for the grantees, upon default being made by the grantor in payment of any of the sums secured, to enter upon the premises & seize & sell the goods assigned, & a stipulation that upon any such sale the purchaser should not be bound to see or inquire whether any such default had been made:—*Held*: such stipulation was not for the maintenance or defeasance of the security, & the effect of the stipulation was to alter, to the prejudice of the grantor, the legal rights which 1882 Act & the statutory form were intended to secure to him, & the bill of sale was void as not being in accordance with the form.—*BLAIBERG v. BECKETT* (1886), 18 Q. B. D. 96; 56 L. J. Q. B. 35; 55 L. T. 876; 35 W. R. 34; 3 T. L. R. 17, C. A.

381. ——— *As to application of purchase-money by grantee.]*—A provision in a bill of sale that the receipt of the mtgee. shall be a sufficient discharge to a purchaser of the chattels assigned, who shall not be required to see to the application of the purchase-money by the mtgee., is not in accordance with the statutory form, as it substantially alters the relation between the grantor & grantee.—*GIBBS v. PARSONS* (1887), 22 L. J. N. C. 96, D. C.

D. Terms for Application of Proceeds of Sale.

382. Retention of principal & interest—& costs of maintaining & realising security.]—A bill of sale of household furniture contained a clause permitting seizure & sale in certain events, & an agreement that the grantee after the sale might retain out of the sale money the principal & interest due & the cost of discharging any distress, execution, or other incumbrance on the chattels, & of their removal, warehousing, valuing, or sale:—*Held*: the stipulations in the deed related either to the maintenance or the realisation of the security, & the deed was substantially in conformity with the statutory form, & was valid.—*CONSOLIDATED CREDIT CORPN. v. GOSNEY* (1885), 16 Q. B. D. 24; 55 L. J. Q. B. 61; 54 L. T. 21; 34 W. R. 106, D. C.

Annotations:—Consd. Blaiberg v. Beckett (1886), 56 L. J. Q. B. 35; *Liverpool Commercial Investment Soc. v. Richardson* (1886), 2 T. L. R. 602; *Lumley v. Simmons* (1887), 34 Ch. D. 698. *Refd. Re Morritt, Ex p. Official Receiver* (1886), 18 Q. B. D. 222. *Mentd. Blaiberg v. Parsons* (1886), 17 Q. B. D. 336; *Re Cleaver, Ex p. Rawlings* (1886), 55 L. J. Q. B. 455; *Hadden Best v. Oppenheim* (1889), 60 L. T. 962; *Seed v. Bradley*, [1894] 1 Q. B. 319.

383. ———.]—A bill of sale provided that the mtgees. should retain out of the proceeds of sale the principal & interest due, together with all expenses incurred in entering upon the premises & discharging any distress, execution, or incumbrance upon the chattels, & in seizing, keeping possession, removing, warehousing, valuing, or sale thereof:—*Held*: the bill of sale was in accordance with the statutory form & valid.—*Re MORRITT, Ex p. OFFICIAL RECEIVER* (1886), 18 Q. B. D. 222; 56 L. J. Q. B. 139; 56 L. T. 42; 35 W. R. 277; 3 T. L. R. 266, C. A.

Annotations:—Consd. Re Cleaver, Ex p. Rawlings (1887), 18 Q. B. D. 489. *Refd. Calvert v. Thomas* (1887), 19 Q. B. D. 204; *Lumley v. Simmons* (1887), 34 Ch. D. 698. *Mentd. Watkins v. Evans* (1887), 18 Q. B. D. 386; *Deverges v. Sandeman, Clark*, [1902] 1 Ch. 579; *The Ningehow*, [1916] P. 221.

384. ———.]—A bill of sale contained a proviso making void the security on payment of

the principal sum & interest & any expenses which the grantee might properly incur in lawfully seizing & removing the chattels, & any costs he might properly incur in defending & maintaining his rights under the bill, & a power after five clear days from the day of seizure to remove & sell the chattels & retain out of the proceeds the principal unpaid & interest due & all costs & expenses he might incur as aforesaid & the expenses of sale:—*Held*: the bill was valid.—*LUMLEY v. SIMMONS* (1887), 34 Ch. D. 698; 56 L. J. Ch. 329; 56 L. T. 131; 35 W. R. 122, C. A.

Annotation: — *Mentd.* *Re Wood, Ex p. Woolfe*, [1894] 1 Q. B. 605.

385. ———.]—The power to sell all the chattels assigned by a bill of sale carries with it implied trusts with respect to the money produced by the sale.

Where the bill of sale contained an express declaration that the grantee should retain out of the sale money the principal sum, or so much thereof as might for the time being remain unpaid, & the interest then due, together with all costs, charges, payments, & expenses incurred or sustained in & about entering the grantor's premises & in discharging any distress, execution, or other incumbrance on the chattels assigned, & seizing, taking, retaining, & keeping possession thereof, & in & about the carriage, removal, warehousing, valuing, or sale thereof, including the cost of inventories, catalogues, or advertising:—*Held*: the trusts declared of the sale money were such as might reasonably & properly be inserted, & did not differ from the trusts that would have been implied if there had been no such express declaration.—*Re CLEAVER, Ex p. RAWLINGS* (1887), 18 Q. B. D. 489; 56 L. J. Q. B. 197; 56 L. T. 593; 35 W. R. 281; 3 T. L. R. 315, C. A.

Annotation: — *Mentd.* *Haslewood v. Consolidated Credit Co.* (1890), 25 Q. B. D. 555.

386. ——— & expenses incurred in relation to security.]—The grantor of a bill of sale agreed that the grantee should, on sale, retain the principal sum advanced with interest, together with "all costs & expenses incurred in relation to the security":—*Held*: the bill of sale was invalid, as not being substantially in accordance with the statutory form.—*LIVERPOOL COMMERCIAL INVESTMENT SOCIETY v. RICHARDSON* (1886), 2 T. L. R. 602; 30 Sol. Jo. 433, D. C.

Annotations: — *Refd.* *Blaiberg v. Beckett* (1886), 3 T. L. R. 17. *Mentd.* *Re Cleaver, Ex p. Rawlings* (1886), 55 L. J. Q. B. 455; *Sedgwick v. Hellier* (1887), 31 Sol. Jo. 661.

387. ———.]—A bill of sale given by way of security for payment of money, which contains a provision that the grantee may deduct from the proceeds of the sale of the mortgaged property expenses of such sale "or expenses otherwise incurred in relation to the security," is not in accordance with the statutory form, for the provision is so large that it would include expenses improperly incurred & also expenses incurred in the preparation of the bill of sale & before its execution, & the bill of sale is void.—*CALVERT v. THOMAS* (1887), 19 Q. B. D. 204; 56 L. J. Q. B. 470; 57 L. T. 441; 35 W. R. 616; 3 T. L. R. 684, C. A.

Annotations: — *Folld.* *Macey v. Gilbert* (1888), 57 L. J. Q. B. 461. *Mentd.* *Ex p. Wickens* (1898), 67 L. J. Q. B. 397.

388. ——— & expenses of attending sale—& commission as auctioneers.]—A bill of sale, as security for money, assigned to the grantees, auctioneers, the chattels specifically described in a schedule, & which were stated to be then in a certain house. It was agreed that, in case default should be made by the grantor in the performance

of any of the covenants, all of which covenants were thereby declared & agreed to be necessary for the maintenance of the security thereby created, it should be lawful for the grantees after any such default without notice, immediately or whenever they should think fit, to seize & take possession of the chattels, & after the expiration of five clear days, to sell same, & out of the proceeds of sale in the first place to reimburse themselves the costs, charges, & expenses of & attending such sale, including therein the full charges & commission of the grantees as auctioneers, as if they were selling on behalf of the grantor:—*Held*: the bill of sale was void because it authorised the grantees to retain their commission as auctioneers out of the proceeds of the sale of the chattels, that being a provision not for the maintenance of the security, but for obtaining for the grantees, in addition to the security, their trade profits as auctioneers by the sale, an advantage which they would not have had if the statutory form had been followed.—*FURBER v. COBB* (1887), 18 Q. B. D. 491; 56 L. J. Q. B. 273; 56 L. T. 689; 35 W. R. 398; 3 T. L. R. 456, C. A.

Annotations: — *Mentd.* *Blaiberg v. Beckett* (1886), 3 T. L. R. 17; *Watson v. Strickland* (1887), 56 L. J. Q. B. 591; *Topley v. Corbie* (1888), 20 Q. B. D. 350; *Turner v. Culpan* (1888), 58 L. T. 340; *Carpenter v. Deen* (1889), 23 Q. B. D. 566; *Re Paxton, Ex p. Pope* (1889), 60 L. T. 428; *Bourne v. Wall* (1891), 64 L. T. 530; *Seed v. Bradley*, [1894] 1 Q. B. 319; *Weardale Coal & Iron Co. v. Hodson*, [1894] 1 Q. B. 598.

E. Terms for Insurance and Production of Receipts.

389. Insurance—& delivery of receipts for premiums.]—An agreement in a bill of sale that the grantor will pay all premiums necessary for insuring & keeping insured the chattels against loss by fire, & forthwith after every payment in respect of such insurance produce, & if required, deliver to the grantee the receipt or voucher for same, is not unnecessary for the maintenance of the security, & does not contravene 1882 Act.—*HAMMOND v. HOCKING* (1884), 12 Q. B. D. 291; 53 L. J. Q. B. 205; 50 L. T. 267, D. C.

Annotation: — *Refd.* *Re Bullock, Ex p. Ward* (1899), 68 L. J. Q. B. 953.

390. ———.]—*Re BARBER, Ex p. STANFORD*, No. 391, *post*.

391. ——— Power to grantee to insure on default—& add charges to sum secured.]—A bill of sale of chattels, given as security for money, contained stipulations by the grantor to insure the chattels against fire, to pay the premiums, & on demand, to produce the receipts for the premiums to the grantee, & that, if default should be made by the grantor in effecting or keeping up the policy, the grantee might insure the property, & that all money expended by him for that purpose, with interest thereon, should on demand be repaid by the grantor, & until repayment should be a charge on the property, but it was provided that the goods should not be liable to seizure by the grantee for any cause other than those specified in 1882 Act, s. 7:—*Held*: the deed was not made void by s. 9.—*Re BARBER, Ex p. STANFORD* (1886), 17 Q. B. D. 259; 34 W. R. 237, C. A.

Annotations: — *Folld.* *Goldstrom v. Tallerman* (1886), 18 Q. B. D. 1. *Distd.* *Barr v. Kingsford* (1887), 56 L. T. 861. *Refd.* *Topley v. Corbie* (1888), 58 L. T. 342; *Turner v. Culpan* (1888), 58 L. T. 340. *Mentd.* *Bianchi v. Offord* (1886), 17 Q. B. D. 484; *Blaiberg v. Beckett* (1886), 18 Q. B. D. 96; *Re Cleaver, Ex p. Rawlings* (1886), 55 L. J. Q. B. 455; *Davies v. Rees* (1886), 17 Q. B. D. 408; *Hughes v. Little* (1886), 18 Q. B. D. 32; *Re Morrill, Ex p. Official Receiver* (1886), 18 Q. B. D. 222; *Parsons v. Hargreaves* (1886), 34 W. R. 717; *Calvert v. Thomas* (1887), 19 Q. B. D. 204; *Furber v. Cobb* (1887), 18 Q. B. D. 494; *Lumley v. Simmons* (1887), 34 Ch. D. 698; *Real Personal Advance Co. v. Clears* (1888), 20 Q. B. D. 304;

Sect. 2. — Form of bills of sale by way of security:
Sub-sect. 6, E., F. & G.]

Thomas v. Kelly (1888), 13 App. Cas. 506; *Re Yates*, Batchelor v. Yates (1888), 59 L. T. 47; Curtis v. National Bank of Wales (1889), 5 T. L. R. 338; Cochrane v. Entwhistle (1890), 25 Q. B. D. 116; Haslewood v. Consolidated Co. (1890), 60 L. J. Q. B. 12; Parsons v. Brand, Coulson v. Dickson (1890), 25 Q. B. D. 110; *Re Heseltine*, Woodward v. Heseltine, [1891] 1 Ch. 464; *Re Tweedale*, *Ex p.* Tweedale, [1892] 2 Q. B. 216; Weardale Coal & Iron Co. v. Hodson, [1894] 1 Q. B. 598; Cartwright v. Regan, [1895] 1 Q. B. 900; De Brauni v. Ford, [1900] 1 Ch. 142; Saunders v. White, [1902] 1 K. B. 472; Attia v. Finch (1904), 91 L. T. 70; Brandon Hill v. Lane, [1915] 1 K. B. 250.

392. ————.]—A bill of sale contained a covenant by the grantor to insure the chattels assigned, & that in default it should be lawful for the grantee to insure same, & that all money for that purpose expended by him should on demand be repaid by the grantor, & until such repayment should be a charge upon the chattels. The bill of sale contained no power to the grantee to seize the goods on default of the performance of the covenant: *Held*: in the absence of a power to seize on default the insertion of the covenant did not render the bill of sale void.—TOPILEY v. CORSBIE (1888), 20 Q. B. D. 350; 57 L. J. Q. B. 271; 58 L. T. 342; 36 W. R. 352, D. C.

Annotation: *Folld.* Harrison v. Shallis (1909), 25 T. L. R. 664.

393. ————.]—A bill of sale contained a clause that the grantors should insure the chattels assigned & that on their failure to do so the grantee might make the payments, & all money so expended by the grantee, with 5 per cent. interest thereon, were to be repaid by the grantors, & until repayment were to be a charge on the chattels assigned. A further clause gave a power to seize the chattels in any of the events specified in 1882 Act, s. 7, but not otherwise:—*Held*: the insertion of the foregoing clauses did not invalidate the bill of sale.—HARRISON v. SHALLIS & Co. (1909), 25 T. L. R. 661.

See, also, Nos. 347-351, *ante*; Nos. 101-103,

394. Production of receipts for rent, rates, & taxes—No exception for reasonable excuse.]—A bill of sale contained a clause in which the grantor agreed with the grantees that he would, during the continuance of the security, pay all rents, rates, taxes, assessments, or outgoings which ought to be paid by the tenant or occupier of the premises then occupied by him, on which the chattels & things then were, or any other place or places where any of the chattels & things included in the security might during its continuance be, & would take proper receipts for such payments, & would, on demand in writing, produce to the grantees or their authorised agents the receipts for every such payment as aforesaid, provided always, that the chattels thereby assigned should not be liable to seizure or be taken possession of by the grantees for any cause other than those specified in 1882 Act, s. 7:—*Held*: as the covenant to produce the receipts was one for the maintenance of the security, there was a power to seize for a breach of it, but though the covenant to produce was not qualified by the condition that the non-production of the receipts might be excused, yet the power to seize under the covenant was not unqualified, but limited to the ground provided by 1882 Act, s. 7, & was not contrary to the statutory form.—TURNER & Co. v. CULPAN (1888), 58 L. T. 340; 36 W. R. 278, D. C.

395. ————.]—A bill of sale, given to secure money lent, contained a covenant by the grantor to produce, on demand in writing, the last

receipts for rent, rates, & taxes, followed by a proviso that the chattels should not be liable to seizure for any cause other than those specified in 1882 Act, s. 7, which were set out in the deed:—*Held*: the above covenant must be read with the qualification contained in s. 7 (4), that the goods could only be seized if the failure to produce the receipts should be without reasonable excuse.—WEARDALE COAL & IRON CO. v. HODSON, [1894] 1 Q. B. 598; 63 L. J. Q. B. 391; 70 L. T. 632; 42 W. R. 424; 1 Mans. 396; 9 R. 844, C. A.

396. ———— Without previous demand.]—A bill of sale contained a covenant by the grantor to produce his last receipts for rent, rates & taxes, no demand in writing by the grantee being required, & a proviso that the chattels assigned should not be liable to seizure for any cause other than specified in 1882 Act, s. 7:—*Held*: the bill was not void as deviating from the statutory form.—CARTWRIGHT v. REGAN, [1895] 1 Q. B. 900; 64 L. J. Q. B. 507; 43 W. R. 650; 15 R. 385; *sub nom.* REGAN v. HAWTHORN, 39 Sol. Jo. 471, D. C. *Annotation*:—*Refd.* *Re* Bullock, *Ex p.* Ward (1899), 68 L. J. Q. B. 953.

——— Express power of seizure.]—*See* Nos. 359-364, *ante*.

F. Terms against Removal and for Replacement.

397. Validity.]—A bill of sale of household goods contained a covenant by the grantor to preserve the goods assigned, & from time to time replace such of them as should be worn out by articles of equal value:—*Held*: the terms of the bill of sale were substantially in accordance with the statutory form.—CONSOLIDATED CREDIT CORPN. v. GOSNEY (1885), 16 Q. B. D. 24; 55 L. J. Q. B. 61; 54 L. T. 21; 34 W. R. 106, D. C.

Annotations:—*Distd.* Blalberg v. Parsons (1886), 17 Q. B. D. 336; *Re* Cleaver, *Ex p.* Rawlings (1886), 55 L. J. Q. B. 455. *Consd.* Seed v. Bradley, [1894] 1 Q. B. 319. *Refd.* Hadden Best v. Oppenheim (1889), 60 L. T. 962. *Mentd.* Blalberg v. Beckett (1886), 35 W. R. 34; Liverpool Commercial Investment Soc. v. Richardson & Hall (1886), 2 T. L. R. 602; *Re* Morrill, *Ex p.* Official Receiver (1886), 18 Q. B. D. 222; Lumley v. Simmons (1887), 34 Ch. D. 698.

398. ————.]—A bill of sale contained a covenant that the grantor would not remove furniture, the subject of the bill of sale, except to be repaired, without consent of the grantee, & would replace any articles damaged or worn out by others of equal value:—*Held*: the covenant might be inserted, as being for the maintenance of the security, & the bill of sale did not deviate from the statutory form. SEED v. BRADLEY, [1894] 1 Q. B. 319; 63 L. J. Q. B. 387; 70 L. T. 214; 42 W. R. 257; 10 T. L. R. 196; 1 Mans. 157; 9 R. 171, C. A. *Annotation*:—*Folld.* Coates v. Moore, [1903] 2 K. B. 140.

399. ————.]—By a bill of sale, given as a security for payment of money, the grantor assigned the chattels & things specifically described, & also all chattels & things which might at any time during the continuance of the security be substituted for them or any of them. The bill of sale contained a covenant by the grantor that he would during the continuance of the security replace such of the chattels & things expressed to be assigned as should be worn out by other articles of equal value to the articles worn out, so as at all times to keep up the total value of the chattels & things comprised in the security to the present value:—*Held*: the bill of sale did not deviate from the statutory form, the assignment of substituted chattels & things only applying to the chattels & things substituted under the covenant for the maintenance of the security.—COATES v. MOORE, [1903] 2 K. B. 140; 72 L. J. K. B. 539; 89 L. T. 8; 51 W. R. 618; 10 Mans. 271, C. A.

400. —.]—A bill of sale granted by depts., furniture removers, contained a clause that the grantors would not without the consent in writing of the grantee remove the chattels thereby assigned from the premises where they were or from any other place where they might at any time be. A further clause provided that the grantors should repair & replace the chattels assigned. A further clause gave a power to seize the chattels in any of the events specified in 1882 Act, s. 7, but not otherwise. The chattels assigned were pantehnicon & other vans & horses used in deft.'s business:—*Held*: the insertion of the foregoing clauses did not invalidate the bill of sale, & the clause prohibiting the removal of the assigned chattels referred to removal to other premises & did not prohibit the taking out of those chattels in the ordinary course of deft.'s business.—*HARRISON v. SHALLIS & Co.* (1909), 25 T. L. R. 664.

G. Miscellaneous Terms.

401. Grantor to pay rent, rates, & taxes—Power to grantee to pay on default—& add charges to sum secured.—An agreement to charge on the chattels assigned, with interest, sums paid by the mtgee. for rent, rates, taxes, assessments, & outgoings payable, but not paid, by the mtgor. in respect of the premises on which the chattels are, is admissible in a bill of sale made under 1882 Act, & does not avoid the bill.—*GOLDSTROM v. TALLERMAN* (1886), 18 Q. B. D. 1; 56 L. J. Q. B. 22; 55 L. T. 866; 35 W. R. 68; 3 T. L. R. 89, C. A.

Annotations:—*Consd.* *Turner v. Culpan* (1888), 58 L. T. 340. *Mentd.* *Real & Personal Advance Co. v. Cleurs* (1888), 20 Q. B. D. 304; *Topley v. Corsbie* (1888), 20 Q. B. D. 350; *Haslewood v. Consolidated Credit Co.* (1890), 25 Q. B. D. 555; *Edwards v. Marston*, [1891] 1 Q. B. 225; *Monson v. Milner* (1892), 8 T. L. R. 447; *Re Bagen, Ex p. Hasluck*, [1894] 1 Q. B. 444; *Weardale Coal & Iron Co. v. Hodson* (1894), 63 L. J. Q. B. 391; *Linfoot v. Pockett*, [1895] 2 Ch. 835; *Rosefield v. Provincial Union Bank*, [1910] 2 K. B. 781.

402. —.]—A bill of sale contained a clause that the grantors should pay the rent, rates, & taxes of the premises where the chattels were, & that on their failure to do so the grantee might make the payments, & all money so expended by the grantee, with 5 per cent. interest thereon, were to be repaid by the grantors, & until repayment were to be a charge on the chattels assigned. A further clause gave a power to seize the chattels in any of the events specified in 1882 Act, s. 7, but not otherwise:—*Held*: the insertion of the foregoing clauses did not invalidate the bill of sale.—*HARRISON v. SHALLIS & Co.* (1909), 25 T. L. R. 664.

403. Grantor to keep chattels in repair—Power to grantee to repair on default—& add charges to sum secured.—A bill of sale contained a covenant by the grantor to keep in repair the chattels assigned, & that in default it should be lawful for the grantee to repair same, & that all money for that purpose expended by him should on demand be repaid by the grantor, & until such repayment should be a charge upon the chattels. The bill of sale contained no power to the grantee to seize the goods on default of the performance of the covenant:—*Held*: in the absence of a power to seize on default the insertion of the covenant did not render the bill of sale void.—*TOPLEY v. CORSBIE* (1888), 20 Q. B. D. 350; 57 L. J. Q. B. 271; 58 L. T. 342; 36 W. R. 352, D. C.

Annotation:—*Folld.* *Harrison v. Shallis* (1909), 25 T. L. R. 664.

See, also, Nos. 317–351, 391–393, *ante*.

404. Grantor to pay interest on mortgages.—A bill of sale given as a security for payment of money contained a covenant for the payment by the grantor of all interest on mtges., if any, of the premises on which the goods assigned were or to which they might be removed:—*Held*: the stipulation was a deviation from the statutory form, & the bill of sale was void.—*WATSON v. STRICKLAND* (1887), 19 Q. B. D. 391; 56 L. J. Q. B. 594; 35 W. R. 769; 3 T. L. R. 815, C. A.

405. Covenant for further assurance—Binding all claiming goods.—A bill of sale contained a covenant that the mtgor. & every other person claiming any interest in the chattels assigned or any of them, would at all times, at the cost, until seizure or sale, of the mtgor., & afterwards of the person requiring same, execute & do all such assurances & things for the further or better assuring of the chattels to the mtgee. as should be reasonably required:—*Held*: the bill of sale was not in accordance with the statutory form.—*LIVERPOOL COMMERCIAL INVESTMENT SOCIETY v. RICHARDSON* (1886), 2 T. L. R. 602; 30 Sol. Jo. 433, D. C.

Annotations:—*Consd.* *Re Cleaver, Ex p. Rawlings* (1886), 55 L. J. Q. B. 455; *Sedgwick v. Hellier* (1887), 31 Sol. Jo. 661. *Refd.* *Blalberg v. Beckett* (1886), 3 T. L. R. 17.

406. —.]—A covenant that the mtgor. & every person claiming through him will at all times, at his own cost, execute & do all such assurances & things for the better assuring all or any of the chattels to the mtgees. & enabling them to obtain possession of same as may by them be lawfully required is a provision for the maintenance of the security.—*Re CLEAVER, Ex p. RAWLINGS* (1887), 18 Q. B. D. 489; 56 L. J. Q. B. 197; 56 L. T. 593; 35 W. R. 281; 3 T. L. R. 315, C. A.

Annotation:—*Consd.* *Sedgwick v. Hellier* (1887), 31 Sol. Jo. 661.

407. S. P. *SEDGWICK v. HILLIER* (1887), 31 Sol. Jo. 661, D. C.

408. Grantor to obtain only limited credit—To give bulk of business to grantee—& keep books open to grantee's inspection.—J. gave a bill of sale to plffs., creditors, to secure repayment of £150, which they advanced to him to enable him to pay a composition to creditors other than themselves, & also to secure a composition to which they themselves were entitled. The bill of sale contained a stipulation "that during the course of the trading of J., he shall not during the continuance of this security, obtain credit to the extent of £10 without the consent of one of the firms parties hereto, but this clause shall not apply to his dealings or transactions for the purchase of goods from the firms, & J. binds himself to give the firms the greater portion of his business, & J. shall keep proper books of account of his business, & shall permit the parties hereto, or any of them, or any authorised agent of them or any of them, to enter the premises of J. & inspect same books at all reasonable times during the existence of this security":—*Held*: the stipulation was not for the maintenance or defeasance of the security, & the bill of sale was void.—*PEACE v. BROOKES*, [1895] 2 Q. B. 451; 64 L. J. Q. B. 717; 72 L. T. 798; 2 Mans. 491; 15 R. 593.

PART V. SECT. 2, SUB-SECT. 6.
—G.

p. Grantor to sell mortgaged stock—To pay running expenses—Contemporaneous agreement.—A mtge. of cattle contained the following proviso: "Pro-

vided always, anything hereinbefore contained to the contrary notwithstanding, that the said mtgors. shall be at liberty at any time to sell bulls & steers":—*Held*: this power was restricted to sales authorised by a

contemporaneous agreement between the mtgor. & mtgee., viz., of such animals as it might become necessary to sell to pay running expenses.—*GRAVELEY v. SPRENGER*, 20 C. L. T. Occ. N. 147.—CAN.

⁹ *Form of bills of sale by way of security:*
sect. 6, G.; Sub-sects. 7 & 8, A. & B.]

409. Grantor not to obtain loan from other office.]—At the time of the giving of a bill of sale as security for an advance, & before the completion of the transaction, the grantee handed to the grantor a card on which were printed certain conditions, which were made part of the bargain before the money was lent. One of the conditions was that borrowers were prohibited from obtaining or endeavouring to obtain money from any other loan office until the account was paid; otherwise they would be liable for the full amount to be called in, as though an instalment had been missed. The condition was not inserted in the bill of sale, which otherwise was in accordance with the statutory form:—*Held*: as the condition was not inserted in the bill of sale, & would have avoided it if it had been inserted, the bill of sale was not in accordance with the statutory form, & was absolutely void. *SMITH v. WHITEMAN*, [1909] 2 K. B. 437; 78 L. J. K. B. 1073; 100 L. T. 770; 16 Mans. 283, C. A.

Annotation: *Folld. Hall v. Whiteman*, [1912] 1 K. B. 683.

410. Grantee not to enforce bill—Until other securities exhausted.]—An agreement by the grantee of a bill of sale given by way of security for payment of money by the grantor, that the bill of sale should not be enforced until all other securities & remedies of the grantee had been exhausted, is not a term for the defeasance of the security, & its omission from the bill of sale does not render the bill of sale void under s. 9.—*HESELTINE SIMMONS*, [1892] 2 Q. B. 547; 62 L. J. Q. B. 567; 67 L. T. 611; 57 J. P. 53; 41 W. R. 67; 8 T. L. R. 768; 36 Sol. Jo. 695; 4 R. 52, C. A.

Annotations: *Refd. Edwards v. Marcus*, [1891] 1 Q. B. 587. *Mentd. Saunders v. White*, [1902] 1 K. B. 472.

411. Power to grantee—To retain bill—After payment or sale.]—A bill of sale provided that upon payment of the loan the bill of sale & any documents signed in relation to the loan should remain in the custody of & be the property of the grantee:—*Held*: the bill of sale was not in accordance with the statutory form, for the provision interfered with the legal right of the grantor to the possession of the bill of sale & documents, & was not immaterial, & altered the legal effect of the form.—*WATSON v. STRICKLAND* (1887), 19 Q. B. D. 391; 56 L. J. Q. B. 591; W. R. 769; 3 T. L. R. 815, C. A.

PART V. SECT. 2, SUB-SECT. 8. —A.

g. Annexed when bill executed
Actual fastening.]—A schedule of a bill of sale must be annexed at the time of execution. There must be some actual fastening of the documents together.—*SOMMERS v. EIBY* (1890), 8 N. Z. L. R. —N.Z.

413 i. Absence of schedule—Effect.]—A bill of sale professed to convey all the goods & merchandise of the grantors in their store, situate, etc., of dry goods, & groceries mentioned in the schedule annexed. There was no schedule.

Qu.: whether the bill of sale was not thereby rendered inoperative.—*Re DE VEBER, Ex p. DE VEBER* (1882), 21 N. B. R. 397.—CAN.

413 ii. —. —.] A bill of sale ordinance required that a schedule should be attached to the bill of sale: *Held*: the absence of that avoided the sale when there was no immediate delivery followed by an actual & continual change of possession.—*SWAIGHER v. ROTARY* (1906), 3 W. L. R. 486.—CAN.

PART V. SECT. 2, SUB-SECT. 8. —B.

a. What is sufficient description—Question of fact.]—*Seem*: the question whether a description of property in a bill of sale is sufficient is a question of fact to be decided by the magistrate without appeal.—*CHRISTCHURCH FINANCE CO. v. DURANT & SON* (1889), 7 N. Z. L. R. 619.—N.Z.

b. — — — Admissibility of oral evidence.]—Whether or not a description is sufficient to enable the mortgaged goods to be distinguished, is a question of fact; & oral evidence throwing light upon the question of fact is not to be excluded when that question has to be judicially determined.—*WOOLLINGS v. BARR* (1919), 46 O. L. R. 1; 16 O. W. N. 302.—CAN.

415 i. — — — General rule—Chattels described as in inventory.]—Chattels other than stock are sufficiently described within Chattels Transfer Act, 1889, s. 29, if described in the same way as they would ordinarily be described in an inventory compiled for business purposes, unless the mtgor. has another article answering the

412. — — — To affix placards on grantor's premises.]—A bill of sale provided that the grantee of a bill of sale might at any time during the subsistence of the security affix such bills & placards having reference to the chattels assigned as he might think fit on any premises for the time being in the occupation of the grantor:—*Held*: the covenant was not necessary for the maintenance of the security.—*BARDELL v. DAYKIN* (1887), 3 T. L. R. 526, D. C.

Annotation: *Consd. Bourne v. Wall* (1891), 64 L. T. 530.

SUB-SECT. 7.—ATTESTATION AND EXECUTION.

See Sect. 4, post.

Necessity for address & description of attesting witness.]—*See Sect. 1, sub-sect. 2, post.*

SUB-SECT. 8.—THE SCHEDULE.

See 1882 Act, s. 4.

A. Must be Annexed to or Written on

413. Absence of schedule—Effect.]—Defts. borrowed £1,500, & to secure further the money borrowed, they assigned all their plant, machinery, stock-in-trade, etc., to A. The assignment was registered as a bill of sale, but was not in the statutory form, the assignment not containing a schedule:—*Held*: the assignment was void under 1882 Act, s. 4.—*BROCKLEHURST v. RAILWAY PRINTING & PUBLISHING CO.*, [1884] W. N. 70; 28 Sol. Jo. 358; Bitt. Rep. in Ch. 117.

Annotations:—*Refd. Ross v. Army & Navy Hotel Co.* (1886), 34 Ch. D. 43; *Topham v. Greenside Glazed Fire-Brick Co.* (1887), 37 Ch. D. 281. *Mentd. Jenkinson v. Brandley Mining Co.* (1887), 35 W. R. 834; *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627; *Richards v. Kidderminster Overseers, Richards v. Kidderminster Corpn.*, [1896] 2 Ch. 212.

414. — — —.]—At the date of execution of a bill of sale there was no schedule attached to it:—*Held*: the absence of the schedule not only made the bill void in the manner limited in 1882 Act, s. 4, but it also vitiated it, under s. 9, for all purposes.—*GRIFFIN v. UNION DEPOSIT BANK* (1887), 3 T. L. R. 608.

B. Must specifically describe Chattels.

415. What is sufficient description—General rule.—“Household furniture & effects, implements

same description as that described in the instrument, & the latter is not distinguished in some way.—*Re CHRISTIE* (1901), 19 N. Z. L. R. 615. N.Z.

415 ii. — — — *If goods identified*
Where in a chattel mtge. some articles can be identified, they are the majority, the mtge. is but where they are few & significant the mtge. is void.—*ADAMS v.* (1893), 3 Torr. L. R. 206.

CAN.

415 iii. —. —.]—*Held*: the description of the property enumerated in the bill of sale, as in the possession of the grantor, rendered it sufficiently certain.—*PHINNEY v. MORSE* (1893), 25 N. S. R. 502; *revers. on other grounds*, 22 S. C. R. 563.—CAN.

415 iv. — — —.]—A description of mortgaged property is sufficient, if the property can be identified from it.—*ROGERS LUMBER CO. v. DUNLOP* (1914), 30 W. L. R. 209; 7 W. W. R. 975; 20 D. L. R. 154.—CAN.

415 v. — — —.]—Unless the description of mortgaged chattels is so indefinite as to render the instrument

of husbandry.”]—The schedule to a bill of sale contained the description “household furniture & effects, implements of husbandry”:—*Held*: insufficient to convey the goods so described, for the schedule must contain such an inventory as was usual in business, separating the classes of articles comprised in it one from the other, although it need not contain a detailed description of each article.—*ROBERTS v. ROBERTS* (1884), 13 Q. B. D. 794; 53 L. J. Q. B. 313; 50 L. T. 351; 32 W. R. 605, C. A.

Annotations:—*Consd.* *Witt v. Banner* (1887), 20 Q. B. D. 114. *Refd.* *Carpenter v. Deen* (1889), 23 Q. B. D. 566. *Mentd.* *Bouchette v. Attenborough* (1887), 3 T. L. R. 813; *Kelly v. Kellond* (1888), 20 Q. B. D. 569; *Mayer & Fulda v. Mindlevich* (1888), 59 L. T. 400; *Thomas v. Kelly* (1888), 13 App. Cas. 506; *Davies v. Jenkins* (1899), 48 W. R. 286.

416. ——— **Necessity for stating situation of chattels.**—A bill of sale is not void for omitting to specify the house or place at which the goods assigned are situated.—*Re LANE, Ex p. HILL* (1886), 17 Q. B. D. 71; 3 Morr. 148, D. C.

417. ——— **Chattels normally requiring to be replaced.**—Where the chattels comprised in a bill of sale are of a kind which requires to be replaced from time to time by the substitution of other similar chattels, as in the case of the live stock on a farm, a more specific description of them in the schedule is necessary than in the case of chattels which do not require to be replaced with the same degree of frequency, such as the furniture of a house. *DAVIES v. JENKINS*, [1900] 1 Q. B. 133; 69 L. J. Q. B. 187; 81 L. T. 788; 48 W. R. 286; 44 Sol. Jo. 103; 7 Mans. 149, D. C.

Annotation: *Mentd.* *Burchell v. Thompson*, [1920] 2 K. B. 80.

418. ——— **Pictures & frames—On premises of picture dealer.**—A bill of sale was given by a picture dealer with regard to pictures, etc., forming stock-in-trade. The description in the schedule was: “At 77, Mortimer Street; four hundred & fifty oil-paintings in gilt frames, three hundred

oil-paintings unframed, fifty water-colours in gilt frames, twenty water-colours unframed, & twenty gilt frames”:—*Held*: the bill of sale did not comply with the requirements of 1882 Act, s. 4, & was void as against an execution creditor so far as chattels claimed under the above description were concerned.—*WITT v. BANNER* (1887), 20 Q. B. D. 114; 57 L. J. Q. B. 141; 58 L. T. 34; 36 W. R. 115; 4 T. L. R. 113, C. A.

Annotations:—*Consd.* *Carpenter v. Deen* (1889), 23 Q. B. D. 566; *Hickley v. Greenwood* (1890), 25 Q. B. D. 277; *Davies v. Jenkins* (1900), 1 Q. B. 133.

419. ——— **In private house.**—The schedule to a bill of sale of the contents of a house described certain pictures in one room as “twelve oil paintings in gilt frames”:—*Held*: they were “specifically described” within 1882 Act, s. 4.—*COOPER v. HUGGINS* (1889), 34 Sol. Jo. 96.

420. ——— **“Twenty-one milch cows.”**—By a bill of sale the grantor assigned “all & singular the several chattels & things specifically described in the schedule hereto annexed.” Among the chattels mentioned in the schedule were “21 milch cows” on a farm belonging to the grantor. Subsequently to the execution of the bill of sale the grantor sold some of the cows referred to & bought others:—*Held*: the cows were not specifically described within 1882 Act, s. 4.—*CARPENTIER v. DEEN* (1889), 23 Q. B. D. 566; 61 L. T. 860; 5 T. L. R. 617, C. A.

Annotations:—*Distd.* *Edwards v. Marston* (1890), 64 L. T. 97; *Hickley v. Greenwood* (1890), 25 Q. B. D. 277. *Apd.* *Davies v. Jenkins*, [1900] 1 Q. B. 133. *Refd.* *Davidson v. Carlton Bank*, [1893] 1 Q. B. 82. *Mentd.* *Edwards v. Marens*, [1894] 1 Q. B. 587; *Ellis v. Wright* (1897), 76 L. T. 522; *Oakes v. Green* (1907), 23 T. L. R. 560.

421. ——— **“All my farming stock comprising four horses, five cows.”**—The schedule to a bill of sale of farming stock contained the following description: “All my farming stock, comprising 4 horses, 5 cows”:—*Held*: the description satisfied 1882 Act, s. 4.—*JONES v. ROBERTS* (1890), 34 Sol. Jo. 245.

of mtge. void for uncertainty, such description is sufficient.—*ROYAL BANK v. WHIELDON* (1915), 8 W. W. R. 734; B. C. R. 267; 9 W. W. R. 776; 52 S. C. R. 254. **CAN.**

415 vi. ——— **—**—A misdescription in a chattel mtge. of the age of a mare will not invalidate the security.—*CLEMENTS v. NATIONAL FURING CO.*, [1918] 1 W. W. R. 138. **CAN.**

415 vii. ——— **—**—If there is sufficient material on the face of a chattel mtge. to indicate how the property may be identified, after proper inquiries have been made, the requirements of R. S. O. 1914 (c. 135), s. 10, are satisfied.

Where the description in the chattel mtge. covered the mtgor.’s entire stock of horses in, around, or upon the camps in or connected with the & pulpwood operations of the in a locality described as “the vicinity of L. Lake & the navigable rivers tributary thereto, in the district of T.”:—*Held*: the description in the chattel mtge., with the evidence adduced, was sufficient to identify the horses as covered by the chattel.—*WOOLLINGS v. BARR* (1919), 46 O. L. R. 1; 1 O. W. N. **CAN.**

415 viii. ——— **—**—Chattels security was void because some of the chattels were not reasonably identified.—*HAYES v. ROSS*, [1919] N. Z. L. R. 777. **N.Z.**

415 ix. ——— **—**—In a chattel mtge. the property was described as follows:—“All cattle & horses of whatever age & sex branded ‘3’ on the

left side & all increase thereof from time to time until the moneys hereby secured are fully paid, together with the ‘3’ brand & the branding irons for said brand, & all right, title, & interest therein & thereto.”:—*Held*: a sufficient description. For the purpose of identification, it was not necessary that all the brands borne by each animal should be referred to. *GRAVELEY v. SPRENGER*, 20 C. L. T., Occ. N. 147. **CAN.**

415 x. ——— **—**—*CLIFF PAPER CO. v. AUGER* (1917), 13 O. W. N. 150. **CAN.**

416 i. ——— **Necessity for situation of goods.**—A chattel must contain a description of the property with reference to locality & therefore, “one horse rake, three lumber waggons, one lumber sleigh, one cutter & one” were insufficient descriptions. *BOLDRICK v. RYAN* (1890), 17 A. R. 253. **CAN.**

416 ii. ——— **—**—*Held*: the mention of the locality where the cattle mortgaged were, when the mtge. was made, was unnecessary.—*GRAVELEY v. SPRENGER*, 20 C. L. T., Occ. N. 147. **CAN.**

416 iii. ——— **—**—A description of goods, chattels, furniture & household stuff, without stating where they were situate or in whose possession:—*Held*: insufficient.—*HISCOTT v. MURRAY* (1862), 12 C. P. 315. **CAN.**

416 iv. ——— **—**—In a chattel mtge. the goods were described as “all & singular the goods, chattels, furniture, & household stuff hereinafter particularly mentioned & described,

in the schedule hereunto annexed marked A., all of which goods & chattels are now situate” (description of the premises) without stating that such goods were all the goods on such premises:—*Held*: the description of the goods was not a full & sufficient description within the meaning of C. S. M. c. 49, s. 5.—*MCCALL v. WOLF* (1885), 13 S. C. R. 130. **CAN.**

416 v. ——— **—**—Seven horses, three lumber waggons, one carriage, one pleasure sleigh, all the household furniture in possession of the said party of the first part, & being in his dwelling house, all the lumber & logs in & about the saw mill & premises of the said grantor, & all the blacksmith’s tools now in possession of the said party of the first part, six cows & four stoves:—*Held*: a sufficient description as to the household furniture, lumber, & logs, & insufficient as to the other goods.—*ROSE v. SCOTT* (1859), 17 U. C. R. 385. **CAN.**

416 vi. ——— **—**—The goods were specified as particularly mentioned in a schedule annexed, in which they were described as one buggy, one cutter, one cart, one broad sleigh, two sets of harness, one horse, one chaff cutter; & the following household furniture, namely, in the small parlour, one stove, etc., enumerating the articles in different rooms:—*Held*: sufficient as to the furniture, but insufficient as to the other goods. *SUTHERLAND v. NIXON* (1862), 21 U. C. R. 629. **CAN.**

o. ——— **Goods described generally—Locality specified.**—All the goods, etc., of the assignor being in & about

Sect. 2.—Form of bills of sale by way of security:
Sub-sect. 8, B.]

422. — — — — — **“Roan horse ‘Drummer,’ brown mare & foal, three rave carts.”**—Stock comprised in a bill of sale was described in the schedule to the bill as follows: “Roan horse ‘Drummer,’ “brown mare & foal,” “three rave carts”:—*Held*: the horse & mare were sufficiently specified, &, in the absence of evidence showing want of identification of the particular carts, the expression “three rave carts” would be a sufficiently specific description.—**HICKLEY v. GREENWOOD,**

his warehouse on Y. street, & all his furniture in & about his dwelling-house on W. street, & all bonds, bills, & securities for money, loans, stock, notes, etc., whatsoever, & whosoever, belonging, due, or owing to him:—*Held*: sufficient.—**HARRIS & WOODSIDE v. COMMERCIAL BANK OF CANADA** (1858), 16 U. C. R. 437.—**CAN.**

p. — — — — — **“All the horses, mares, cows, heifers, calves, sheep, lambs, pigs, waggons, buggy, harness, farming utensils, hay, household furniture, books, & every other article or thing on or about the south half of lot 24, in etc.”**—*Held*: sufficient.—**BALKWELL v. BEDDOME** (1858), 16 U. C. R. 203.—**CAN.**

q. — — — — — **“By an antenuptial settlement made between J. C. of the first part, M. H., plff., his intended wife of the second part, & M. of third part, in consideration of the intended marriage, certain lands & goods, consisting of horses, cows, several articles of household furniture, described as being in & upon & around the premises & appurtenances used & occupied by J. M. & being city number, etc., were conveyed & assigned to M. to hold to the use of J. C. until the marriage, & thereafter to the use of plff., her heirs, exors., administrators, & assigns:—*Held*: the goods were sufficiently described & identified.**—**CONNELL v. HICKOCK** (1888), 15 A. R. 518.—**CAN.**

r. — — — — — **Assignment of individual & joint property.**—A deed was executed by J. N. Kline & Son, of the first part, whereby, after reciting that they had proposed & agreed to assign all their personal estate & effects to certain parties of the second part, they conveyed & assigned in the said parties “all & singular the stock-in-trade, goods, merchandise, sum & sums of money, bills, bonds, drafts, mtges., books of account, of what nature or kind soever, belonging to or due or owing to the said parties of the first part, & which are set forth in the schedule hereto annexed, marked with the letter ‘A,’ & subscribed by the parties hereto of the first & second parts: & all the personal estate whatsoever of the said parties of the first part, & all their estate & interest therein.” No schedule was attached to the deed at its execution, but schedules were afterwards annexed, signed John N. Kline & Son, John N. Kline, junr., Anthony Kline:—*Held*: independently of the schedule, the words of the assignment were large enough to include both the individual & joint personal property of John N. Kline.—**HEWARD v. MITCHELL** (1853), 10 U. C. R. 535.—**CAN.**

s. — — — — — **Specific designation in schedule.**—In a deed of assignment of all the property of a co. to trustees for the benefit of creditors, the property was described as “all the real estate lands tenements & hereditaments of debtors whatsoever & wheresoever, of or to which they are now seized or entitled or of or to which they have any estate right or interest of any kind or description, with the appurtenances,

the particulars of which are more particularly set out in the schedule hereto, & all & singular the personal estate & effects, stock-in-trade, goods, chattels, & all other the personal estate & effects whatsoever & wheresoever, whether upon the premises where debtors’ business is carried on or elsewhere & which debtors are possessed of or entitled to in any way whatever.” The schedule annexed specifically designated the real estate & included the foundry, erections & buildings thereon erected, & all articles such as engines, etc., in or upon said premises:—*Held*: this was a sufficient description of the property intended to be conveyed to satisfy R. S. C., c. 119, s. 23.—**HOVEY v. WHITING** (1886), 14 S. C. R. 515; *sub nom.* **WHITING v. HOVEY**, 13 A. R. 7; 9 O. R. 314.—**CAN.**

t. — — — — — **Articles described in detail.**—*Locality specified.*—“All & singular the leasehold interests, live stock, vehicles, furniture, furnishings, bedding, household linen, office fittings, stoves, furnaces, heating apparatus, kitchen utensils, cutlery, dishes, provisions, bars, bar fittings, beer pumps, mirrors, stock-in-trade, including spirituous, vinous & malt liquors & other beverages, tobacco, cigars, cigarettes, leasehold interests, license to sell intoxicating liquors & all other goods, chattels & personal effects whatsoever owned by & in the possession of the mtgor., & used by him in connection with his business as a hotel-keeper, licensed to sell intoxicating liquors & being in, on, around & about or in connection with the premises situate on the following described land, that & to say: Lots eight (8) & nine (9) & ten (10), block six (6), according to a map or plan of part of the town of Castor of record in the Land Titles Office for the North Alberta Land Registration District as plan 8387, T. Castor”:—*Held*: a sufficient description.—**ROYAL TRUST CO. v. CASTOR TOWN**, [1917] 3 W. W. R. 586; 37 D. L. R. 277.—**CAN.**

a. — — — — — **“The goods were described as set forth in the schedules annexed. Schedule C. was headed, ‘Household furniture in J. E. W.’s residence,’ specified the several articles in detail, giving a list of those contained in each room, from which the sheriff said he had no difficulty in identifying them:—*Held*: sufficient.**—**FRASER v. BANK OF TORONTO** (1860), 19 U. C. R. 381.—**CAN.**

b. — — — — — **Half-finished locomotives.**—*Deed reciting oral agreement.*—Plffs. agreed by word of mouth with G. a manufacturer to buy two half-finished locomotives from him for \$16,000, payable as he might require it, the locomotives to be finished by him. Subsequently, by deed reciting this arrangement, G. conveyed the locomotives to plffs.:—*Held*: the locomotives were sufficiently described in the deed reciting the oral agreement to comply with Chattel Mortgage Act as to description & locality.—**BURTON v. BELLHOUSE** (1860), 20 U. C. R. 60.—**CAN.**

(1890), 25 Q. B. D. 277; 59 L. J. Q. B. 413; 63 L. T. 288; 38 W. R. 686, D. C.

Annotation:—**Mentd. Re Heseltine, Woodward v. Heseltine**, [1891] 1 Ch. 464.

423. — — — — — **“Stock, two horses, four cows.”**—Part of the chattels comprised in a bill of sale were described in the schedule as, “stock: 2 horses, 4 cows.” There was no evidence that at the date of the bill there were any other horses or cows on the premises of the grantor:—*Held*: there was not such a specific description of the stock as to satisfy 1882 Act, s. 4.—**DAVIES v. JENKINS**, [1900] 1 Q. B. 133; 69 L. J. Q. B. 187; 81 L. T. 788;

c. — — — — — **“Stock of general merchandise as set out in stock list attached.”**—*No stock list attached. Inaccuracy as to locality.*—A bill of sale described the property as “stock of general merchandise as set out in the stock list attached hereto & marked with the letter A., all of which stock of general merchandise, chattels & effects are now situate & being in the two-storey frame building situated on lots 1 & 2 in block 249, city of R.” No stock list was attached to the bill of sale. The goods were not all contained in the building mentioned—some being there & some in S. R. Street:—*Held*: the instrument did not contain such sufficient & full description of the goods as was required to distinguish them under Bills of Sale Ordinance, s. 12.—**SVAIGHER v. ROTARU** (1906), 3 W. L. R. 486.—**CAN.**

d. — — — — — **“Stock of gold & silver watches, jewellery & electro-silver plate.”**—*Articles identifiable.*—The goods & chattels were described in a chattel mtge. as follows: Certain specific articles were first enumerated in the mtge., & the description then proceeded, “also the stock of gold & silver watches, jewellery, & electro-silver plate, which, at the date hereof, is in the possession of the mtgor. in his said store.” The evidence showed the electro-plated goods & watches were numbered, & might have been identified thereby:—*Held*: a sufficient description of the goods mortgaged.—**SEGSWORTH v. MERIDEN SILVER PLATING CO.** (1882), 3 O. R. 413.—**CAN.**

e. — — — — — **“Stable & coach house, three horses, one cow, etc.”**—*Description not detailed.*—In an assignment 11 goods were described as “all the household furniture, goods, chattels, & effects belonging to & being in the dwelling-house of the said B., & which are enumerated & set forth in the second schedule hereunto annexed; & also the stock-in-trade, implements of business, & machinery in the said schedule enumerated & set forth.” In the margin of the schedule different localities were mentioned, & opposite to them the goods specified, some of the articles in question being as follows:—“Stable & coach house; three horses, three sets harness, one straw-cutter, one cow, one cutter, two buggies, etc., lumber yard; two waggons, one pair bob-sleighs, four wheelbarrows, trestles & scaffolding”:—*Held*: the description as to these was insufficient.—**HAWORTH v. FLETCHER** (1860), 20 U. C. R. 278.—**CAN.**

f. — — — — — **“400,000 envelopes.”**—An inventory describing items of stationery in general terms, such as “400,000 envelopes,” etc., does not sufficiently describe & identify the articles so described to pass them in a schedule to a bill of sale of part of a stationer’s stock.—**SOMMERS v. EBY** (1890), 8 N. Z. L. R. 626.—**N.Z.**

g. — — — — — **“One horse & buggy.”**—*Similar articles not in grantor’s possession.*—*Seemle*: “one horse & buggy” is a sufficient inventory in a case where a man possesses only one horse & buggy.—**CHRISTCHURCH**

48 W. R. 286; 44 Sol. Jo. 103; 7 Mans. 149, D. C.

Annotation:—**Mentd.** Burchell v. Thompson, [1920] 2 K. B. 80.

424. ——— “Premier Platen” machine—Described as “Premier Plating” machine.]—In the schedule to a bill of sale given by a printer a “Premier Platen” machine was described as a “Premier Plating” machine, but certain accessories were included which indicated the true description of the machine:—*Held*: as the description could not have misled any one acquainted with a printer’s business the bill was good.—**SIMMONDS v. HUGHES** (1890), 6 T. L. R. 443, C. A.

FINANCE CO. v. DURANT & SON (1889), 7 N. Z. L. R. 619.—**N.Z.**

h. ——— “One single buggy.”]—The words “one single buggy,” in a chattel mtgo.:—*Held*: not a sufficient description to satisfy R. S. O. 1877 (c. 119), s. 23.—**HOLT v. CARMICHAEL** (1878), 2 A. R. 639.—**CAN.**

k. ——— “One team of oxen.”—*Bailor retaining possession.*]—A receipt note was given for “one team of oxen” & it provided that the right to possession of the property for which the note was given should remain in the bailors:—*Held*: extrinsic evidence could be obtained to show that this team of oxen was the one sold by plffs. & therefore the description was sufficient.—**WESTERN MILLING CO. v. DARKE & BALDERSON** (1894), 2 Terr. L. R. 40.—**CAN.**

l. ——— “One brown stallion, ten years old.”]—In a bill of sale certain goods were described as “one brown stallion, ten years old; one bay horse, eight years old; one black mare, nine years old”:—*Held*: a sufficient description.—**CORNEILL v. ABELL** (1880), 31 C. P. 107.—**CAN.**

m. ——— “One red cow four years old, valued at \$21.”]—Plff. claimed a cow under a bill of sale from one M., by which M. conveyed to plff. “One red cow four years old, valued at \$21”:—*Held*: the description was insufficient to pass the property in the cow, as it did not in any way distinguish the cow so that she could be identified.—**HUGHAN v. MCCOLLUM** (1887), 20 N. S. R. 202; 8 C. L. T. 381.—**CAN.**

n. ——— “One horse or mare, three cows & all my farming implements.”]—A bill of sale given by M., to plff., described the property conveyed as follows: “One horse or mare, three cows, two heifers, sheep, cart, all my farming implements.”

The evidence showed that M., being about to leave the province, sold his farm, stock, etc., to plff., but returned in a short time, & occupied the farm under an agreement to redeem it, & treated the stock as his own, selling & otherwise disposing of it as he saw fit:—*Held*: in an action against deflt. sheriff, who levied upon the stock in satisfaction of a judgment recovered against M., the property levied upon was that of M.—**McASKILL v. POWER** (1897), 30 N. S. R. 189.—**CAN.**

o. ——— “One piano, Dominion make, No. 2773.”]—**FIELD v. HART** (1895), 22 A. R. 449.—**CAN.**

p. ——— “Cooking utensils” — “Crockery.”]—“Cooking utensils” & “crockery” is not a sufficient description in the schedule to a bill of sale, of goods designated under these headings, & specific goods not further described than by such general words are not covered by the bill of sale.—**PEAKE v. HOGG** (1885), 4 N. Z. L. R. 190.—**N.Z.**

q. ——— “One kitchen table, four chairs.”—*Locality specified.*]—Goods were described in a chattel mtgo. as “one kitchen table, four chairs, all

contained in & about the dwelling-house & barn of the mtgor., situate at or on lots,” etc.:—*Held*: sufficient.—**NATTRASS v. PHAIR** (1875), 37 U. C. R. 153.—**CAN.**

r. ——— “Two sets of blacksmithing & one set of waggon maker’s tools complete.”]—In a chattel mtgo. made by M. & Co., the goods were described as “Two sets of blacksmithing & one set of waggon maker’s tools complete”:—*Held*: an insufficient description.—**MASON v. MACDONALD** (1875), 25 C. P. 435.—**CAN.**

s. ——— “14,415 feet of prepared moulding.”]—“14,415 feet of prepared moulding”:—*Held*: a sufficient & full description under the statute.—**NOELL v. PELL** (1861), 7 C. L. J. O. S. 322.—**CAN.**

t. ——— *Stock-in-trade—Locality specified.*]—*Held*: (1) goods in a mtgo. were sufficiently described as “all the stock of dry goods, hardware, crockery, groceries, & other goods, wares, & merchandise in the store & premises occupied by the mtgor. at,” etc., if it were clearly made out that those in question were in the mtgor.’s store, & his, at the execution of the instrument; (2) the evidence of identity in this case was sufficient.—**ROSS v. CONGER** (1856), 14 U. C. R. 525.—**CAN.**

w. ——— ————*Seemle* a description of property in a bill of sale or chattel mtgo. as “the stock-in-trade” of the grantor in a specified locality, such as his store or warehouse in such a place or street is sufficient.—**HOVEY v. WHITING** (1886), 14 S. C. R. 515; *sub nom.* **WHITING v. HOVEY**, 13 A. R. 7; 9 O. R. 314.—**CAN.**

z. ——— ————.]—The description in a chattel mtgo. was as follows: “All & singular the goods, chattels, stock-in-trade, fixtures, & store building of the mtgors., used in or pertaining to their business as general merchants, said stock-in-trade consisting of a full stock of general merchandise now being in the store of said mtgors. on the north-half of section six, township nineteen, range twenty-eight west of the fourth principal meridian”:—*Held*: sufficient.—**THOMSON v. QUIRK** (1889), 18 S. C. R. 695.—**CAN.**

a. ——— ————*Description in general words.*]—Goods & chattels were described as all the stock-in-trade, goods & chattels, etc., including, among other things, all their stock-in-trade which they, the assignors, “now have in their store & dwelling in the village of R.”:—*Held*: description insufficient, in that the kind of stock-in-trade should have been mentioned.—**NOLAN v. DONNELLY** (1883), 4 O. R. 440.—**CAN.**

b. ——— ————.]—“All & singular his stock-in-trade, chattels, debts,” etc., & “all his personal estate, & effects whatsoever & wheresoever”:—*Held*: as there had been a change of possession, 20 Vict. c. 3 did not apply, otherwise the description would have been insufficient.—**HOWELL v.**

425. **Double bath-chair—Described as four-wheeled carriage.**]—The schedule to a bill of sale included “a four-wheeled carriage & set of cloth cushions.” The grantor lived at B., & it was proved that the vehicle to which the above description was intended to apply was of a particular kind known in B. as a “double bath-chair.” The grantor had no other vehicle to which the description could apply:—*Held*: the description was sufficient.—**EDWARDS v. MARSTON** (1890), 61 L. T. 97; 7 T. L. R. 127, C. A.

Annotations:—**Mentd.** Linfoot v. Pockett, [1895] 2 Ch. 835; Rosefield v. Provincial Union Bank, [1910] 2 K. B. 781.

426. ——— “1,800 books as per catalogue.”]—

McFARLANE (1858), 16 U. C. R. 469.—**CAN.**

c. ——— ————.]—“All my stock-in-trade, goods, wares, & merchandise in my store situate at,” etc.:—*Seemle*: not sufficient.—**HUTCHINSON v. ROBERTS** (1858), 7 C. P. 470.—**CAN.**

d. ——— *Specific description of articles.*]—In an assignment the goods were described as “all the household furniture, goods, chattels, & effects belonging to & being in the dwelling-house of the said Burrowes, & which are enumerated & set forth in the second schedule hereunto annexed; & also the stock-in-trade, implements of business, & machinery in the said schedule enumerated & set forth.” In the margin of the schedule different localities were mentioned, & opposite to them the goods specified, some of the articles in question being as follows: “Old lumber, etc., two thousand feet of oak & hardwood plank & boards, sixty thousand feet of prime assorted sizes, two thousand feet flooring, one pair of timber wheels, one hand cart, two yard dogs, cut stone”:—*Held*: the articles were sufficiently described, & passed as stock-in-trade.—**HAWORTH v. FLETCHER** (1860), 20 U. C. R. 278.—**CAN.**

e. ——— ————.]—On a sale by a partner of his interest in the partnership effects to his co-partner, & for the purpose of securing the amount due on such purchase, the purchaser, T., executed a mtgo. to the vendor on “all the stock-in-trade, consisting of drugs, chemicals, etc., & in fact everything in stock or held by the late firm of T. & P. in connection with their business & now in possession of the said party of the first part [the purchaser] in or upon the shop or premises occupied by him on the north side of Kent street, in A., & also any stock purchased hereafter by the said T., & which may be in his possession upon said premises during the continuance of this security or any renewal thereof.” Afterwards T. executed a renewal of this mtgo., describing the property substantially as above, & as being in his possession on the date of the first mtgo., & “also any stock purchased by the said mtgor. thereafter & now in his possession; & also any stock purchased hereafter by the said mtgor., & which may be in his possession, upon the said premises, at any time during the continuance of this security or any renewal thereof”:—*Held*: the property was sufficiently described in the mtgo. both as to its nature & locality.—**Re THIRKELL, PERRIN v. WOOD** (1874), 21 Gr. 492.—**CAN.**

f. ——— ————*Other goods described generally.*]—“All & singular the stock-in-trade of the said W.,” the assignor, “situate on Ontario street, in the said town of Stratford, & also all his other goods, chattels, furniture, household effects, horses, & cattle, & also all bonds, bills, notes, debts, choses in action, terms of years, leases, & securities for money”:—*Held*:

Sect. 2.—Form of bills of sale by way of security:
Sub-sect. 8, B. & C.]

The grantor of a bill of sale, given as security for an advance, was, at the time of the execution of such bill of sale, possessed of books to the number of 1,800 volumes, which were in a study at his house. The schedule annexed to the bill of sale commenced with the words: "The whole of the chattels at present at W. Vicarage, & consisting (*inter alia*) of the following." It then proceeded to specify the furniture & other chattels contained in each of the rooms in the house. Under the head "Study" was the item: "Eighteen hundred volumes of books as per catalogue." There was a catalogue of the books in the study in existence previously to the bill of sale. There was no evidence of facts showing that there was any difficulty in identifying the books comprised in the bill of sale without referring to the catalogue:

Held: the books were specifically described, inasmuch as the words "as per catalogue" were not restrictive of the previous part of the descrip-

insufficient as to all the goods.—*WILSON v. KERR* (1860), 18 U. C. R. 470.—**CAN.**

k. — *Stock mortgage—Stock not earmarked as described.*—By a mtge. of stock, which was duly registered, bkpt. had mortgaged to resp. a herd of cattle & certain sheep depasturing on land of the grantor therein described, & also all after-acquired stock. The instrument described all the stock as earmarked with the registered earmark of bkpt., & contained a covenant to brand and earmark. But no brand was specified in the instrument, & neither then nor subsequently did any of the cattle bear bkpt.'s brand or earmark: *Held:* (1) as the earmarks on the cattle were not the earmarks mentioned in the mtge., the description was insufficient under *Chattels Transfer Act*, 1908, s. 25; (2) though the instrument was not valid for the purposes of s. 25, the provision in s. 26 that an instrument comprising stock shall be deemed to include all the stock the property of the grantor which he has covenanted to brand or mark, & which are depasturing on the land mentioned in the instrument, made the security valid.—*BAILEY'S OFFICIAL ASSIGNEE v. UNION BANK OF AUSTRALIA, LTD.* (1916), 35 N. Z. L. R. 873.—**N.Z.**

l. — *Stock described or referred to by name—Or by usual description without name or brand.*—Stock are sufficiently described or referred to for the purposes of *Chattels Transfer Act*, 1889, s. 31, if described or referred to by name.

Semble: the usual description of such stock without name or brand is sufficient.—*Re CHRISTIE* (1901), 19 N. Z. L. R. 615.—**N.Z.**

m. — *As to locality.*—The goods were described as "all the goods in the house of the mtgor.; in bedroom No. 1, one bureau," etc., describing the articles in each room, & adding, "all the hereinbefore described goods & chattels being in the dwelling house of the party of the first part, situate on Q. street, in the town of B.; also, one bay mare, one covered buggy," etc., "being on the premises of the party of the first part on said Q. street; also the following goods & articles, being in the store of the party of the first part, on the corner of Q. & M. streets, in the said town of B.; that is to say, eighty-five gallons of vinegar," giving a long list; "& also the following goods, being of the stock-in-trade of the party of the first part, taken in the month of Apr. last; that is to say, sixteen pieces of tweed," etc.: *Held:* all the goods were

sufficiently identified the books assigned.—*DAVIDSON v. CARLTON BANK*, [1893] 1 Q. B. 82; 62 L. J. Q. B. 111; 67 L. T. 641; 41 W. R. 132; 9 T. L. R. 20; 39 Sol. Jo. 699; 4 R. 100, C. A.

C. What passes under Particular Description.

See, also, cases in Sect. 2, sub-sect. 4, ante.

427. General words of bill—Whether limited by description in schedule.—A bill of sale purported to assign to R. "all the household goods & furniture of every kind & description whatsoever in the house No. 2, M. Place, more particularly mentioned & set forth in an inventory or schedule of even date, & given up to R. on the execution thereof." At the time of the execution of the bill of sale one chair was delivered to R. in the name of the whole of the goods & furniture. The inventory did not specify all the goods & furniture in the house:—*Held:* the bill of sale only operated as an assignment of the goods & furniture specified in the inventory.—*WOOD v. ROWCLIFFE* (1851),

sufficiently described, for the last parcel of goods might be taken as described to be in the store.—*MATHERS v. LYNCH* (1869), 28 U. C. R. 354.—**CAN.**

n. — *—*—The goods were described as set forth in the schedules annexed. Schedule D. was headed, "Household furniture & property of J. R. McDermott," & the several apartments containing the furniture were specified:—*Held:* sufficient, as it might be assumed to refer to the party's residence.—*FRASER v. BANK OF TORONTO* (1860), 19 U. C. R. 381.—**CAN.**

o. — *—*—The property was described as "the goods, chattels, furniture, & household stuff expressed in the schedule hereunto annexed," which schedule was headed, "An inventory of goods & chattels in the possession of one J. R." on a named day. It proceeded to mention certain rooms & the articles therein contained: then jewellery, blankets, household linen, silver, etc., the locality of the house in which the goods, etc., were contained not being mentioned:—*Held:* sufficient.—*POWELL v. BANK OF UPPER CANADA* (1861), 11 C. P. 303.—**CAN.**

p. — *—*—*Goods "in bond."*—*Semble:* the description of goods as "in bond," means in the customs warehouse, & is a sufficient description as regards locality.—*MAY v. SECURITY LOAN & SAVINGS Co.* (1880), 45 U. C. R. 106.—**CAN.**

q. — *—*—*Stock mortgage.*—Where sheep were described in a mtge. as at a certain station, which was their headquarters, but at which they were not at the time, having to travel about the country in search of feed. *Qu.*: whether this fact invalidated the mtge.—*SYNNOT v. ETTERSHANK* (1877), 3 V. L. R. 136.—**AUS.**

r. — *—*—*Household furniture in dwelling-house—Erroneous description.*—Goods intended to be included in a chattel mtge. were described therein as those mentioned in the schedule, the property of the mtgors., situate upon the premises on the north-east corner of certain streets in a township. The schedule contained a list of goods, which consisted of household furniture, each article being described, & the articles in each room set out under a heading describing the room. The mtge. contained a covenant that if the mtgors. should part with the possession of the goods, the mtgee. was entitled to take possession:—*Held:* (1) the mortgaged goods were the property of the mtgors., in their

possession, & contained in the building described in the mtge.; (2) the building was the dwelling house of the mtgors., the goods the household furniture in use by the mtgors.; (3) although when the mtge. was executed, the goods were in the house at the north-west corner, & not the north-east corner, the mtge. was not void: the erroneous part of the description might be rejected, & the statement that they were contained in the mtgors.' dwelling house would remain.—*SUPREME COURT OF JUDICATURE (ACCOUNTANT OF) v. MARCON* (1899), 30 O. R. 135.—**CAN.**

s. — *—*—*Goods in warehouse of third party.*—C. & J., by mtge., conveyed certain goods, mentioned & described in schedules attached thereto, to plff. Some of the goods mentioned therein were in possession of the manufacturer, one R.; other portions were in certain rooms in the A. & B. Hotels. The description given merely designated a portion of the property by locality, giving no particular description, & was as follows: "All & singular the goods & chattels, furniture, household stuff, & articles particularly mentioned & expressed in the schedule hereunto annexed, & which are now in the warehouse of R., in the city of H., & are about to be placed in the building known as the B. Hotel." The schedule began: "Schedule mentioned & referred to in the annexed indenture; one set parlour furniture," etc. (describing some articles), "in parlour H. One walnut bedstead," etc. (describing several articles), "in parlour C.":—*Held:* (1) all the goods in the schedule described as having been in certain rooms in either of the hotels, passed by the mtge.; (2) goods described specifically without any local description, passed; (3) goods which were made at the time of executing the mtge., & were the property of the mtgors. in R.'s warehouse, passed under the mtge. as a distinct grant from those in the schedules.—*MILLS v. KING* (1864), 14 C. P. 223.—**CAN.**

t. — *—*—*Goods not on locality specified.*—A description of goods as "being now on the premises occupied by the" mtgors. "in the town of P., being lot," etc., "& being composed of one stumping machine, one prize buggy, one lumber waggon complete," etc.:—*Held:* sufficient as to all the goods, though the stumping machine & waggon were not on the premises.—*BERTRAM v. PENDRY* (1877), 27 C. P. 371.—**CAN.**

w. — *—*—*Held:* all goods described in the schedule as being in certain rooms, & which were not in

428. — A., who carried on his business at No. 111, Fore Street London, but who resided at No. 10, The Grove, South Lambeth, executed a bill of sale to a creditor of all & singular the plate, linen, goods, & chattels, which then were in or about the messuage & premises No. 10, The Grove, South Lambeth. There was then a clause in the bill of sale "that all the household furniture, plate, linen, china, glass, pictures, prints, wines, liquors, & all other the goods, chattels & effects of whatever nature, which the mtgor. now is, or during the continuance of the security, shall become possessed of, shall be subject to the security hereby made, & it shall be lawful for the mtgee. to enter into any messuage or premises & to take possession thereof," etc. There were other provisions inserted in the bill of sale with a view to securing the mtgee., but although the house No. 10, The Grove, was frequently mentioned, no mention in terms was

PART V. SECT. 2, SUB-SECT. 8. C.

427 iv. ———]—A chattel mtgo. described the goods as "all the goods, chattels, furniture & household stuff whatsoever, the property of the said mtgor., situate & being in & upon the hotel, stables & premises known as S.'s Hotel, in the said city of L.; which said goods & chattels, furniture & household stuff, are more particularly, but without restriction to the above description, described & set out in the schedule hereto annexed marked A.—that is to say, any goods & chattels, furniture & household stuff, in & upon the said hotel, stables & premises, not included in the said schedule, are not to be excluded from this security." In the schedule was contained: "Yard & stables, one omnibus, two bay horses, aged, etc., the whole of this above-named property, goods & chattels, household furniture, horses, & waggons, now being in & upon the premises known as S.'s Hotel," on, etc. At the time of giving the mtgo. the mtgor. owned only two horses for the use of the omnibus, one of which was not a bay horse:—*Held*: (1) this

430 ii. — In a chattel mtge. the goods conveyed were described as follows: "All of which goods & chattels are now the property of the mtgor., & are situate in & upon the premises of the L. Co., describing the premises, on the north side of K. street, in the city of L.;" & in a schedule referred to in the mtge. was this additional description:—"And all machines in course of construction or which shall hereafter be in course of construction or completed while any of the moneys hereby secured are unpaid, being in or upon the premises now occupied by the mtgor. or which are now or shall be on any other premises in the city of L." :- *Held* : the description in the schedule could not extend to goods wholly manu-

430. Description of goods in bill—Whether enlarged by words of schedule.]—A. mortgaged an iron foundry, & fixtures, & working plant thereon, as specified in an inventory, which was to be read & construed with the deed. The

c. Assignment of "household furniture"—Sewing machine not included.]—Plff. claimed a sewing machine under an assignment of all the household furniture & fittings of every nature & kind in & upon the dwelling-house, etc.:—*Held*: the sewing machine did not come within the terms of the

2.—*Form of bills of sale by way of security:*
Sub-sect. 8, C.

inventory included stock-in-trade, which was not mentioned in the deed:—*Held*: the inventory could not, contrary to the intention of the parties, be allowed to enlarge the operation of the deed, & as it was not, as a matter of fact, intended that the stock-in-trade should be included in the mtge., it passed to the trustee in the liquidation of the mtgor.—*Re McMANUS, Ex p. JARDINE* (1875), 10 Ch. App. 322; 44 L. J. Bcy. 58; 32 L. T. 681; 23 W. R. 736, L. J. J.

431. Articles described in schedule—Bought before but not on premises until after execution.]—In an assignment of all the furniture in a house, & comprised in a schedule annexed, goods bought & inserted in the schedule before, but not received until after, the execution of the bill of sale, will pass.—*SUTTON v. BATH* (1858), 1 F. & F. 152; *subsequent proceedings*, 3 H. & N. 382.

432. Assignment of "personal estate"—Whether term of years included.]—A bill of sale recited that B. owed pltf. £50 for goods supplied, & that B. assigned to pltf. "all the household

goods, furniture, stock-in-trade, chattels, etc., at the Black Bull, & all other his personal estate whatsoever to which he was entitled." B. surrendered the remainder of his term in the Black Bull to his landlord:—*Held*: the bill of sale operated only to pass the chattels personal, & not the term of years.—*HARRISON v. BLACKBURN* (1864), 17 C. B. N. S. 678; 5 New Rep. 90; 34 L. J. C. P. 109; 11 L. T. 453; 10 Jur. N. S. 1131; 13 W. R. 135; 144 E. R. 272.

Annotations:—*Distd.* Debenham v. Digby (1873), 28 L. T. 170. *Mentd.* Mitcalfe v. Westaway (1864), 34 L. J. C. P. 113; Wallis v. Hands, [1893] 2 Ch. 75; Hawke v. Dunn, [1897] 1 Q. B. 579.

433. Assignment of restaurant & trade fittings—Whether loose articles included.]—A. mortgaged the business of a restaurant together with the trade fixtures, fittings & other articles used for carrying on the business. The deed was not registered as a bill of sale. The loose articles were described in an inventory & included cooking utensils & furniture used in the restaurant as well as the general furniture of the house:—*Held*: the loose articles did not pass.—*Re MACDONALD, DOWLING v. STEWART*, [1885] W. N. 98.

assignment as household furniture.—*ALLEN v. WALLACE* (1888), 21 N. S. R. 49.—**CAN.**

d. Assignment of "wheat & grain & all other personal property of like nature"—Timber & sawmiller's stock-in-trade not included.] *HURREY v. BANK OF NEW SOUTH WALES* (1882), 1 N. Z. L. R. C. A. 115.—**N.Z.**

e. Mortgage on "saw-logs"—Binds lumber into which sawn.]—A mtge. on saw-logs binds the lumber into which they are sawn, but the mtgee. must prove that such lumber was made out of them.—*WHITE v. BROWN* (1855), 12 U. C. R. 477.—**CAN.**

f. Mortgage of ship "with her boats, guns, ammunition, small arms, & appurtenances"—Piano on board not included.]—*ST. JOHN v. BULLIVANT* (1881), 45 U. C. R. 614.—**CAN.**

g. "Assignment of book debts, etc."—Moneys due from insurance company not included.]—The usual agreement called an "assignment of book debts, etc.," taken by banks from customers is of insufficient strength to justify the ct. in holding that moneys due from insurance cos. for loss by fire are book debts, or are *ejusdem generis* with book debts.—*ROYAL BANK v. HEALBY* (1916), 27 O. W. R. 428.—**CAN.**

h. Assignment of real & personal property—Whether book debts included.]—A co. made a mtge. of "its undertakings then made or in course of construction or thereafter to be constructed, together with all the properties real or personal, tolls, incomes, and sources of money, rights, privileges, and franchises, owned or held by it":—*Held*: the mtge. created an equitable charge on present future book debts, though not specifically mentioned.—*NATIONAL TRUST CO. v. TRUSTS & GUARANTEE CO.* (1912), 26 O. L. R. 279.—**CAN.**

k. Assignment of goods in specified place—Locality limited.]—M., owning parts of lots 13 & 14 in the 2nd concession of Murray, gave a chattel mtge. of certain crops, grain, hay, etc., described as "now being on the premises situate on the north-east half of lot 14 in the 2nd concession, & north half of lot 14 in the said concession of Murray":—*Held*: crops & hay upon lot 13 could not pass.—*GRASS v. AUSTIN* (1882), 7 A. R. 511.—**CAN.**

l. —.—In an action against a sheriff for false return the defence was that the goods seized & subsequently, on his being indemnified, abandoned by him, & which were on

Bald Lake, Buckhorn Lake, Sandy Creek, & Squaw River, were covered by a chattel mtge. to a bank, the goods in which mtge. were described as being "now in & upon the waters of Mud Lake, Pigeon Creek, Pigeon Lake, Sturgeon Lake, & Scugog River, & the shore adjacent thereto." The evidence showed that the former waters were well known as such, & as distinct from & forming no part of the latter, & that no part of the goods seized had ever been "in & upon" the latter:—*Held*: the words in the mtge., "now in & upon," expressly limited the goods to which they referred to those goods which were then upon the waters mentioned in the mtge., & the shore adjacent thereto, & could not include the goods seized.—*DONNELLY v. HALL* (1885), 7 O. R. 581.—**CAN.**

m. Assignment of stock-in-trade—"In course of delivery" Goods lying at wharf included.] A trader, in consideration of a debt, by deed assigned to pltf. all his stock-in-trade, etc., on certain premises, "or in course of delivery to him":—*Held*: to pass his interest in goods lying at the wharf in the town where he resided, but not actually delivered to him.—*McPHERSON v. REYNOLDS* (1857), 6 C. P. 491.—**CAN.**

n. — Whether "account register" included Intention of parties.]—It was apparent from the terms of a chattel mtge. of a certain stock in trade that the word "stock" was used in a special & peculiar sense by the parties, & while if interpreted in its general & ordinary sense, the term in question would have included an "account register" placed in the shop, the ct. declined to hold that the account was included in the goods covered by the mtge.—*DOMINION REGISTER CO. v. HALL* (1913), 12 E. L. R. 494; 11 D. L. R. 366.—**CAN.**

o. — Tools not included.]—A bill of sale contained an assignment of "all & singular the stock-in-trade" of a cabinet maker:—*Held*: tools were not included.—*PETERS v. JOSEPH*, 3 J. R. N. S. 142.—**N.Z.**

p. — Movable property & specified stock—Shares not specified not included.]—All the assignor's "stock-in-trade, wares, merchandise, groceries, household furniture, & movable personal property in, upon, or belonging to his store, dwelling, warehouse, wharf, & tenement in Ontario street, in the city of K., or elsewhere (save & except & excluding the goods & chattels of the said J. F.," the assignor, "in the possession,

control, or charge of D. only), & also all his stock in the K. Co.":—*Held*: shares in the B. Co. did not pass.—*HEWITT v. CORBETT* (1857), 15 U. C. R. 39.—

q. Assignment of stock-in-trade & book debts By new firm taking over business—Book debts due to old firm included.]—V. & C. sold their business, including all their stock-in-trade & book debts, to H. & B., who shortly afterwards gave a chattel mtge. to E. covering the stock-in-trade of the business, & also all book debts due to H. & B. in the business carried on by them:—*Held*: book debts originally due to V. & C. & assigned by them to H. & B. were covered by the chattel mtge.—*ROBINSON v. EMPEY* (1904), 24 C. L. T. Occ. N. 343; 10 B. C. R. 466.—**CAN.**

r. Stock mortgage Must describe station where stock depasturing.]—The station whereon stock are depasturing is an essential particular of a valid registered stock mtge., & must be truly described.—*SLEE O'GILBY & CO. v. MURPHY* (1890), 16 V. L. R. 636.—**AUS.**

s. — Brands must be clearly specified.]—In order to obtain protection given to stock mtges. by Stock Mortgages Act, s. 4, the brands of the mortgaged stock must be clearly specified so that any person on going to the place where the stock are depasturing can clearly see what are mortgaged & what are not. It is not sufficient to describe the brands as "various."—*Re GEOHEGAN, Ex p. OFFICIAL ASSIGNEE* (1897), 18 N. S. W. B. 26.—**AUS.**

t. — Protection of stock branded, as described in instrument.]—*Held*: a mtge. of stock under Chattels Securities Act, 1880, Part II., protected only stock branded as described in the instrument. *Qu.*: whether a mtge. of horses not forming part of the stock of a farm or station was a mtge. of stock under Part II. of the Act.—*Re SOMERVILLE* (1889), 7 N. Z. L. R. 400.—**N.Z.**

a. — "Other chattels"—Instruments Act, 1890, ss. 169, 170, 171.]—The words "other chattels" on any station in Victoria in the above Act include all other chattels whatever may be their nature & whatever may be the purpose for which they are used on such station.—*INTERNATIONAL HARVESTER CO. OF AMERICA v. ROWE*, [1909] V. L. R. 244.—**AUS.**

b. Assignment of vehicle & horse—Not a mortgage of "stock" as regards

SECT. 3.—DEFEASANCE, CONDITION OR DECLARATION OF TRUST.

See 1878 Act, s. 10 (3); 1882 Act, s. 9.

434. Defeasance—Agreement made before or on execution of bill—Agreement not to register bill by grantee.]—In consideration of £242, advanced by a money-lender, a bill of sale was executed to secure repayment of £342 by instalments. The extra £100 was charged by way of bonus, & in consideration of so large a bonus the lender undertook, verbally, not to register his bill of sale. The bill of sale was, nevertheless, registered:—*Held*: the undertaking not to register was not a defeasance.—*Re STORRY, Ex p. POPPLEWELL* (1882), 21 Ch. D. 73; 52 L. J. Ch. 39; 47 L. T. 274; 31 W. R. 35, C. A.

Annotations:—*Consd.* *Blaiberg v. Beckett* (1886), 18 Q. B. D. 96. *Mentd.* *Brandon Hill v. Lane* (1914), 84 L. J. K. B. 347.

435. ——— Promissory note by grantor.]—By a bill of sale, the grantor assigned certain specified chattels to secure to the grantees repayment of £80, & interest thereon at 30 per cent., the principal sum to be paid, together with the interest then due, by equal monthly payments of £5 6s. on specified days until the whole sum & interest

should be fully paid. The grantor at the same time gave a separate promissory note bearing the same date as the bill of sale, promising to pay the grantees, or order, £95 12s., by equal monthly instalments of £5 6s. payable on the same days as the monthly payments in the bill of sale, until the whole £95 12s. should be fully paid, & the note contained a stipulation that in case of default in payment of any instalment the whole of the same sum should become due & payable:—*Held*: by reason of such stipulation the promissory note was a defeasance, because if at any time the whole sum payable on the note were paid, the rights of the grantees under the bill of sale would cease, & the bill of sale was void.—*COUNSELL v. LONDON & WESTMINSTER LOAN & DISCOUNT CO.* (1887), 19 Q. B. D. 512; 56 L. J. Q. B. 622; 36 W. R. 53; 4 T. L. R. 2, C. A.

Annotations:—*Expld.* *Monetary Advance Co. v. Cater* (1888), 20 Q. B. D. 785. *Distd.* *Carpenter v. Deen* (1889), 23 Q. B. D. 566. *Folld.* *Onn v. Fisher* (1889), 5 T. L. R. 501. *Appld.* *Edwards v. Marcus*, [1894] 1 Q. B. 587; *Ellis v. Wright* (1897), 76 L. T. 522. *Refd.* *Linfoot v. Pockett* (1895), 73 L. T. 197; *Hall v. Whiteman* (1911), 105 L. T. 854.

436. ——— Note valid.]—Deft. gave ptfs. a bill of sale of personal chattels to secure

a.] A bill of sale given by an expressman over his vehicle & horse is not as regards the horse a mtge. of stock within Chattels Transfer Act, 1889, s. 23, but a mtge. of a specific chattel. *ANDREWS v. FAN TU* (1909), 28 N. Z. L. R. 1012.—N.Z.

PART V. SECT. 3.

c. *Defeasance—Must be contained in bill.]—Held*: the chattels security was void because subject to a defeasance not included therein.—*HAYES v. ROSS*, [1919] N. Z. L. R. 777.—N.Z.

d. ——— *Avoidance as between parties.]*—A document made void by Chattels Transfer Act, 1889, s. 26, by reason of being subject to a condition or defeasance not contained in the body thereof, is void even as between the parties thereto.—*OWLES v. LOVICK* (1892), 11 N. Z. L. R. 178.—N.Z.

434 i. ——— Agreement made before or on execution of bill—Bill absolute in form.] *Qv.*: whether a bill absolute in terms, but subject to a defeasance, which is not reduced to writing & filed, is void against the persons named in Bills of Sale Act, s. 1.—*SHERATON v. WHELFLEY* (1880), 20 N. B. R. 75. CAN.

434 ii. ——— ———.]—A bill of sale, absolute on its face, was made subject to a defeasance or equity of redemption, but the defeasance was not filed under the Bills of Sale Act:—*Held*: the bill of sale was inoperative, & vested no title in the grantee as against the assignee of the grantor.—*Re DE VEBER, Ex p. DE VEBER* (1882), 21 N. B. R. 397.—CAN.

434 iii. ——— Verbal defeasance.]—A bill of sale absolute in its terms was made subject to a verbal defeasance:—*Held*: under Secret Bills of Sale Act, s. 2, such defeasance should have been written on the same paper or parchment on which the bill of sale was written, before the time when the latter or a copy thereof was filed; & the bill of sale alone having been filed, was void as against a judgment creditor of the grantor.—*WILSON v. O'CONNEL* (1865), 4 N. S. W. S. C. R. 264.—AUS.

435 i. ——— Promissory note by grantor.]—A bill of sale was given to two parties, & separate interests were secured to each under it. At the time the grantor executed the bill of sale he gave, in addition, a promissory note

to one of the grantees for the amount of his debt secured under the bill of sale. No mention was made of the note in the bill of sale, & the other grantee knew nothing about the transaction:—*Held*: the giving of the note was not a defeasance or condition to which the bill of sale was subject within Chattel Securities Act, 1880, s. 52; nor was it part of the consideration for which the bill of sale was given.—*COMMERCIAL PROPERTY & FINANCE CO. v. WATERS' OFFICIAL ASSIGNEE* (1890), 8 N. Z. L. R. 560.—N.Z.

435 ii. ——— ———.]—Where, by a bill of sale, the amount secured was made payable on demand, & a promissory note at three months was given to secure the same amount in order to enable the lender to finance:—*Held*: the note was not a defeasance of the bill of sale within Chattel Securities Act, 1880, s. 52. *CHRISTCHURCH FINANCE CO. v. DURANT & SON* (1889), 7 N. Z. L. R. 619.—N.Z.

435 iii. ——— ———.]—A bill of sale of personal chattels, given to secure the repayment of certain money advanced, provided for redemption on payment on demand of the sum secured. Immediately before or at the time of the execution of the bill of sale, a promissory note for the principal & three months' interest was given, payable three months after date, & it was arranged that the money was to be lent for three months, & if paid off meanwhile there was to be a rebate of interest. The bill of sale was filed in accordance with Instruments & Securities Act, 1864, No. 204, s. 56, & Bills of Sale Act, No. 55, s. 1, but neither the promissory note nor arrangement was referred to:—*Held*: the promissory note & arrangement made amounted to a condition of defeasance of the bill of sale &, as it was not contained in the body of it or written on the same paper as the bill of sale, was null & void by virtue of 1864 Act, s. 57.—*ANTHONESSE v. ANDERSON* (1888), 14 V. L. R. 127.—AUS.

g. ——— Letter authorising mortgagee to collect book debts assigned.]—Where a bill of sale contains an assignment of book debts & a power to the mtgee. to at any time require payment of the same to himself, & to collect the same, whether any default has been made by the mtgor. or not, a letter given by the mtgee. to the mtgor., authorising the mtgor. to

collect same, & reserving the right to cancel such authority if the mtgee. should at any time be dissatisfied with the way in which the mtgor. was collecting them, or with the amount being paid away by him, is not inconsistent with the terms of the bill of sale, & is not a condition or defeasance within Chattels Transfer Act, 1889, s. 26.—*Re MARSH* (1893), 12 N. Z. L. R. 456.—N.Z.

h. ——— Oral agreement for return of property.]—A document purported on its face to be an absolute transfer, with a right to immediate possession, but it was referred to in the affidavit as a bill of sale, & the evidence showed that there was an understanding, not reduced to writing, that S., the grantor, should get the property back on payment of the amount secured. After the filing of the bill of sale, the property was allowed to remain in the possession of S.:—*Held*: the oral agreement for the return of the property was not a "defeasance" in the sense in which that term is used, & the section of the Act which requires every defeasance to which a bill of sale is subject to be filed with it, was not applicable.—*FRASER v. MURRAY* (1901), 34 N. S. R. 186.—CAN.

k. ——— Oral agreement as to terms of repayment.]—Appl. sold a vehicle to one R. for a sum of £18 of which £2 was paid in cash, & the balance was to be paid by instalments of £1 5s. a month, & a document was signed by R. which was intended simply to give appl. the rights & powers of a mtgee. upon default in payment of any instalment. The document purported, however, to be a contract by R. to hire the vehicle to pay for it monthly the sum of £1 5s., & it did not specify the period over which such payments were to extend, nor contain any provision that upon payment of the last instalment the vehicle should become the property of R.:—*Held*: the document was void, as an instrument given subject to a defeasance or condition not expressed therein, or set out pursuant to Chattels Transfer Act, 1889, s. 26.—*WRIGHT v. CARMODY* (1897), 16 N. Z. L. R. 155.—N.Z.

l. ——— ———.]—Where a bill of sale was made payable on demand, &, in default of payment power was given to the mtgee. to seize, & the mtgee. verbally agreed

Defeasance, condition or declaration of trust.

repayment of a sum of money & interest, & at the same time, & as part of the same transaction gave them his promissory note for payment of the same sum & interest by instalments of the same amounts & to be paid on the same days as provided by the bill of sale. The promissory note also stipulated that in the event of any of the instalments falling into arrear the whole amount outstanding should immediately become due & payable. In an action on the promissory note:—*Held*: though the stipulation in the promissory note rendered the bill of sale void, the promissory note was good & plffs. were entitled to recover.—*MONETARY ADVANCE CO. v. CATER* (1888), 20 Q. B. D. 785; 57 L. J. Q. B. 463; 59 L. T. 311; 4 T. L. R. 464, D. C.

437. — Joint & several promissory note by grantor & others.]—Plff. gave a bill of sale to deft. to secure an advance of £60 & interest at 40 per cent. *per annum*, payable by weekly instalments, & on the same day plff., & three other persons as sureties, gave deft. a joint & several promissory note, payable on demand, for £85, being £60 & £25 interest thereon. The promissory note was a separate instrument & was not registered as part of the bill of sale. The evidence showed that the bill of sale & promissory note constituted one transaction for the securing of the loan of £60:—*Held*: the bill of sale was void, & fact that other persons besides the grantor of the bill of sale had joined in giving the promissory note made no difference.—*ONN v. FISHER* (1889), 5 T. L. R. 504.

438. — Mortgage to secure same debt & other advances.]—A bill of sale was given to secure repayment of £110 at the expiration of one month. At the same time the grantor of the bill of sale gave to the grantee a mtge. to secure repayment of £140, which included the £110, & covenanted to pay same on demand:—*Held*: the covenant in the mtge. was a defeasance.—*ELLIS v. WRIGHT* (1897), 76 L. T. 522, C. A.

439. — With different provisos.]—A. gave a bill of sale to secure £1,000, & on the same day executed a mtge. of his leaseholds to secure the same loan. The mtge. contained provisos different from the terms of the bill of sale:—*Held*: the mtge. was not a defeasance or condition, but an independent contract not requiring registration.—*Re LEBER, Ex p. TRUSTEE* (1908), 52 Sol. Jo. 483.

440. — Prior mortgage to secure same debt.]—A. borrowed money from B. & lent same to himself & his co-trustee C. A. & C. gave a bill of sale to B. to secure the loan, but prior to granting the bill of sale they had given mtges. of leaseholds

to B. to secure the same loan:—*Held*: the mtges. did not operate as a defeasance of the bill of sale.—*Re JONES, Ex p. OFFICIAL RECEIVER* (1910), 55 Sol. Jo. 30, D. C.

441. — Alteration of terms of payment.]—A bill of sale was given for an advance of £30 to be repaid by monthly instalments of £2 10s. with interest at 60 per cent. On the day when the bill was executed the grantee gave to the grantor a letter agreeing to accept 25s. per month as interest:—*Held*: the agreement as to the interest was not a defeasance which it was necessary to set forth in the bill.—*REED v. FRANKS* (1900), 16 T. L. R. 347.

Annotation:—*Overd. Pettitt v. Lodge & Harper*, [1908] 1 K. B. 744.

442. —]—By a bill of sale the mtgor. agreed to pay the principal sum, together with the interest then due, by equal weekly instalments. Owing to the difficulty of calculating the varying amount of interest due from week to week the parties agreed to substitute for the mode of payment provided by the bill of sale payment by equal weekly instalments of an increased amount, to cover principal & interest, but that arrangement did not alter the aggregate amount payable by the mtgor. for principal & interest: *Held*: that was a defeasance which ought to have been contained in the body of the bill of sale, or written on the same paper with it before registration, & the bill of sale was void. *Reed v. Franks*, No. 411, *ante overd.*—*PIETIT v. LODGE & HARPER*, [1908] 1 K. B. 744; 77 L. J. K. B. 413; 98 L. T. 771; 24 T. L. R. 329; 15 Mans. 136, C. A.

Annotations:—*Consd. Smith v. Whiteman*, [1909] 2 K. B. 437. *Distd. Rosfield v. Provincial Union Bank*, [1910] 2 K. B. 781. *Consd. Cornell v. May* (1915), 112 L. T. 1085. *Distd. Lester v. Hickling*, [1916] 2 K. B. 302; *Graham v. Hart*, [1917] 1 K. B. 201. *Refd. Hall v. Whiteman*, [1912] 1 K. B. 683.

443. — Guarantee by third person.]—A guarantee given by a third person to pay on demand any unpaid balance of the loan & interest secured by a bill of sale is not a condition or defeasance, & does not require registration.—*OAKES v. GREEN* (1907), 23 T. L. R. 560.

444. — Card of conditions shown before execution of bill.]—At the time of the giving of a bill of sale as security for an advance, & before the completion of the transaction, the grantee handed to the grantor a card on which were printed certain conditions, which were made part of the bargain before the money was lent. One of the conditions was to the effect that borrowers were strictly prohibited from obtaining or endeavouring to obtain money from any other loan office until the account was paid; otherwise they would be liable for the full amount to be called in, as though an instalment had been missed. This condition was not inserted

with the mtgor. that, as long as he paid the interest due under the bill of sale, no seizure would be made:—*Held*: such an agreement was a condition or defeasance within Chattel Securities Act, 1880, s. 52, & not being set out, the bill of sale was void.—*CHRISTCHURCH FINANCE CO. v. DURANT & SON* (1889), 7 N. Z. L. R. 619.—N.Z.

m. — Subsequent lien.]—Resp. bank agreed to advance W. £1,000 on a mtge. of stock by himself & a guarantee by R. W. & R. attended at the bank, & executed respectively a mtge. of stock for £1,000 & further advances & a guarantee limited to £1,000. W. then, at the request of the manager of the bank, drew a cheque on the bank for £1,000. The manager took the cheque & obtained

from his teller £1,000 in notes. W. then signed a credit slip for £1,000, & the £1,000 in notes was handed to the teller with the credit slip, and lodged to the credit of W. The mtge. of stock contained covenants by W. to give the bank wool liens yearly. Immediately after the lodging of the £1,000 to the credit of W., & at the same interview, the manager produced a form of wool lien, filled it up as a security for £1,000 and further advances, & requested W. to sign it. W. at first objected, but signed it before leaving the bank. None of the three documents, the mtge. of stock, the guarantee, & the wool lien, contained any reference to either of the others. By both mtge. of stock & wool lien the balance of the account current between W. & the bank was made payable on demand. By the mtge. of stock, W., besides covenanting

to give wool liens yearly, further covenanted to deliver all his wool to the order of the bank. The wool lien itself contained the usual provisions enabling the bank to sell the wool, & apply the proceeds in payment of the amount secured, although no demand or default should have been made:—*Held*: (1) the guarantee was not a defeasance either of the mtge. of stock or of the wool lien within Chattels Transfer Act, 1889, s. 26; (2) the giving of the wool lien was a transaction subsequent to & distinct from the giving of the mtge. of stock, & the wool lien could not be a defeasance of the mtge. of stock within that sect.; (3) the wool lien, even if contemporaneous with the mtge. of stock, would not have been a defeasance of the mtge. of stock within the sect.; (4) the mtge. of stock was not a defeasance of the wool lien within the sect.—

in the bill of sale, which otherwise was in accordance with the form in the sched. to the Bills of Sale Act (1878) Amendment Act, 1882 :—*Held* : as the condition was not inserted in the bill of sale, & would have avoided it if it had been inserted, the bill of sale was not in accordance with the statutory form, & was absolutely void, & the grantor's covenant for payment of interest was not enforceable by the grantee.—*SMITH v. WHITEMAN*, [1909] 2 K. B. 437 ; 78 L. J. K. B. 1073 ; 100 L. T. 770 ; 16 Mans. 283, C. A.

Annotation :—*Folld. Hall v. Whiteman*, [1912] 1 K. B. 683

445. — Letter undertaking not to mortgage or borrow from other office.—At the time of the giving of a bill of sale as security for an advance & before the completion of the transaction, the grantee obtained from the borrower a letter addressed to the grantee & signed by the borrower to the following effect : “ I have this day obtained from you £34 upon the faith of my representation that the furniture ” comprised in the bill of sale “ is my own property free from any charge, & I hereby undertake & agree not to mtge. same or any part thereof in any way whatsoever nor borrow from any other loan office until the whole of the above sum has been repaid. Further, I am quite aware that it is solely upon the faith of these representations that I have obtained the advance from you.” The agreement was not inserted in the bill of sale, which otherwise was in the statutory form. The jury found that the signature of the letter by the borrower was a condition of obtaining the advance :—*Held* : as the agreement ought to have been inserted in the bill of sale, & if so inserted, would have operated as a defeasance of the security by virtue of the defeasance clause therein contained, the bill of sale was not in accordance with the statutory form.—*HALL v. WHITEMAN*, [1912] 1 K. B. 683 ; 81 L. J. K. B. 660 ; 105 L. T. 854 ; 28 T. L. R. 161 ; 19 Mans. 143, C. A.

446. — Agreement made after execution of bill.—Hiring agreement after absolute bill.—A. agreed to make an advance to B. on having an absolute bill of sale of B.'s furniture, & it was agreed that the purchase should be made at the full value of the furniture. The bill of sale was made & registered. Shortly after the execution of the instrument but on the same day at a different place A. executed an agreement with B. to let the furniture to him at a rental of £21 *per annum* payable half-yearly. That agreement was not registered. The negotiations for the agreement for hire were subsequent to the arrangement for the advance of the money, although before the execution of the bill of sale. It was admitted that the execution of the deeds was on the same day, &

within a short time of each other :—*Held* : (1) the utmost that could be attempted to be contended was that it was void under 1878 Act, s. 10 (3), because the bill of sale was accompanied by another agreement which it was alleged was a defeasance & was not registered with the bill of sale ; (2) the two agreements were separate & distinct & *bona fide* & the bill of sale was valid.—*Re MCGINITY, Ex p. MCSHANE* (1884), 29 Sol. Jo. 70, D. C.

447. — Book of “ rules & regulations ” received after execution of bill.—Pltf. signed a bill of sale & paid the first instalment, & deft. sent him a receipt in a book, on the cover of which were printed, “ Rules & regulations which are strictly adhered to.” Those rules & regulations contained various provisions very burdensome to pltf., which had not previously been mentioned to him. He did not assent so as to bind himself to them, but deft. afterwards wrote to him treating the rules & regulations as part of the bargain :—*Held* : the bargain being complete at the time when the bill of sale was executed, & the rules & regulations being no part of it, the false statement of deft. that they were part of the bargain did not enable the ct. to hold as against him that they were part of it, & so to hold the bill of sale void as being made subject to a condition or defeasance not expressed in it.—*LINFOOT v. POCKETT*, [1895] 2 Ch. 835 64 L. J. Ch. 752 73 L. T. 197 ; 44 W. R. 66 ; 11 T. L. R. 590 39 Sol. Jo. 721 ; 2 Mans. 482 ; 12 R. 504, C. A.

Annotations :—*Distd. Smith v. Whiteman*, [1909] 2 K. B. 437. *Consd. Lester v. Hickling*, [1916] 2 K. B. 302. *Mentd. Attia v. Finch* (1904), 91 L. T. 70 ; *Rosefield v. Provincial Union Bank*, [1910] 2 K. B. 781.

448. — Alteration of terms of payment.—An agreement between a grantor & grantee of a bill of sale, given by way of security for payment of a debt, whereby the terms of payment in the bill of sale are varied, but made subsequent to the execution of the bill of sale & constituting a separate transaction therefrom, is not a defeasance rendering the registration of the bill of sale void.

Deft. having obtained judgment against pltf. for a sum of money, levied execution on pltf.'s chattels, but agreed to withdraw the execution on pltf. executing in deft.'s favour a bill of sale over his chattels as security for payment of the judgment debt & costs of execution. A bill of sale containing a covenant by pltf. to pay the amount in two instalments at the end of three & six months was executed, & the execution was withdrawn. On the day subsequent to the execution of the bill of sale, & as a separate transaction, the parties entered into a verbal agreement, under which pltf. agreed to purchase coal for his business exclusively

WILSON'S OFFICIAL ASSIGNEE v. BANK OF AUSTRALASIA (1891), 10 N. Z. L. R. 338.—**N.Z.**

n. — Assignments for benefit of creditors.—W., O., & N., traders, by deeds of assignment (A., B., & C.) assigned to pltf. all their real & personal estate in trust for creditors. The assignment A. was made for the general benefit of creditors, & the assignments B. & C. for the benefit of certain preferred creditors, the residue only, if any, being assigned for the benefit of creditors generally. Bearing even date with the assignments, the assignors executed separate bills of sale of their respective personal property (D., E., F.) to pltf., subject to the trusts contained in the deeds of assignment. None of the deeds of assignment were filed. The bills of sale were filed, but were not accompanied with affidavits under the 1883 Act, s. 1 :—*Held* : the

assignments referred to in the bills of sale E. & F., setting out the considerations & trusts on which they were made not being of the character of defeasances, & it sufficiently appearing that no interest remained in the grantors, & that the sales & assignments were made for the benefit of creditors, such assignments were not required to be filed as part of the instrument of transfer.—*DURKEE v. FLINT* (1886), 7 R. & G. 487 ; 8 C. L. T. 19.—**CAN.**

o. — Reference to rules of building society.—Bill of sale collateral to mortgage.—Where a bill of sale over chattels upon land, the subject of a prior mtge., & given as collateral security by the mtgor. to his mtgee., a building society, makes reference to the rules of the society containing provisions regarding defeasance, but the bill contains also provisions

differing in this respect from both those in the mtge. & those in the rules :—*Held* : (1) such bill is not void under Instruments Act, 1890, s. 116, as being given subject to a defeasance or condition not contained in the body of the bill, but that such provisions are incorporated by reference ; (2) being collateral to the mtge., the fact that its conditions differed from those in the mtge., did not render the bill of sale void.—*WILSON v. BENDIGO MUTUAL PERMANENT LAND & BUILDING SOCIETY* (1896), 23 V. L. R. 24.—**AUS.**

p. — Second bill incorporating first.—Defeasance not apparent.—Where a second bill of sale incorporates the first by reference only, & it is impossible to discover what the real defeasance of the second is without an examination of the first, the second bill of sale is void.—*FERRIE v. ISAACS* (1889), 7 N. Z. L. R. 745.—**N.Z.**

Sect. 3.—Defeasance, condition or declaration of trust. Sect. 4: Sub-sect. 1.]

from debt., & to pay the amount for which the bill of sale was given as security by instalments of 10s. a week, & debt. agreed that the bill of sale should be unenforceable so long as those conditions were performed:—*Held*: the agreement subsequent to the bill of sale was not a defeasance, & pltf. was liable to perform its covenant & conditions.—*LESTER v. HICKLING*, [1916] 2 K. B. 302; 85 L. J. K. B. 1060; 114 L. T. 798.

449. Condition—Antecedent parol arrangement as to repayment.]—An antecedent parol arrangement to repay by instalments a loan secured by a bill of sale is a condition, & as such must be reduced into writing & appear on the registered copy of the bill of sale. *Re SOUTHAM, Ex p. SOUTHAM* (1874), 1 L. R. 17 Eq. 578; 43 L. J. Bey. 39; 30 L. T. 132; 22 W. R. 456.

Annotations:—**Distd.** *Re Storey, Ex p. Popplewell* (1882), 52 L. J. Ch. 39. **Consd.** *Lester v. Hickling*, [1916] 2 K. B.

450. — Written memorandum as to repayment.]—A bill of sale of chattels, with power to take immediate possession, was expressed to be made in consideration of an advance of £130, to be repaid by certain instalments without interest, the whole to become payable on default in any instalment. In fact the sum advanced was only £100, the mtgee., who was a money-lender, charging the £30 by way of bonus & interest. A written memorandum was signed by the mtgor., at the same time as the bill of sale, which stated that the £30 was to be paid in full, notwithstanding that the money secured by the bill of sale might be repaid, or the mtgee.'s rights under it enforced, before the expiration of the time limited for payment. The bill of sale was registered, but the memorandum was not:—*Held*: the memorandum was not a condition, & its not being registered did not affect the validity of the bill of sale.—*Re LEES, Ex p. COLLINS* (1875), 10 Ch. App. 367; 44 L. J. Bey. 78; 32 L. T. 108; 23 W. R. 862, L. J.J.

Annotations:—**Consd.** *Re Storey, Ex p. Popplewell* (1882), 21 Ch. D. 73; *Edwards v. Marcus*, [1894] 1 Q. B. 587.

451. — — —.]—Where a bill of sale, proper in its terms, is accompanied by another document, which contains terms, *e.g.*, as to repayment, not allowed by Bill of Sale Acts, & the whole of the conditions of the transactions are gathered from the joint effect of the two documents, the bill of sale is void.—*SIMPSON v. CHARING CROSS BANK* (1886), 31 W. R. 568, D. C.

Annotations:—**Consd.** *Sharp v. McHenry, Sharp v. Brown* (1887), 38 Ch. D. 427. **Refd.** *Counsell v. London & Westminster Loan & Discount Co.* (1887), 4 T. L. R. 2.

See, further, cases in Sect. 1, sub-sect. 2, ante.

452. — Deposit of insurance policy—No memorandum of deposit or reference in bill.]—The grantor of a bill of sale deposited with the grantee a policy of insurance on his life as collateral security; there was no memorandum of the deposit, nor was the policy referred to in the bill of sale:—*Held*: the policy, being only a collateral security, was not a defeasance on condition which required registration.—*CARPENTER v. DEEN* (1889), 23 Q. B. D. 566; 61 L. T. 860; 5 T. L. R. 617, C. A.

Annotations:—**Consd.** *Ellis v. Wright* (1897), 76 L. T. 522. **Fold.** *Oakes v. Green* (1907), 23 T. L. R. 560. **Refd.** *Edwards v. Marcus*, [1894] 1 Q. B. 587. **Mentd.** *Edwards v. Marston* (1890), 61 L. T. 97; *Hickley v. Greenwood*

(1890), 25 Q. B. D. 277; *Davidson v. Carlton Bank*, [1893] 1 Q. B. 82; *Davies v. Jenkins*, [1900] 1 Q. B. 133.

453. — Mortgage by wife agreeing to pay compound interest—Bill of sale by husband & wife agreeing to pay simple interest.]—A husband & wife executed a bill of sale to T. to secure repayment of a loan of £300 with simple interest. The wife on the same day mortgaged her interest under certain wills to T. to secure repayment of £300 with compound interest. Both securities were given for the same debt & as part of the same transaction. The bill was registered, but the mtge. was not:—*Held*: the agreement in the mtge. to pay compound interest was a condition which ought to have been written on the same paper as the bill, & the bill was void under 1878 Act, s. 10 (3).

In considering whether a defeasance or condition is within the above sub-sect., it is immaterial whether it is in favour of grantor or grantee.—*EDWARDS v. MARCUS*, [1894] 1 Q. B. 587; 63 L. J. Q. B. 363; 70 L. T. 182; 10 T. L. R. 255; 38 Sol. Jo. 234; 1 Mans. 70; 9 R. 337, C. A.

Annotations:—**Fold.** *Ellis v. Wright* (1897), 76 L. T. 522. **Refd.** *Hall v. Whiteman*, [1912] 1 K. B. 683.

454. — Cheque given to get matter arranged.]—Deft. agreed to lend pltf. £60 upon the security of a bill of sale over her furniture. Deft.'s representative thereupon took an inventory of the furniture, & asked pltf. for 30s., stating that the matter could not go through unless pltf. paid him that amount. Pltf., in order to get the matter through, gave him a cheque for 30s., it being arranged that the cheque should not be cashed until the advance had been made. The bill of sale was subsequently executed to secure £60 & interest, & the £60 was paid in cash to pltf. The bill of sale contained no statement as to the payment of the 30s.:—*Held*: the payment of the 30s. was not a condition, & it was not necessary that it should be contained in the body of the bill of sale or written on the same paper or parchment therewith before registration, & the bill of sale was not on that account void.—*GRAHAM v. HARR*, [1917] 1 K. B. 201; 86 L. J. K. B. 111; 115 L. T. 659; [1917] H. B. R. 147, C. A.

455. Declaration of trust—Must be trust in favour of grantor—Grantee undisclosed trustee for third party.]—The declaration of trust required by 1854 Act, s. 2, to be registered must be a trust for the benefit of the assignor of the goods, & a trust between the assignee & a third party need not be registered.

A. having advanced the money of a third person, & taken a bill of sale in his own name:—*Held*: though equity would declare A. a trustee for the person who had found the money, this was not such a trust as need be registered under the above sect.—*ROBINSON v. COLLINGWOOD* (1861), 17 C. B. N. S. 777; 5 New Rep. 11; 34 L. J. C. P. 18; 11 L. T. 313; 10 Jur. N. S. 1080; 13 W. R. 84; 144 E. R. 311.

Annotation:—**Refd.** *Re Lees, Ex p. Collins* (1874), 10 Ch. App. 369, n.

456. — Undertaking to pay off existing debt out of money advanced.]—A., who owed a sum of money partly secured by an existing bill of sale, executed a second bill of sale of the same chattels to secure a fresh advance, on the understanding that out of the sum advanced he should pay off

q. Condition—Must be contained in bill.]—A bill of sale given subject to a condition not appearing therein is void as against creditors.—*DOLL v. HART* (1890), 2 B. C. R. 32.—**CAN.**
r. Declaration of trust—Must be

registered.]—Held: a bill of sale (registered) for the consideration of 5s., with a separate declaration of trust referred to & forming part of the instrument (not registered) was invalid, & that the conveyance registered must

show the true & full consideration for which it is given.—*ARNOLD v. ROBERTSON* (1859), 8 C. P. 147.—**CAN.**

s. — — —.]—An assignment registered, with a separate declaration of trust not registered:—*Held*: invalid.

the existing debt. The bill of sale was expressed to be made in consideration of the fresh advance, without alluding to the intended application of the money. The money was actually paid to the grantor & applied by him as agreed:—*Held*: there was no undisclosed trust within 1878 Act, s. 10 (3).—*THOMAS v. SEARLES*, [1891] 2 Q. B. 408; 60 L. J. Q. B. 722; 65 L. T. 39; 39 W. R. 692; 7 T. L. R. 606, C. A.

Annotations:—*Refd.* *Edwards v. Marcus* (1894), 70 L. T. 182. *Mentd.* *Parsons v. Equitable Investment Co.*, [1916] 2 Ch. 527.

457. Contemporaneous letter from grantor undertaking to transfer bill.—K. & P. each advanced £100 to F., who in pursuance of a previous arrangement gave P. a bill of sale on furniture belonging to F. to secure £200, which was expressed in the bill of sale to have been paid by P. to F., whereas in fact K. paid his £100 direct to F. K., who acted as the solr. of F., himself attested the bill of sale, & retained it. He also had given him at the same time a letter signed by P. & addressed to K., stating that the bill of sale was in fact to secure the £100 advanced by K., & undertaking to transfer the bill of sale to K. The bill of sale was registered, but the letter was not written upon or annexed to it:—*Held*: the contemporaneous letter was a declaration of trust which should have been written on the same paper as the bill of sale before registration.—*KINNERSLEY v. PAYNE* (1909), 100 L. T. 229.

See, also, Sect. 2, sub-sect. 5, *ante*.

SECT. 4.—ATTESTATION AND EXECUTION.

See 1878 Act, s. 10; 1882 Act, ss. 8, 10.

SUB-SECT. 1.—ABSOLUTE BILLS OF SALE.

See 1878 Act, s. 10.

458. Necessity for attestation—Before 1878 Act.—*Held*: no attestation was necessary to the validity of a bill of sale.—*DEFFELL v. MILES* (1866), 15 L. T. 293, N. P.

459. — Under 1878 Act, s. 10—Not affected by 1882 Act.—1882 Act repeals 1878 Act, s. 10, only so far as that sect. relates to bills of sale given by way of security for the payment of money, & bills of sale granted by way of absolute transfer must still be attested in manner provided by 1878 Act, s. 10.—*CASSON v. CHURCHLEY* (1881), 53 L. J. Q. B. 335; 50 L. T. 568, D. C.

—*Mentd.* *Read v. Joannon* (1890), 25 Q. B. D.

460. Who may attest—Solicitor not practising on own account—Managing clerk to grantee's solicitor.—A bill of sale is sufficiently attested by a solr. within 1878 Act, s. 10, though such solr. is not practising on his own account, & is a managing clerk of the solrs. who act generally for the grantee.—*HILL v. KIRKWOOD* (1880), 42 L. T. 105; 28 W. R. 358, C. A.

Annotations:—*Consd.* *Penwarden v. Roberts, Wilson v. Roberts, Heath v. Roberts* (1882), 9 Q. B. D. 137. *Refd.* *Re Haynes, Ex p. National Mercantile Bank* (1880), 15 Ch. D. 42; *Peace v. Brookes*, [1895] 2 Q. B. 451. *Mentd.* *Hickson v. Darlow* (1883), 23 Ch. D. 690.

461. — Solicitor being also grantee.—A solr., who is the grantee of a bill of sale, cannot also be the attesting solr. of that bill of sale so as to satisfy 1878 Act.—*SEAL v. CLARIDGE* (1881), 7

Q. B. D. 516; 50 L. J. Q. B. 316; 44 L. T. 501; 29 W. R. 598, C. A.

Annotations:—*Distd.* *Penwarden v. Roberts, Wilson v. Roberts, Heath v. Roberts* (1882), 9 Q. B. D. 137. *Consd.* *Peace v. Brookes*, [1895] 2 Q. B. 451. *Mentd.* *Re Parrott, Ex p. Cullen*, [1891] 2 Q. B. 151.

462. — Solicitor to grantee.—The execution of a bill of sale, to which 1878 Act applies, may be attested by the solr. to the grantee.—*PENWARDEN v. ROBERTS, WILSON v. ROBERTS, HEATH v. ROBERTS* (1882), 9 Q. B. D. 137; 51 L. J. Q. B. 312; 46 L. T. 161; 30 W. R. 427, D. C.

Annotation:—*Refd.* *Peace v. Brookes*, [1895] 2 Q. B. 451.

463. Statement of explanation to grantor—Whether explanation must have been given.—1878 Act, s. 10, though it requires that the attestation clause shall state that the effect of the bill of sale has before its execution been explained by the attesting solr. to the grantor, does not require that any such explanation should have in fact been given. *Semble*: a solr., who stated in the attestation clause to a bill of sale that he had explained the effect of it to the grantor, when he had not in fact done so, would be liable to civil & penal consequences.—*Re HAYNES, Ex p. NATIONAL MERCANTILE BANK* (1880), 15 Ch. D. 42; L. J. Rep. 62; 43 L. T. 36; 44 J. P. 780; 28 W. R. 848, C. A.

Annotations:—*Distd.* *Seal v. Claridge* (1881), 7 Q. B. D. 516. *Consd.* *Re Roper, Ex p. Bolland* (1882), 21 Ch. D. 543. *Mentd.* *Credit Co. v. Pott* (1880), 6 Q. B. D. 295; *Re Parker, Ex p. Charing Cross Advance & Deposit Bank* (1880), 16 Ch. D. 35; *Re Rogers, Ex p. Challiner* (1880), 16 Ch. D. 260; *Hamilton v. Chaine* (1881), 7 Q. B. D. 319; *Re Spindler, Ex p. Rolph* (1881), 19 Ch. D. 98; *Re Cowburn, Ex p. Firth* (1882), 19 Ch. D. 419; *Re Chapman, Ex p. Johnson* (1884), 26 Ch. D. 338; *Throssell v. Marsh* (1885), 53 L. T. 321; *Richardson v. Harris* (1889), 22 Q. B. D. 268; *Re Smith, Ex p. Tarbuck* (1894), 72 L. T. 59; *Barron v. Potter, Potter v. Berry* (1914), 84 L. J. K. B. 751; *Parsons v. Equitable Investment Co.*, [1916] 2 Ch. 527.

464. — Sufficiency of explanation.—*Qu.*: whether if the attestation clause states that before execution of the bill of sale the effect thereof has been explained by a solr., the ct. can go into the question of the nature or sufficiency of the explanation.—*HILL v. KIRKWOOD* (1880), 42 L. T. 105; 28 W. R. 358, C. A.

Annotations:—*Consd.* *Re Haynes, Ex p. National Mercantile Bank* (1880), 15 Ch. D. 42. *Mentd.* *Penwarden v. Roberts, Wilson v. Roberts, Heath v. Roberts* (1882), 9 Q. B. D. 137; *Hickson v. Darlow* (1883), 23 Ch. D. 690; *Peace v. Brookes*, [1895] 2 Q. B. 451.

465. — Statement that grantor fully informed of nature & effect of bill.—The attestation of a bill of sale stated that the solr. fully informed the grantor of the nature & effect of the bill of sale. It was contended that there was no statement that the effect of the bill of sale had been explained to the grantor:—*Held*: the solr. could not fully inform the grantor of the nature & effect of the bill of sale without explaining it.—*CORKHILL v. LAMBERT* (1880), 70 L. T. Jo. 46.

466. Non-compliance with statutory requirements—Whether bill void against grantor.—A bill of sale to which 1878 Act applies, if it be not explained to the grantor & attested by a solr. in compliance with ss. 8, 10, is not void as between the grantor & grantee.—*DAVIS v. GOODMAN* (1880), 5 C. P. D. 128; 49 L. J. Q. B. 344; 42 L. T. 288; 28 W. R. 559, C. A.

Annotations:—*Distd.* *Seal v. Claridge* (1881), 7 Q. B. D. 516. *Refd.* *Re Haynes, Ex p. National Mercantile Bank* (1880), 15 Ch. D. 42. *Mentd.* *Baghott v. Norman* (1880), 41 L. T.

—*FRASER v. GLADSTONE* (1861), 11 C. P. 125.—CAN.

PART V. SECT. 4, SUB-SECT. 1.

t. Necessity for attestation—Under Instruments & Securities Act, No. 204,

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s. 55.]—The above Act does not require that every execution of a bill of sale be attested, but that where any such execution is attested there be filed a true copy of it & an affidavit verifying the residence & occupation of the attesting witness; & where the execu-

tion of a bill of sale is attested, such execution may under Evidence Act, No. 197, s. 55, be proved by other evidence than that of the attesting witness.—*SMITH v. MARTIN* (1866), 3 W. W. & A. B. 35.—AUS.

Sect. 4.—Attestation and execution: Sub-sects. 1 & 2.
Sect. 5: Sub-sect. 1.]

787; *Conelly v. Steer* (1881), 7 Q. B. D. 520; *Lyons v. Tucker* (1881), 6 Q. B. D. 660; *Hickson v. Darlow* (1883), 23 Ch. D. 690; *Casson v. Churchley* (1884), 53 L. J. Q. B. 335; *Re Thornbury Division of Gloucestershire Petn.*, *Ackers v. Howard* (1886), 16 Q. B. D. 739.

467. Execution—Proof of.]—In trover by assignees of bkpt. to recover goods taken by deft. under a fraudulent bill of sale given by bkpt. to deft., deft.'s examination before the comrs., in which he admitted the execution of the deed, is sufficient evidence to prove the execution, & supersedes the necessity of calling the subscribing witness.—*BOWLES v. LANGWORTHY* (1793), 5 Term Rep. 366; 101 E. R. 204.

Affidavit of due attestation & execution.]—See Sect. 5, sub-sect. 4, *post*.

SUB-SECT. 2.—BILLS OF SALE BY WAY OF SECURITY.
 See 1882 Act, s. 10.

468. Who are attesting witnesses—Company directors.]—A bill of sale was executed under the common seal of a trading co. Opposite the seal were the names of two of the directors, who purported to sign as directors. The secretary, who was called as a witness, stated that "it was usual to affix the seal in the presence of the board, & for two directors to attest it":—*Held*: the directors signing as above were not attesting witnesses within 1854 Act.—*SHEARS v. JACOB* (1866), L. R. 1 C. P. 513; *Har. & Ruth*, 492; 35 L. J. C. P. 241; 14 L. T. 286; 12 Jur. N. S. 785; 14 W. R. 609.

*Annotations:—***Refd.** *Deffell v. White* (1866), L. R. 2 C. P. 144. **Mentd.** *Re Standard Manufacturing Co.*, *Ex p. Lowe* (1891), 39 W. R. 369; *G. N. Ry. Co. v. Coal Co-op. Soc.*, [1896] 1 Ch. 187.

469. ———.]—A co. gave a bill of sale of all its property to trustees for certain debenture-holders. By a resolution of the directors of the co., it had been provided that the seal of the co. should be affixed to documents only in the presence of two directors, who were to attest it by their signatures. The deed was sealed with the seal of the co., & adjoining the seal were the words: "Seal of the co., affixed at a board meeting June 23, 1865, in the presence of R. O., chairman; R. C., director. Countersigned—C. D., secretary *pro tem*." There was no other attesting witness. The bill of sale was duly registered, but the affidavit filed with it contained only the address of C. D., & not that of R. O., or of R. C.:—*Held*: the latter were not attesting witnesses, because they did not attest an execution of the deed already completed, their signatures forming part of such execution, & the affidavit was sufficient, & the bill of sale good.—*DEFFELL v. WHITE* (1866), L. R. 2 C. P. 144; 36 L. J. C. P. 25; 15 L. T. 211; 12 Jur. N. S. 902; 15 W. R. 68.

*Annotations:—***Mentd.** *Re Standard Manufacturing Co.*, *Ex p. Lowe* (1891), 39 W. R. 369; *G. N. Ry. Co. v. Coal Co-op. Soc.*, [1896] 1 Ch. 187.

470. Who may attest—Agent & manager of one of several grantees.]—A bill of sale of personal chattels was given to secure repayment of money advanced by several firms, creditors of the grantor, in order to enable him to pay a composition to them & to others of his creditors. The sole attesting witness of the bill of sale was the agent & manager of one of the firms who were grantees. He had conducted the negotiations with respect of the giving of the bill of sale & the payment of the composition, & he had to see that such composition was paid to the creditors other than the grantees:—*Held*: the bill of sale was duly attested, because the attesting witness was not a "party thereto"

within 1882 Act, s. 10.—*PEACE v. BROOKES*, [1895] 2 Q. B. 451; 64 L. J. Q. B. 747; 72 L. T. 798; 2 Mans. 491; 15 R. 593.

471. ——— Grantor's solicitor being also one of two grantees.]—K. & P. each advanced £100 to F., who gave P. a bill of sale on furniture belonging to F. to secure £200, which was expressed in the bill of sale to have been paid by P. to F., whereas in fact K. paid his £100 direct to F. K., who acted as the solr. of F., himself attested the bill of sale, & retained it. He also had given him at the same time a letter signed by P. & addressed to K. stating that the bill of sale was in fact to secure the £100 advanced by K., & undertaking to transfer the bill of sale to K. The bill of sale was registered, but the letter was not written upon or annexed to it:—*Held*: the bill of sale was void as regards the assignment of the chattels because the letter being a declaration of trust must be deemed to be part of the bill of sale, & K. was a party to the bill, & his attestation of it irregular.—*KINNERSLEY v. PAYNE* (1909), 100 L. T. 229.

472. Description of attesting witness—Occupation omitted—Witness having no occupation.]—The meaning of the term "description" in the statutory form is not confined to the description of the occupation of the witness.

Where the attestation clause of a bill of sale contained no description of an attesting witness who had no occupation:—*Held*: the bill of sale was void as not being in accordance with the statutory form.—*SIMS v. TROLLOPE & SONS*, [1897] 1 Q. B. 24; 66 L. J. Q. B. 11; 75 L. T. 351; 45 W. R. 97; 13 T. L. R. 57; 41 Sol. Jo. 80, C. A.

473. ——— Address & description omitted—Whether cured by affidavit.]—Under 1882 Act, a bill of sale given by way of security is void unless both the address & description of the attesting witness appear in the attestation clause, & the defect is not cured by the fact that such address & description appear in the affidavit filed on registering the bill of sale.—*PARSONS v. BRAND, COULSON v. DICKSON* (1890), 25 Q. B. D. 110; 59 L. J. Q. B. 189; 62 L. T. 479; 38 W. R. 388; 6 T. L. R. 226, C. A.

*Annotations:—***Distd.** *Bird v. Davey*, [1891] 1 Q. B. 29. **Consd.** *Re Heseltine*, *Woodward v. Heseltine*, [1891] 1 Ch. 464; *Sims v. Trollope*, [1897] 1 Q. B. 24. **Mentd.** *Thomas v. Roberts*, [1898] 1 Q. B. 657.

474. ———.]—A bill of sale did not contain the addresses & descriptions of the attesting witnesses, though that omission was rectified in the affidavit of registration, which properly contained the addresses & descriptions of the witnesses:—*Held*: the bill of sale was not in accordance with the statutory form, because it omitted the addresses & descriptions of the attesting witnesses in the attestation clause, & such omission could not be cured by the addresses & descriptions being properly set out in the affidavit.—*BLANKENSTEIN v. ROBERTSON* (1890), 24 Q. B. D. 543; 59 L. J. Q. B. 315; 62 L. T. 732; 6 T. L. R. 178, D. C.

*Annotations:—***Folld.** *Bird v. Davey* (1890), 59 L. J. Q. B. 473. **Mentd.** *Burchell v. Thompson*, [1920] 2 K. B. 80.

475. ——— In one attestation clause—Two attestation clauses attested by same witness.]—A bill of sale had two attestation clauses, attesting the execution of the instrument by different grantors respectively. The signature to both clauses was the same, & in one of them the address & description of the attesting witness were given, but in the other they were not. An irresistible inference arose from what appeared on the face of the bill of sale that the witness in the two attestation clauses was the same person:—*Held*:

the bill of sale sufficiently complied with the statutory form.—*BIRD v. DAVEY*, [1891] 1 Q. B. 29; 60 L. J. Q. B. 8; 63 L. T. 741; 39 W. R. 40; 7 T. L. R. 5, C. A.

Annotation:—*Distd. Re Heseltine, Woodward v. Heseltine*, [1891] 1 Ch. 464.

See, also, Nos. 534, 548, *post*; Sect. 5, sub-sect. 5, E., *post*.

— *In affidavit on registration.*—*See* Sect. 5, sub-sect. 5, *post*.

476. Execution—At foot of schedule.—There was no execution on the body of a bill of sale, the intended execution being at the foot of the schedule on a separate paper:—*Held*: the schedule being by 1882 Act, s. 4, annexed to the bill of sale, the execution was good within s. 9 of that Act & the statutory form.—*MELVILLE v. STRINGER* (1883), 12 Q. B. D. 132; 50 L. T. 531; 32 W. R. 388, D. C.; *reversd.* on another point (1884), 13 Q. B. D. 392, C. A.

Annotations:—*Mentd.* *Davies v. Usher* (1884), 51 L. T. 297; *Consolidated Credit Corp. v. Gosney* (1885), 16 Q. B. D. 24; *Re Barber, Ex p. Stanford* (1886), 17 Q. B. D. 259; *Goldstrom v. Tallermann* (1886), 17 Q. B. D. 80; *Hughes v. Little* (1886), 17 Q. B. D. 204; *Haslewood v. Consolidated Co.* (1890), 60 L. J. Q. B. 12; *Peace v. Brookes*, [1895] 2 Q. B. 451; *Saunders v. White*, [1902] 1 K. B. 472; *Brandon Hill v. Lane*, [1915] 1 K. B. 250.

477. — By attorney—Being also grantee.—A valid bill of sale may be executed by attorney, & the grantee is not necessarily excluded from being such attorney.—*FURNIVALL v. HUDSON*, [1893] 1 Ch. 335; 62 L. J. Ch. 178; 68 L. T. 378; 41 W. R. 358; 3 R. 230.

Annotations:—*Reid.* *Dennison v. Jeffs*, [1896] 1 Ch. 611; *Re Wilson*, [1916] 1 K. B. 382.

Affidavit of due attestation & execution.—*See* Sect. 5, sub-sect. 4, *post*.

SECT. 5.—REGISTRATION.

SUB-SECT. 1.—NECESSITY FOR REGISTRATION.

What documents require registration.—*See* Parts II. & III., *ante*.

PART V. SECT. 4, SUB-SECT. 2.

a. Execution—Grantee need not execute.—A chattel mtge. need not be executed by the mtgee., & after execution by the grantor & delivery to & acceptance by the mtgee. or his agent it becomes binding as between the parties. The grantor's solrs. are his agents for such purpose.—*ADAMS v. HUTCHINGS* (1893), 3 Terr. L. R. 206.—**CAN.**

PART V. SECT. 5, SUB-SECT. 1.

b. Duty of registrar.—It is the duty of the registrar of any ct. in which bills of sale are required by the Bills of Sale Act, 1891, to be registered, to register any instrument presented to him for registration as a bill of sale, without inquiry as to the effect of such registration.—*Re WATSON'S BILL OF SALE* (1896), 7 Q. L. J. 27.—**AUS.**

c. Agreement not to register.—*Semble*: an agreement not to register a chattel mtge. makes it void *ab initio*.—*NATIONAL TRUST CO. v. TRUSTS & GUARANTEE CO.* (1912), 26 O. L. R. 279.—**CAN.**

d. Mortgage not within Act.—If the mtge. is one which the statute does not provide for, or the affidavit cannot possibly be made, then the mtge. is not avoided by the Act for want of registration, or of the recitals required by the Act, but the Act does not apply at all, & the mtge. stands as at common law.—*BALDWIN v. BENJAMIN* (1857), 16 U. C. R. 52.—**CAN.**

e. S. P. BRODIE v. RUTTAN (1858), 16 U. C. R. 207.—**CAN.**

f. S. P. BURTON v. BELLHOUSE (1860), 20 U. C. R. 60.—**CAN.**

g. S. P. PATERSON v. MAUGHAN (1876), 39 U. C. R. 371.—**CAN.**

h. S. P. MATHERS v. LYNCH (1869), 28 U. C. R. 354.—**CAN.**

j. S. P. WALKER v. NILES (1871), 18 Gr. 210.—**CAN.**

k. Mortgage by company.—If a mtge. within R. S. O. 1897 (c. 148), ss. 2, 23, made by a co. is not registered, it is null & void under s. 5 of the Act.—*NATIONAL TRUST CO. v. TRUSTS & GUARANTEE CO.* (1912), 26 O. L. R. 279.—**CAN.**

l. Notice of intention to file—Object of Instrument Act, 1890, s. 135.—*Held*: (1) the object of the above Act & the fifth sched. thereto, in requiring a statement of the business or occupation, & the place of business or residence of the grantor to be stated was to enable a creditor to see if his debtor was about to give a bill of sale & that object not being fulfilled in this instance, the bill of sale was void: (2) registration could not cure the omission of that which the Act required.—*ANDERSON v. WATSON* (1891), 17 V. L. R. 263.—**AUS.**

m. — Statement of consideration in.—If the consideration is sufficiently accurately stated in the notice of intention to file, either as to its legal effect or as to its mercantile & business effect & substantially falls under the

Avoidance of bill for non-registration.—*See* Part VI., *post*.

478. Wrongful registration of document supposed to be bill of sale—Action for damage—Absence of malice.—An action will not lie for damage suffered by pltf. in consequence of deft. without malice causing to be registered a document which was not in fact a bill of sale.—*HORSLEY v. STYLE* (1893), 69 L. T. 222; 58 J. P. 38; 9 T. L. R. 605; 4 R. 574, C. A.

479. Proof of registration—By office copy.—An office copy of the affidavit filed with a bill of sale admitted as good & sufficient evidence.—*BATH v. SUTTON* (1858), 27 L. J. Ex. 388; *sub nom.* *SUTTON v. BATH*, 31 L. T. O. S. 186.

Annotations:—*Mentd.* *Morewood v. South Yorkshire Ry. & River Dun Co.* (1858), 3 H. & N. 798; *Smith v. Cheese* (1875), 1 C. P. D. 60; *Castle v. Downton* (1879), 5 C. P. D. 56.

480. — — ——The registration of a bill of sale may be proved by an office copy.—*WEBSTER v. BLACKMAN* (1861), 2 F. & F. 490, N. P.

481. — By certificate—That affidavit in proper form.—Upon the trial of an interpleader issue, pltf., in order to prove the due filing of a bill of sale in compliance with 1854 Act, produced the bill of sale itself & the following certificate stamped with the seal of the Ct. of Queen's Bench: "J. & M. A document purporting to be a copy bill of sale, & dated Apr. 8, 1875, indorsed with the above names, was registered at the judgment office of the Ct. of Queen's Bench on Apr. 15, 1875":—*Held*: no evidence that an affidavit satisfying all the requirements of the Act had been filed with the bill of sale.—*MASON v. WOOD* (1875), 1 C. P. D. 63; 45 L. J. Q. B. 76; 33 L. T. 571; 40 J. P. 72; 24 W. R. 41.

Annotation:—*Reid.* *Emmott v. Marchant* (1878), 3 Q. B. D. 555.

482. — — ——*Semble*: a certificate under the seal of the Q. B. D., that an affidavit was filed as required by 1854 Act, is, without production of the affidavit itself, *prima facie* evidence that the affidavit was in the form required by the Act.—

sub-heading under which it is placed, the notice is in that respect good.

The consideration stated in the notice must be substantially the same as that stated in the bill of sale itself.—*O'CONNOR v. QUINN* (1911), 12 C. L. R. 239.—**AUS.**

n. — — — Omission to state contemporaneous guarantee.—At the time of giving a bill of sale the grantees had, in addition to the consideration truly set out in the notice of intention to file the bill of sale, agreed to guarantee the grantor to the extent of £1,000 with a bank. The fact of the agreement to give such guarantee was recited in the deed, but no mention of it was made in the particulars filed under the form given in Instruments Act, 1890:—*Held*: the omission did not invalidate the bill of sale.—*DANBY v. AUSTRALIAN FINANCIAL AGENCY & GUARANTEE CO., LTD.* (1892), 18 V. L. R. 303.—**AUS.**

o. — Description of property in—Substantial variance.—A notice of intention to file a bill of sale described the property secured thereby as consisting of goods, chattels, etc., at present on certain premises. The bill of sale itself also included in the property secured thereby not only the goods, etc., on the premises at the time of making the bill of sale, but also property which might be afterwards acquired:—*Held*: as there was a substantial variance between the notice & the bill of sale, the registration of the bill was bad.—*LYONS v. GRAHAM* (1892), 18 V. L. R. 491.—**AUS.**

5.—Registration: Sub-sects. 1, 2 & 3.]

EMMOTT v. MARCHANT (1878), 3 Q. B. D. 555; 38 L. T. 508; *sub nom.* HALKETT v. EMMOTT, 47 L. J. Q. B. 436; 26 W. R. 632, D. C.

Annotation:—*Mentd.* *Re* Wood, *Ex p.* Hattle (1878), 39 L. T. 373.

483. ————.]—The production, at the hearing of an interpleader issue, of a bill of sale, together with a certificate of registration, is no evidence that the proper affidavit was also filed in accordance with 1878 Act, s. 10, but the proper course is to adjourn the hearing for the production of evidence, & not hold the bill of sale void merely on such ground.—TURNER & Co. v. OULPAN (1888), 36 W. R. 278, D. C.

Proof of time of registration.]—See Sub-sect. 2, *post*.

SUB-SECT. 2.—TIME FOR REGISTRATION.

See 1878 Act, ss. 8, 10 (2), 14, 22; 1882 Act, s. 8.

484. On same day as bill dated—But before consideration paid.]—B. executed a bill of sale, by way of mtge., of household goods to D., pltf., as a security for a debt of £130, then due from him to D., & for a further advance of £160, then to be made, the receipt of which was acknowledged, & the execution purported to be attested, on the day the bill was dated, Jan. 9. The £160 was not in fact paid till two days after, & the signature of the attesting witness was affixed on the latter day. The bill of sale was registered as of Jan. 9, the day it bore date:—*Held*: the consideration-money having been paid two days after the execution of the bill of sale, the registration was not informal.—DARVILL v. TERRY (1861), 6 H. & N. 807; 30 L. J. Ex. 355; 158 E. R. 333.

Annotations:—*Mentd.* *Geisse v. Taylor & Hartland* (1905), 93 L. T. 534; *Glegg v. Bromley* (1911), 81 L. J. K. B. 334.

485. 1882 Act not retrospective.]—A bill of sale executed on Oct. 5, 1882, was not registered within seven clear days thereafter. 1882 Act came into operation on Nov. 1, 1882:—*Held*: s. 8 of the Act was not retrospective as regarded registration; &

p. *Absolute bill.*]—Under 20 Vict. c. 3, a copy of an absolute assignment or bill of sale may be filed, as well as of a mtge.—CARSCALLEN v. MOODIE (1857), 15 U. C. R. 92.—CAN.

q. S. P. HARRIS v. COMMERCIAL BANK OF CANADA (1858), 16 U. C. R. 437.—CAN.

r. ——— Possession given under.]—Instruments Act, 1890, re-enacting Act No. 557, excluded from its application all bills of sale other than those given by way of security. Accordingly, a document which is an absolute transfer, & under which possession is given, need not be filed in the manner prescribed for a bill of sale by way of security.—ASKREW v. DANBY (1892), 18 V. L. R. 335.—AUS.

s. Goods with warehouseman—As agent of transferee.]—Registration of a bill of sale is unnecessary when the goods are in the hands of a warehouseman who becomes the agent of the transferee & agrees to hold the goods for him.—JONES v. HENDERSON (1885), 3 Man. L. R. 433.—CAN.

t. Removal of mortgaged goods—To another county.]—Goods covered by mtge. were removed from a county, & sold in another county to debt., the mtgor. being no party to the removal. Just over two months from removal, the mtgee., on hearing where they were, went & demanded them from debt.:—*Held*: such a removal was not within the Act, requiring a copy to be filed within two months of the permanent removal of the goods from

the county.—CLARKE v. BATES (1871), 21 C. P. 348.—CAN.

a. ——— To another province.]—The owner of goods, having executed a chattel mtge. which was duly recorded in the proper registration district in the province of Saskatchewan, afterwards fraudulently removed them to the province of Alberta, where he sold them to a *bona fide* purchaser for value without notice:—*Held*: such sale conferred no title to the goods as against the chattel mtge., the Bills of Sale Ordinance, which requires a certified copy of the mtge. to be filed in the registration district to which the goods were removed, being inoperative, as a law of the province of Saskatchewan, beyond the boundaries of that province.—JONES v. TWOHEY (1908), 8 W. L. R. 295; 1 Alta. L. R. 267.—CAN.

b. Remedy for non-registration—At law.]—Where a contract of sale of chattels is not registered as a bill of sale under Act No. 557, the remedy is at law & not in equity.—DAVEY v. BAILEY (1884), 10 V. L. R. 240.—AUS.

PART V. SECT. 5, SUB-SECT. 2.

c. When time begins to run—From date of execution of bill.]—The time for filing a bill of sale runs from the date on which it is executed, & is not affected by an antecedent verbal agreement to assign.—O'DONNELL v. PATCHELL (1879), 5 V. L. R. 360.—AUS.

Actual execution.]—The

the bill of sale was not void as against the grantor.—

HICKSON v. DARLOW (1883), 23 Ch. D. 690; 52 L. J. Ch. 453; 48 L. T. 449; 31 W. R. 417, C. A.

Annotations:—*Reid. Ex p.* Cotton (1883), 49 L. T. 52; Blackburn Corpn. v. Micklethwait (1886), 54 L. T. 539; *Re* Athlumney, *Ex p.* Wilson, [1898] 2 Q. B. 547. *Mentd.* Brewer v. Square, [1892] 2 Ch. 111.

Seizure of chattels within time for registration.]—See Part VI., Sect. 1, *post*.

486. Extension of time—Rights of third parties affected—Execution creditor.]—The power given by 1878 Act, s. 14, of extending the time for registration will not be exercised after the title to the goods has actually vested in an execution creditor who has seized them.—CREW v. CUMMINGS (1888), 21 Q. B. D. 420; 57 L. J. Q. B. 641; 59 L. T. 886; 36 W. R. 908; 4 T. L. R. 772, C. A.

Annotations:—*Consd.* *Re* Parsons, *Ex p.* Furber, [1893] 2 Q. B. 122; *Re* Abrahams, [1902] 1 Ch. 695; *Re* Johnson, [1902] 2 Ch. 101; *Re* Spiral Globe, [1902] 1 Ch. 396. *Reid. Re* Cardiff Workmen's Cottage Co., [1906] 2 Ch. 627.

487. ——— Ownership of chattels unchanged.]—The principle of law as to extending the time for registration of a bill of sale is not limited in its application to cases in which the ownership of or property in goods has actually changed; it extends to cases in which the rights of third parties have actually accrued & would be prejudicially affected, if registration were allowed without saving those rights.—*Re* SPIRAL GLOBE, LTD., [1902] 1 Ch. 396; 71 L. J. Ch. 128; 85 L. T. 778; 50 W. R. 187; 18 T. L. R. 154; 9 Mans. 52.

Annotations:—*Reid. Re* Ehrmann, Albert v. Ehrmann, [1906] 2 Ch. 697. *Mentd.* *Re* Abrahams (1902), 71 L. J. Ch. 307.

——— For renewal of registration.]—See Sub-sect. 8, *post*.

488. Proof of time of registration.]—Under 1854 Act, s. 3, the officer of the Queen's Bench kept a book containing a list of every bill of sale filed in the office, & the dates of the execution & filing of same:—*Held*: that book was of such a public nature that a certified copy was admissible in evidence, & such certified copy proved the time at which the affidavit was filed, as well as the time at which the bill of sale was filed.—GRINDELL v.

date in a bill of sale is immaterial if it is registered after its actual execution within the time required by R. S. O. 1897 (c. 148).—McDONALD v. GAUNT (1899), 30 O. R. 398.—CAN.

e. Within five days—Sunday intervening.]—A chattel mtge. was duly executed on July 12, & filed on the 18th, the 17th having been Sunday:—*Held*: such registration was too late, R. S. O. 1877 (c. 119), requiring same to be effected within five days from the execution of the instrument & that Sunday counted as one of such five days.—McLEAN v. PINKERTON (1882), 7 A. R. 490.—CAN.

f. Extension of time—Under Companies Act, 1910, s. 104.]—Under the above Act a judge has power to extend the time for registering a chattel mtge., & according to the practice, this is done *ex p.* & merely upon proof of the particular excuse put forward.—MORRISON THOMPSON HARDWARE CO. v. WESTBANK TRADING CO. (1911), 19 W. L. R. 294; 16 B. C. R. 314.—CAN.

g. ——— County court judge acting as local judge of Supreme Court.]—A county ct. judge as local judge of the Supreme Ct. has no jurisdiction to extend the time for filing a chattel mtge. under Bills of Sale Act.—*Re* AUSTIN HOTEL CO., LTD., & ROYAL TRUST CO., [1919] 1 W. W. R. 943; 44 D. L. R. 480.—CAN.

486 i. ——— Rights of third parties affected—Form of order.]—A co., domiciled in T., Ontario, took a bill of sale on goods in G., British Columbia. It

BRENDON (1859), 6 C. B. N. S. 698; 28 L. J. C. P. 333; 33 L. T. O. S. 224; 5 Jur. N. S. 1420; 7 W. R. 579; 141 E. R. 625.

Annotations:—*Mentd.* Waddington v. Roberts (1868), L. R. 3 Q. B. 579; Mason v. Wood (1875), 1 C. P. D. 63; Emmott v. Marchant (1878), 3 Q. B. D. 555.

489. ———.]—The registration of a bill of sale may be proved by an office copy, & it is not necessary to call the attesting witness to show that the bill was made on the day on which it bore date.—WEBSTER v. BLACKMAN (1861), 2 F. & F. 490, N. P.

SUB-SECT. 3.—FILED COPY MUST BE TRUE COPY.

See 1878 Act, s. 10 (2).

490. Name of one of several assignees omitted.]

—It was objected that the filed copy of a bill of sale was defective in that it omitted the name of one of the assignees, & that the name of another was omitted in the attestation:—*Held*: the registration was sufficient.—MINISTER v. PRICE (1859), 1 F. & F. 686, N. P.

491. Schedule lost—Copy registered with bill.]

—The schedule to a bill of sale, being written on separate paper, became disannexed from the bill of sale & lost, & a copy of the schedule was registered with the original bill of sale:—*Held*: the registration of the copy with the bill of sale complied with 1854 Act.—GREEN v. ATTENBOROUGH (1864), 3 H. & C. 468; 5 New Rep. 253; 34 L. J. Ex. 88; 11 L. T. 513; 11 Jur. N. S. 141; 13 W. R. 185; 159 E. R. 614, Ex. Ch.

492. Whether true copy must be exact copy—Clerical errors not calculated to mislead—Name of grantee misspelt.]—In a bill of sale given to Gardnor, such name was correctly spelt, but in the filed copy it was erroneously spelt as Gardner:—*Held*: the error being merely clerical, & not calculated to mislead, it was immaterial, & did not vitiate the registration of the bill of sale.—GARDNOR v. SHAW (1871), 24 L. T. 319; 19 W. R. 753.

Annotation:—*Refd.* *Re* Hewer, *Ex p.* Kahen (1882), 21 Ch. D. 871.

493. ——— Error in amount in one part of copy.]—Where £1,000 was written by mistake for £100 in one part of the copy of a bill of sale registered in the Ct. of Queen's Bench:—*Held*: it did not invalidate the bill of sale.—ELLIOTT v. FREEMAN (1863), 1 New Rep. 328; 7 L. T. 715.

Annotation:—*Refd.* *Re* Hewer, *Ex p.* Kahen (1882), 21 Ch. D. 871.

494. ——— Date for payment of instalments omitted.]—A true copy of a bill of sale within 1878 Act, s. 10 (2), need not necessarily be an exact copy, so long as any errors or omissions in the copy filed are merely clerical & of such a nature that no one could be thereby misled.

In a copy bill of sale filed on registration the words "third day of each month" in the proviso

was not possible to send the instrument to T. & have it returned for filing with the registrar with the affidavit of *bona fides* within the five days required by Bills of Sale Act, 1905:—*Held*: in the order granting an extension of time for filing the instrument there should be a provision protecting intervening rights.—*Re* ELLIS (W. P.) & Co. (1908), 7 W. L. R. 371; 13 B. C. R. 271.—CAN.

k. ——— Registration at wrong place—No evidence of *mala fides*.]—Where a bank, in the ordinary course of business obtained a chattel mtge. from a co. indebted to it, but without the knowledge of other creditors, & registered such mtge. in the county ct. instead of with the registrar of joint stock cos., the bank was granted an

extension of time within which to register, & an action to set aside the mtge., was dismissed, there being no evidence of *mala fides* or dissimulation on the part of the bank.—MORRISON THOMPSON HARDWARE CO. v. WEST-BANK TRADING CO. (1911), 16 B. C. R. 314.—CAN.

l. ——— Order granting extension—Sunday intervening.]—A bill of sale, through inadvertence, not being registered within the time limited by 1879 Act, leave was given on the *ex p.* application of the grantee to register within three days; & the bill of sale was registered on the fourth day from the order, reckoning an intervening Sunday:—*Held*: (1) Sunday was not to be counted in the three days limited by the order for registration, & that

for repayment were omitted:—*Held*: it was a true copy within 1878 Act, s. 10 (2).—*Re* HEWER, *Ex p.* KAHEN (1882), 21 Ch. D. 871; 51 L. J. Ch. 904; 46 L. T. 856; 30 W. R. 954.

495. ——— Blank as to amount.]—In a copy of a bill of sale, the amount of the debt was duly stated in the operative part, but was, by a clerical omission, referred to in the power of sale, & also in the covenant for quiet enjoyment until default, as "the sum of . . ." though the blanks did not occur in the original:—*Held*: the copy was a true copy.—SHARP v. MCHENRY, SHARP v. BROWN (1887), 38 Ch. D. 427; 57 L. J. Ch. 961; 57 L. T. 606; 3 T. L. R. 847.

Annotations:—*Consd.* Burchell v. Thompson, [1920] 2 K. B. 80. *Mentd.* *Re* McHenry, *Ex p.* McDermott (1888), 21 Q. B. D. 580; Tuck v. Southern Counties Deposit Bank (1889), 42 Ch. D. 471; Barron v. Potter, [1915] 3 K. B. 593.

496. ——— Blank as to date.]—A bill of sale is not void because the copy filed leaves the date of the execution of the bill of sale in blank, if the date is truly stated in the original bill of sale, & in the affidavit.—THOMAS v. ROBERTS, [1898] 1 Q. B. 657; 67 L. J. Q. B. 478; 78 L. T. 712; 14 T. L. R. 309; 42 Sol. Jo. 365; 5 Mans. 70, D. C. *Annotation*:—*Refd.* Coates v. Moore, [1903] 2 K. B. 140.

Clerical errors in affidavit.]—See cases in Subsect. 4, A. & B., *post*.

497. Whether defect capable of being supplied from affidavit—Signatures of grantor & of attesting witness omitted.]—The copy of a bill of sale filed on registration omitted the signature of the grantor & the signature, address, & description of the attesting witness. The affidavit filed with the copy stated that the bill of sale was duly executed by the grantor, & that the execution thereof was witnessed by the attesting witness, & gave the name, address, & description of the attesting witness:—*Held*: the bill of sale was not rendered invalid by the omissions in the filed copy, as they might be supplied by reference to the affidavit.—COATES v. MOORE, [1903] 2 K. B. 140; 72 L. J. K. B. 539; 89 L. T. 8; 51 W. R. 648; 10 Mans. 271, C. A.

498. Words "per annum" omitted.]—By a bill of sale the grantor assigned to the grantees certain chattels by way of security for payment of £250 " & interest thereon at the rate of 55 per cent. *per annum*." The bill of sale was in a printed form, & in the print the interest was stated to be at the rate of "one shilling in the pound per month," but in the bill of sale as executed the words "one shilling in the pound per month" were struck out, & "fifty-five per cent. *per annum*" were written in above them. The filed copy of the bill of sale was in a similar form, but in the statement of the rate of interest the words "*per annum*" were omitted:—*Held*: the bill of sale was void on the ground that the copy filed was not a true copy, by reason of the omission of the words "*per annum*"

therefore the registration had been effected within the time prescribed by that order; (2) the validity of the order could only be questioned in the ct. by which it was made.—*Re* PARKE (1884), 13 L. R. Ir. 85.—IR.

PART V. SECT. 5, SUB-SECT. 3.

492 i. Whether true copy must be exact copy—Misleading variations.]—A document is not a true copy of an instrument within Chattel Securities Act, 1880, s. 42, if it varies from the original in such a way that, although it might not mislead a lawyer, it would be unintelligible to the general public.—OFFICIAL ASSIGNEE v. COLONIAL BANK OF NEW ZEALAND (1887), 5 N. Z. L. R. 456.—N.Z.

Sect. 5.—Registration: Sub-sects. 3 & 4,

in the statement of the interest, there being nothing in the rest of the document to supply the omission.—**BURCHELL v. THOMPSON**, [1920] 2 K. B. 80; 89 L. J. K. B. 533; 122 L. T. 758; 36 T. L. R. 257; 64 Sol. Jo. 307; [1920] B. & C. R. 7, C. A.

499. Truth of copy—How proved—Burden of proof.]—It is incumbent on claimant, under a bill of sale, to show that the document filed is a true copy of the original instrument. A certificate of the registration of a bill of sale, without production of an authenticated or office copy of the bill of sale certified to have been registered, is not

sufficient.—**EMMOTT v. MARCHANT** (1878), 3 Q. B. D. 555; 38 L. T. 508; *sub nom.* **HALKETT v. EMMOTT**, 47 L. J. Q. B. 436; 26 W. R. 632, D. C.
Annotation:—Mentd. Re Wood, Ex p. Hattie (1878), 39 L. T. 373.

SUB-SECT. 4.—THE AFFIDAVIT.

See 1878 Act, ss. 10 (2), 17.

A. Making and Swearing of Affidavit.

500. Who may make—Attesting witness.]—The affidavit for registration of a bill of sale need not be made by an attesting witness.—**CRAWCOUR**

PART V. SECT. 5, SUB-SECT. 4.

—A.

n. Necessity for affidavit.]—A chattel mtge., registered without an affidavit of execution, is void as against creditors of the mtgor.—**PETINATO v. SWIFT CANADIAN CO., LTD.** (1919), 46 O. L. R. 247.—**CAN.**

o. — Bill to secure debt.]—A bill of sale was given as security for an advance of money made by defts. to insolvents to enable them to pay debts:—*Held*: the bill of sale was security for a debt, not being verified by the affidavit of *bona fides* as required by Bills of Sale Act, s. 7 (8), was void.—**WINTER v. GAULT BROTHERS, LTD.** (1913), 25 W. L. R. 210; 13 D. L. R. 176.—**CAN.**

p. When made.]—Affidavits under 13 & 14 Vict. c. 62, need not be made on the day the mtge. is executed.—**PERRY v. RUTTAN** (1853), 10 U. C. R. 637.—**CAN.**

before mortgage executed.]—Where the affidavit of *bona fides* to a chattel mtge. was sworn to before the execution of the mtge., the mtge. was held invalid.—**BUILDING & LOAN ASSOCN. v. BETZNER**, 10 C. L. T. Occ. N. 112.—**CAN.**

500 i. Who may make—Attesting witness.]—The Bills of Sale Ordinance requires an affidavit of *bona fides* to be made by a witness to the execution of the bill of sale, but as attestation is not essential to the validity of the instrument, its execution can be proved by any competent witness.—**EMERSON v. BANNERMAN** (1891), 19 S. C. R. 1.—**CAN.**

500 ii. — — — Whether essential.]—*Held*: under 12 Vict. c. 74, it was not essential that the affidavit of execution should be of a subscribing witness & where the original had no subscribing witness, but in the copy filed the name of the person who made the affidavit was inserted as a witness, the variance was not material.—**ARMSTRONG v. AUSMAN** (1854), 11 U. C. R. 498.—**CAN.**

r. — Mortgagee — In fiduciary position.]—A chattel mtge. to secure a debt was made to a nominee of the creditor, as trustee for him. It was contended that the mtge. was invalid because the mtge. could not properly make the usual affidavit of *bona fides*, as there was no debt due to him:—*Held*: notwithstanding there was nothing on the face of the mtge. to show the fiduciary position of the mtgee. the mtge. was valid.—**LIGHT v. HAWLEY** (1897), 29 O. R. 25.—**CAN.**

s. — — Not agent.]—13 & 14 Vict. c. 62, requires that the mtgee. himself shall make the affidavit; therefore a mtge. filed upon an affidavit of his agent was held void.—**HOLMES v. VANCAMP** (1853), 10 U. C. R. 510.—**CAN.**

t. — — Antenuptial settlement.]—By an antenuptial settlement, made between J. C. of the first part, M. H. (pltf.) his intended wife of the

second part & one M. of the third part, in consideration of the intended marriage certain lands & goods were conveyed & assigned to M. to hold to the use of J. C. until the marriage, & thereafter to the use of pltf., her heirs, exors., etc. The assignment was duly registered as a bill of sale. The affidavit of *bona fides* was made by pltf. after the marriage, she being described therein as the bargainee:—*Held*: pltf. was a person who, as bargainee, might properly make the affidavit of *bona fides*.—**CONNELL v. HICKOCK** (1888), 15 A. R. 518.—**CAN.**

a. — One of several mortgages.]—It is sufficient if one of several mtgees. make the affidavit required by R. S. O. 1877 (c. 119), s. 2.—**TIDEY v. CRAIB** (1883), 4 O. R. 696.—**CAN.**

b. — — —.]—An affidavit made by one of several bargainees or assignees of goods:—*Held*: sufficient.—**HEWARD v. MITCHELL** (1854), 11 U. C. R. 625.—**CAN.**

c. S. P. BALKWELL v. BEDDOME (1858), 16 U. C. R. 203.—**CAN.**

d. — One of two joint mortgages—Separate debts.]—Where a bill of sale was made to two jointly, & filed on an affidavit of *bona fides* made by one, but the evidence showed that the consideration was made up of two debts, due to the vendees separately:—*Held*: sufficient.—**MCLEOD v. FORTUNE** (1859), 19 U. C. R. 100.—**CAN.**

e. — — — Mortgages not connected in business.]—F. owed pltf. & M. \$200 & \$100 respectively for goods supplied by them, & had given a chattel mtge. on his property to A. for \$600. Being pressed by A. he applied to pltf. & M. for the money, offering them a chattel mtge. therefor as well as for what he already owed them, which they agreed to, but not having the money at the time they borrowed it from J., giving him their note indorsed by F., & A. was paid off & his mtge. discharged. F. gave pltf. & M. the mtge. in question, the expressed consideration being \$900. The affidavit of *bona fides* was made by pltf. alone, & stated that the mtgor. was justly & truly indebted to him & M. as the mtgees. therein named in the sum of \$900 mentioned therein, etc.; & on the renewal of the mtge. the affidavit was made by pltf. in like manner. Pltf. & M. were not connected in business:—*Held*: the fact of part of the consideration of the mtge. consisting of separate debts to pltf. & M. did not prevent pltf. making the affidavit of *bona fides*, Chattel Mortgage Act, s. 1, not being limited to cases of joint mtgees. connected in business.—**SEVERN v. CLARKE** (1879), 30 C. P. 363.—**CAN.**

f. S. P. CORBY v. CLARKE (1879), 30 C. P. 368.—**CAN.**

g. — Two joint mortgagees — Not severally sworn.]—The affidavit of *bona fides* on a chattel mtge. is sufficient, although it purports to be the joint affidavit of two mtgees., & the *jurat* does not show that they were

severally sworn.—**DYCK v. GRAENING** (1907), 6 W. L. R. 171; 17 Man. L. R. 158.—**CAN.**

h. — Partner.]—One partner can make the affidavit of *bona fides*.—**ROSS v. DUNN** (1889), 16 A. R. 552.—**CAN.**

i. — — — Advances by firm.]—Where an arrangement had been entered into between partners of a firm whereby, although money was to be advanced by the firm, the securities therefor were to be taken in the individual name of each partner according as each was willing to accept the security of the person seeking to borrow:—*Held*: the mtgee. could properly make the affidavit of *bona fides*.—**HOBBS HARDWARE CO. v. KITCHEN** (1889), 17 O. R. 363.—**CAN.**

j. — Company taking mortgage—President or other principal officer—Without written authority.]—The president or other principal officer of a corp'n. taking a mtge. for & in the name of the corp'n. does not act as its agent, but as principal in the exercise of its corporate powers & may therefore make the affidavit of *bona fides* under C. S. U. C., c. 45, without authority in writing.—**BANK OF TORONTO v. McDUGGALL** (1865), 15 C. P. 475.—**CAN.**

k. — — —.]—Under Bills of Sale & Chattel Mortgage Act, s. 10, the affidavit of *bona fides*, where the mtgees. are an incorporated co. if made by the president, vice-president, manager, assistant manager, secretary, or treasurer of the co., need not state that the deponent is authorised by resolution of the directors in that behalf, nor that he is aware of the circumstances connected with the mtge. & has personal knowledge of the facts deposed to, the words "officer or agent" being confined in their application to an officer or agent who is not one of the principal officers above enumerated.—**UNIVERSAL SKIRT MANUFACTURING CO. v. GORMLEY** (1908), 17 O. L. R. 114; 11 O. W. R. 1110.—**CAN.**

l. — — — Manager — Written authority necessary.]—The affidavit of *bona fides* of a chattel mtge. was made by the manager of a loan society, no written authority to him being filed with the mtge., nor any statement contained in the affidavit as to his knowledge of the circumstances:—*Held*:—insufficient.—**FREKHOLD LOAN & SAVINGS CO. v. BANK OF COMMERCE** (1879), 44 U. C. R. 284.—**CAN.**

m. — — — Secretary-treasurer — Written authority necessary.]—Where the affidavit of *bona fides* of a chattel mtge. to an incorporated trading co. was made by the secretary-treasurer, who was also a shareholder in the co. & had an important share in the management of its affairs, there being, however, a president & vice-president:—*Held*: the affiant was to be regarded not as one of the mtgees., but as an agent, & as no written authority to him was registered, as required by R. S. O. 1887 (c. 125), s. 1, the mtge.

v. SALTER (1881), 18 Ch. D. 30; 45 L. T. 62; *affd.*, 18 Ch. D. 52, C. A.

Annotations:—*Mentd. Re Fowler, Ex p. Brooks* (1883), 23 Ch. D. 261; *Re Parker, Ex p. Turquand* (1885), 14 Q. B. D. 636; *Moult v. Halliday* (1897), 46 W. R. 318; *Re Hambrough* (1909), 79 L. J. Ch. 19; *Chappell v. Harrison* (1910), 103 L. T. 594; *Re Tabor, Ex p. Cork*, [1920] 1 K. B. 808.

501. Before whom sworn—Commissioner for taking affidavits—Presumption of due performance.]

—An affidavit filed with a bill of sale was properly instituted as in the Queen's Bench, but the *jurat* appeared to have been sworn before a comr. of the Ct. of Exch.:—*Held*: the affidavit was not thereby invalidated, it being consistent therewith that the comr. had jurisdiction, & jurisdiction would be presumed, on the principle that *omnia presumuntur rite esse acta*.—*CHENEY v. COURTOIS* (1863), 13 O. B. N. S. 634; 1 New Rep. 322; 32 L. J. C. P. 116; 7 L. T. 680; 9 Jur. N. S. 1057; 143 E. R. 252.

Annotations:—*Consd. Re Chapman, Ex p. Johnson* (1884), 26 Ch. D. 338. *Mentd. Eddowes v. Argentine Loan & Mercantile Agency Co.* (1890), 38 W. R. 629.

was invalid as against creditors.—*GREENE & SONS CO. v. CASTLEMEN* (1894), 25 O. R. 113.—CAN.

p. ——— Agent—Styled “vice-president.”]—The affidavit of *bona fides* may be made by the agent or manager of any mtgee. being an incorporated co.—that the person making the affidavit is therein styled “vice-president” does not preclude the co. from asserting that he was its agent.—*NEWLANDS v. HIGGINS* (1907), 7 W. L. R. 59.—CAN.

q. ——— Assistant secretary—Insufficient evidence of authority.]—Where the affidavit of *bona fides* was made by one who was not an officer permitted by R. S. O. 1914 (c. 135), s. 12 (2), to make the authorisation by resolution of the directors & where what purported to be an authority to the assistant secretary of pltf., was written on the bill of sale & signed by the secretary-treasurer of the co. with the seal of pltf. co. attached & where no evidence was offered to show that the indorsement was made as the result of any resolution of the directors authorising the assistant secretary to make the affidavit:—*Held*: this defect rendered the bill of sale null & void against debts.—*CLIFF PAPER CO. v. AUGER* (1917), 13 O. W. N. 150.—CAN.

r. Signatures to affidavit—Omission of grantor to sign.]—The affidavit attached to a bill of sale purported to be sworn before a Justice of the Peace & was signed by the Justice, but not by the grantor. The bill of sale having been executed under the 1883 Acts:—*Held*: it was not avoided by reason of defects in the affidavit or by want of an affidavit.—*SLOCOMB v. MORSE* (1887), 20 N. S. R. (8 R. & G.) 60.—CAN.

501 i. Before whom sworn—Commissioner for taking affidavits.]—An affidavit of *bona fides* in a chattel mtge. sworn before a person who is in fact a comr. authorised to take affidavits in & for the high ct., but who places after his signature in the *jurat* only the words “A Comr., etc.,” is good.—*CANADA PERMANENT LOAN & SAVINGS CO. v. TODD* (1895), 22 A. R. 515.—CAN.

501 ii. ——— Who is also mortgagee.]—Under R. S. M., c. 10, a mtge. is not rendered invalid or void by reason of the affidavit of execution being sworn before the mtgee. himself, he being a comr., for taking affidavits in the Queen's Bench.—*INCH v. SIMON* (1897), 12 Man. L. R. 1.—CAN.

502 i. ——— Solicitor acting for both parties.]—Affidavits of execution &

bona fides may be sworn before a solr. for both parties to the mtge.—*BARTHELS SHEWAN & CO., LTD. v. WINNIPEG CIGAR CO.* (1910), 10 W. L. R. 263.—CAN.

502 ii. ———.]—A chattel mtge. filed in the county ct. is void where the affidavit of due execution is sworn before the common solr. of both mtgees. & mtgor.—*COLUMBIA BITULITHIC v. VANCOUVER LUMBER CO.* (1915), 20 D. L. R. 954; 7 W. W. R. 286; *affd.* 30 W. L. R. 753; 8 W. W. R. 132; 21 D. L. R. 91.—CAN.

503 i. ——— Grantee's solicitor.]—The affidavit of *bona fides* of a chattel mtge. may be sworn before the solr. who acted for the affiant.—*AVERILL v. CASWELL & CO.* (1915), 31 W. L. R. 953; 23 D. L. R. 112; 8 Sask. L. R. 269.—CAN.

a. ——— Solicitor drafting instrument.]—A person who prepared the assignment may take an affidavit as comr.—*NOELL v. PELL* (1861), 7 L. C. L. J. 322.—CAN.

b. ———.]—*Held*: the affidavit to the bill of sale was not bad because it had been sworn before the solr. by whom the bill of sale was prepared.—*MOSHER v. O'BRIEN* (1905), 37 N. S. R. 286.—CAN.

c. ——— Solicitor employed in office of mortgagee's solicitors.]—An affidavit of *bona fides* may be made before a solr. employed in the office of the mtgee.'s solrs.—*CANADA PERMANENT LOAN & SAVINGS CO. v. TODD* (1895), 22 A. R. 515.—CAN.

d. ——— Mayor of foreign town.]—An affidavit of execution sworn before the mayor of a foreign town is useless.—*DE FORREST v. BUNNELL* (1858), 15 U. C. R. 370.—CAN.

505 i. Errors in jurat—Omission—Of status of person before whom sworn.]—The affidavit of *bona fides* in a chattel mtge. purported to be sworn before “T. B. F.” without any addition. The affidavit of execution was sworn before the same comr., his name being followed by the words, “A Comr. in B. R., etc.”:—*Held*: no objection to the affidavit of *bona fides*.—*HAMILTON v. HARRISON* (1881), 46 U. C. R. 127.—CAN.

506 i. ——— Of commissioner's name.]—Where the signature of the comr. to the affidavit of *bona fides* to a chattel mtge. was omitted through inadvertence, the instrument was held invalid as against a subsequent execution creditor, although it was satisfactorily proved that the oath was in fact administered.—*NISBET v. COCK* (1879), 4 A. R. 200.—CAN.

502. Solicitor acting for both parties.]

An affidavit filed with an absolute bill of sale is good, though sworn before a solr. acting for grantor & grantee of the bill.—*VERNON v. COOKE* (1880), 49 L. J. Q. B. 767, C. A.

Annotations:—*Expld. & Distd. Baker v. Ambrose*, [1896] 2 Q. B. 372. The effect of *Vernon v. Cooke* must be regarded as done away with by R. S. C., Ord. 38, r. 16 (WRIGHT, J.). *Distd. Re Bagley*, [1911] 1 K. B. 317.

503. ——— Grantee's solicitor—R. S. C., Ord. 38, r. 16.]—The above rule applies to affidavits of execution of bills of sale, & if an affidavit of execution be sworn before the solr. acting for the grantee in the preparation of the bill, the bill of sale will be void.—*BAKER v. AMBROSE*, [1896] 2 Q. B. 372; 65 L. J. Q. B. 589; 12 T. L. R. 603.

Annotation:—*Folld. Re Bagley*, [1911] 1 K. B. 317.

504. Errors in jurat.]—The *jurat* of the affidavit of execution of a bill of sale purported to have been sworn on Jan. 10, 1860, instead of on Jan. 10, 1861:—*Held*: that was a mere clerical error, which might be amended if material.

506 ii. ——— Of place where sworn.]—In the form, & also in the affidavit filed with chattel mtge., no mention was made in the *jurat* of the place of swearing the affidavit:—*Held*: the affidavit was sufficient under C. S. B. C. 1888 (c. 8), s. 3.—*BROWN & ERR v. JOWETT* (1895), 4 B. C. R. 44.—CAN.

506 iii. ———.]—The registration of a chattel mtge. is not rendered void by the omission from the *jurat* of the place in the N. W. Territories where the affidavit was sworn.—*COMMERCIAL BANK OF MANITOBA v. FEBRENBACH* (1900), 4 Terr. L. R. 335.—CAN.

506 iv. ——— Of county where sworn.]—*Held*: where the *jurat* to an affidavit was “sworn to at Middleton this July 6, 1891,” etc., without naming the county, the mtge. was void, notwithstanding the affidavit was headed “in the county of Annapolis.”—*MORSE v. PHINNEY* (1894), 22 S. C. R. 563.—CAN.

506 v. ——— Of date & words “before me.”]—The omission of the date & words “before me” from the *jurat* of an affidavit accompanying a bill of sale under Nova Scotia Bills of Sale Act, s. 4, makes such affidavit void & the defect cannot be supplied by parol evidence in proceedings by a creditor of the assignor against the mortgaged goods.—*ARCHIBALD v. HUBLEY* (1890), 18 S. C. R. 116.—CAN.

506 vi. ——— Misdescription—Of place where sworn.]—The *jurat* to an affidavit on a chattel mtge. was as follows: “Sworn before me at the Brantford of ——— in the ——— county of Brantford, this Oct. 13, 1855: G. W. Malloch, a comr. for taking affidavits in the Queen's Bench, in & for the said county of Brant.”:—*Held*: sufficient.—*DE FORREST v. BUNNELL* (1858), 15 U. C. R. 370.—CAN.

506 vii. ——— “Sworn” instead of “affirmed.”]—The fact that it is stated in the *jurat* that the affidavit has been “sworn,” whereas the deponents affirmed, is not a fatal objection, as by Interpretation Act the expressions “swear” & “sworn” respectively include “affirm solemnly” & “affirmed solemnly.”—*GRAEWING* (1907), 17 Man. L. R. 158.—CAN.

506 viii. ——— Insufficient statement—“Sworn & affirmed”—Two deponents.]—The words “sworn & affirmed,” without saying which of the two deponents swore, & which affirmed, & omitting the word “severally” in the affidavit to a mtge.:—*Held*: sufficient.—*MOYER v. DAVIDSON* (1858), 7 C. P. 521.—CAN.

Sect. 5.—Registration:

B.]

—HOLLINGSWORTH v. WHITE (1862), 6 L. T. 604; 10 W. R. 619.

Annotations:—*Consd.* Cheney v. Courtois (1863), 13 C. B. N. S. 634; Lamb v. Bruce, Duggan v. Bruce, Cooper v. Bruce (1876), 45 L. J. Q. B. 538. *Mentd.* Re Pulling, Ex p. Harris (1872), 8 Ch. App. 48; Smale v. Burr (1872), L. R. 8 C. P. 64; Ramsden v. Lupton (1873), L. R. 9 Q. B. 17; Chapman v. Knight (1880), 49 L. J. Q. B. 425.

505. — Omission—Of status of person before whom sworn.]—An affidavit, filed on registering a bill of sale, which has been sworn before a comr., & the *jurat* of which is signed by him, is sufficient, although it does not state that the person signing the *jurat* is a comr.—*Re* CHAPMAN, Ex p. JOHNSON (1884), 26 Ch. D. 338; 53 L. J. Ch. 762; 50 L. T. 214; 48 J. P. 648; 32 W. R. 693, C. A.

Annotations:—*Refd.* Baker v. Ambrose, [1896] 2 Q. B. 372. *Mentd.* Richardson v. Harris (1889), 22 Q. B. D. 268; Administrator-General of Jamaica v. Lascelles, De Mercado, [1894] A. C. 135; Re Smith, Ex p. Tarbuck (1894), 72 L. T. 59; Darlow v. Bland, [1897] 1 Q. B. 125; Re Rouard, Ex p. Trustee (1915), 85 L. J. K. B. 393.

506. — Of commissioner's name.]—In the affidavit sworn on the filing of a bill of sale the name of the comr. before whom it was sworn was not inserted in the *jurat*:—*Held*: the registration was void.—BROWN v. LONDON & COUNTY ADVANCE & DISCOUNT CO. (1889), 5 T. L. R. 199.

Errors in true copy of bill.]—*See* Nos. 492–496, ante.

PART V. SECT. 5, SUB-SECT. 4.

—B.

1. Due attestation & execution—Form of affidavit—General rule.]—Affidavits of the execution of a chattel mtge. will not be treated with the same particularity as affidavits used in proceedings before the ct.—MOYER v. DAVIDSON (1858), 7 C. P. 521.—CAN.

2. Small inaccuracy.]—Where a witness to a mtge. by two swears that he saw both execute, when in fact he only saw one, & the mtge. has been registered on such affidavit, it is sufficient.—DE FORREST v. BUNNELL (1858), 15 U. C. R. 370.—CAN.

h. — Necessity for statement—Of day when mortgage executed.]—Where the affidavit of execution of a chattel mtge. does not state the day of the month upon which the mtge. was executed, as required by R. S. O. 1914 (c. 135), s. 5, the mtge. is invalid as against the assignee for benefit of creditors of the mtgor.—MARTIN v. SHAPIRO (1914), 32 O. L. R. 640; 20 D. L. R. 574.—CAN.

k. —]—The affidavit of execution need not state the date of the bill of sale or on what day it was executed.—MCLEOD v. FORTUNE (1859), 19 U. C. R. 100.—CAN.

509 i. — Truth of attestation clause of bill must be sworn to—Not truth of copy.]—The affidavit of the attesting witness to the execution of a bill of sale did not swear to the truth of the attestation clause of the bill of sale where the description was given, but only to the "truth of the copy" of the attestation clause quoted in the affidavit:—*Held*: the affidavit did not give either in itself or by reference to the attestation clause the information on oath required by Act No. 141, s. 2, & the bill of sale was void as against a person entitled to impeach it.—McCULLOUGH v. HARFOOT (1863), 2 W. & W. 267.—AUS.

l. Affidavit of bona fides—Form of—Avoidance of technicalities.]—It is not necessary in affidavits sworn under a statute to conform to the technicalities required by rules of ct.—MOYER v. DAVIDSON (1858), 7 C. P. 521.—CAN.

m. S. P. DE FORREST v. BUNNELL (1858), 15 U. C. R. 370.—CAN.

n. — Must be in form prescribed.]—An affidavit that the "bill of sale was executed in good faith & for good consideration," instead of "that the sale is *bona fide* & for good consideration":—*Held*: insufficient.—BOYNTON v. BOYD (1862), 12 C. P. 334.—CAN.

o. — Slight variation immaterial.]—Where an affidavit of *bona fides* to a bill of sale stated that the sale was not made for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor, while the form given in the Act used the words "against any creditors of the bargainor":—*Held*: such violation did not avoid the bill of sale as against execution creditors, the two expressions being substantially the same.—EMERSON v. BANNERMAN (1891), 19 S. C. R. 1.—CAN.

p. —]—An affidavit stated that it was made "for the purposes & trusts therein set forth," & not for the purpose of holding, etc., "the estate & effects mentioned therein," instead of "the goods," as in the statute:—*Held*: sufficient.—MASON v. THOMAS (1864), 23 U. C. R. 305.—CAN.

q. —]—The affidavit of *bona fides* made by the mtgee. in respect of a chattel mtge. given to secure him against his indorsement of certain promissory notes for the mtgor., contained the expression, "& truly states the extent of the liability intended to be created by such agreement & covered by such mtge.," instead of the statutory words, "& truly states the extent of the liability intended to be created & covered by such mtge." It also contained this clause: "& for the express purpose of securing me, the said mtgee. therein named, against the payment of the amount of such notes indorsing liability for the said mtgor.," instead of the words, "& for the express purpose of securing the mtgee. against the payment of the amount of his liability for the mtgor.":—*Held*: the mtge. was not void as against creditors by reason of these variations from the statutory form.—ROGERS v. CARROLL (1899), 30 O. R. 328.—CAN.

r. —

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B. Contents of Affidavit.

507. Due attestation & execution—Necessity for statement—Of explanation to grantor.]—The affidavit of the solr. attesting the execution of a bill of sale, stating that he saw the grantor sign & execute the bill of sale is sufficient within 1878 Act, s. 10 (2), although such affidavit does not contain a statement that the deponent read over & explained the bill of sale to the grantor before his execution of same.—*Re* THREAPPLETON, Ex p. CARTER (1879), 12 Ch. D. 908; 41 L. T. 37; 27 W. R. 943.

Annotations:—*Mentd.* Credit Co. v. Pott (1880), 42 L. T. 592; *Re* Haynes, Ex p. National Mercantile Bank (1880), 15 Ch. D. 42; Hamilton v. Chaine (1881), 7 Q. B. D. 319.

508. —]—It is not necessary that the affidavit filed on the registration of a bill of sale should state that the solr. who attested the execution of the deed explained the effect of it to the grantor before he executed it.—*Re* Roper, Ex p. BOLLAND (1882), 21 Ch. D. 543; 52 L. J. Ch. 113; 47 L. T. 488; 31 W. R. 102, C. A.

Annotations:—*Mentd.* Staniforth v. Capon (1886), 2 T. L. R. 493; Thomas v. Searles (1891), 60 L. J. Q. B. 722; The Benwell Tower (1895), 72 L. T. 664.

509. — That attesting witnesses present.]—The affidavit of the due execution & attestation of a bill of sale is not sufficient, unless it contains a statement that the attesting witnesses were present

affidavit of the mtgee. stated that he had indorsed the promissory note in the mtge. named: "that the said mtge. was executed in good faith, & for the express purpose of securing the due payment of the said promissory note, & security & indemnity to me against the said indorsement or any loss thereby, & not for the purpose of protecting the goods & chattels mentioned in the said mtge. against the creditors of the said mtgors. therein named, or preventing the creditors of such mtgors. from obtaining payment of any claim against the said mtgors.":—*Held*: the affidavit was sufficient, though not in the exact words of the statute.—O'DONOHUE v. WILSON (1877), 42 U. C. R. 329.—CAN.

s. —]—That a mtge. by two was not executed to secure the goods against the creditors of the mtgors., nor to prevent such creditors from recovering, etc., is sufficient, without adding "or either of them," as regards the mtgors., or "or any or either of them" as regards the creditors.—FRASER v. BANK OF TORONTO (1860), 19 U. C. R. 381.—CAN.

t. —]—The affidavit of *bona fides* stated that the mtge. was not made for the purpose of protecting the goods against the creditors of M. & D., not adding, "or either of them," or preventing the creditors obtaining their claims against him, instead of "them":—*Held*: sufficient.—BERTRAM v. FENDRY (1877), 27 C. P. 371.—CAN.

u. — Additional words treated as surplusage.]—A chattel mtge. was made to secure pltf. as indorser of a promissory note of the mtgor. A recital in the instrument stated that it had been given "as security to the mtgee. against his indorsement of said note, or any renewal thereof that shall not extend the liability of the mtgee. beyond one year from the date thereof; & against any loss that may be sustained by him by reason of such indorsement of said note, or any renewal thereof." The affidavit stated it was made "for the express purpose of securing the mtgee. against the payment of such his liability for the said mtgor. by reason of the promissory note therein recited,

& saw the execution of the bill of sale by the grantor.—*Re MOULSON, Ex p. KNIGHTLY* (1882), 51 L. J. Ch. 823; 46 L. T. 776; 30 W. R. 844.

Annotation:—*Reid. Greenham v. Child* (1889), 24 Q. B. D. 29.

510. — Mere verification of signature not sufficient.—The affidavit of due execution & attestation must state that the bill of sale was duly attested by the attesting solr., i.e. that he was present & witnessed the due execution, & an affidavit merely verifying his signature to the attestation clause, & describing his residence & occupation, is defective, & will invalidate the registration.—*SHARPE v. BIRCH* (1881), 8 Q. B. D. 111; 51 L. J. Q. B. 64; 45 L. T. 760; 46 J. P. 246; 30 W. R. 428, D. C.

or any future note or notes which he may indorse for the accommodation of the mtgor., whether as renewals of the said note or otherwise":—*Held*: as the affidavit covered all that is required by the Act, that part of the affidavit from "or any future note" to the end was unnecessary, & could not vitiate the security.—*DRISCOLL v. GREEN* (1883), 8 A. R. 366.—CAN.

b. ——The affidavit of *bona fides* in a bill of sale, which the evidence showed was taken in satisfaction of a previous loan from the bargainee to the bargainor, stated that the sale was *bona fide* & for good consideration, namely, \$830 (which was the consideration expressed in the bill of sale), advanced by the bargainee by way of a loan:—*Held*: the affidavit substantially complied with R. S. O. 1887 (c. 125), s. 5, & the addition of the words "advanced, etc., by way of a loan," did not render the affidavit defective.—*ORMSBY v. JARVIS, CHAPMAN v. JARVIS* (1892), 22 O. R. 11.—CAN.

c. — Substantial variations.—The affidavit to a bill of sale contained the words: "I am the rightful owner & possessor of said personal property as mentioned in the accompanying bill of sale," instead of the words: "I am the grantor mentioned in the accompanying bill of sale," as in 5th R. S., c. 92, Form A. In the second paragraph the words "the said H. B. Ward," were used instead of the word "grantor" in the clause setting out that the bill of sale was executed in good faith & not for the purpose of protecting the property mentioned therein against the creditors of the grantor. & in the next clause, "or of preventing the creditors of such grantor from obtaining payment, etc.," the words "of such grantor" were omitted:—*Held*: the affidavit was not in compliance with the statute, & was bad as against the sheriff levying on the property in question.—*KILCUP v. BELCHER* (1891), 23 N. S. R. 462.—CAN.

d. ——A bill of sale was given by P. to pltf. (1) for the purpose of securing repayment of a debt of \$50; (2) for the purpose of securing pltf. against liability as indorser on two promissory notes. The affidavit was framed to cover both transactions, but was not in accordance with the requirements of the Act with respect to the debt intended to be secured, & could be made to apply to the liability as indorser, against which it was intended to protect pltf., only by striking out certain words, & treating them as surplusage, & by making other alterations:—*Held*: (1) the affidavit was not "as nearly as may be" in accordance with the forms prescribed by 5th R. S., c. 92, ss. 4, 5, 11; (2) the ct. had no power to strike out words, or make other alterations, with the view of making the affidavit effective as to the liability as indorser; (3) the necessity for an affidavit was

Annotations:—*Reid. Re Moulson, Ex p. Knightly* (1882), 51 L. J. Ch. 823; *Cooper v. Zeffert* (1883), 32 W. R. 402.

511. ——The affidavit which is filed on the registration of a bill of sale must show that the solr., whose name appears as the attesting witness to the deed, did in fact attest it, i.e. was present when it was executed by the grantor. The affidavit is not sufficient if it only verifies the signature of the solr. to the attestation clause.—*FORD v. KETTLE* (1882), 9 Q. B. D. 139; 51 L. J. Q. B. 558; 46 L. T. 666; 30 W. R. 741, C. A.

Annotations:—*Apld. Re Moulson, Ex p. Knightly* (1882), 51 L. J. Ch. 823. *Consd. Cooper v. Zeffert* (1883), 32 W. R. 402. *Reid. Re Roper, Ex p. Bolland* (1882), 21 Ch. D. 543; *Casson v. Churchley* (1884), 53 L. J. Q. B. 335.

512. — In express terms—Inference of attestation sufficient.—The affidavit of an attesting

not dispensed with by the fact that the instrument was not intended exclusively for the purposes mentioned in s. 4 or s. 5, but combined them both.—*LANTZ v. MORSE* (1896), 28 N. S. R. 535.—CAN.

e. ——A mtge. was given to secure both a present & future indebtedness, & was accompanied by a single affidavit combining the main features of both forms:—*Held*: this affidavit was not "as nearly as may be" in the form prescribed, & the mtge. was void.—*REID v. CREIGHTON* (1895), 24 S. C. R. 69.—CAN.

f. ——N. cuted a mtge. of certain goods for securing the repayment of money due by him to pltf. & also for securing pltf. against several promissory notes which pltf. had indorsed for N. but which had not yet accrued due. The accompanying affidavit of the mtgee. did not set out the agreement entered into by the parties, the extent of the liability intended to be created by the agreement & covered by the mtge., nor that the mtge. was executed in good faith for securing the mtgee. against the payment of the amount of his liability for the mtgor.:—*Held*: the mtge. was void as the affidavit was defective, not being in compliance with 1893 Act, s. 6.—*LEVASSEUR v. BEAULIEU* (1896), 33 N. B. R. 569.—CAN.

g. ——A. mortgaged to B. for a debt due by C., & C., to secure A., gave him a chattel mtge. conditioned to be void on his paying the amount of the debt either to A. or B., or indemnifying A. against his suretyship. This was registered under 13 & 14 Vict. c. 62, on an affidavit in the form prescribed, that C. was "justly & truly indebted to A." in the amount of the mtge. It was objected that such mtge. was void as against pltf., a creditor of C., because the affidavit could not have been made consistently with the facts:—*Held*: (1) A. could properly make the affidavit; (2) if he could not, then the mtge., not being within the statute, would not have required registration at all.—*BALDWIN v. BENJAMIN* (1857), 16 U. C. R. 52.—CAN.

h. ——An affidavit that the mtgor. was justly & truly indebted to the mtgee. in the sum of £800, or thereabouts, as fully set forth in the mtge.; that the mtge. was executed in good faith, & for the express purpose of securing the payment of the money so justly due as aforesaid, & of securing the mtgee. for his said indorsement, & not for the purpose of protecting the goods against the creditors of the mtgor.:—*Held*: sufficient.—*VALENTINE v. SMITH* (1859), 9 C. P. 59.—CAN.

k. ——An affidavit that the mtge. was executed in good faith, & not for the purpose of protecting the goods & chattels men-

tioned in the said mtge., or preventing the creditors of the said L. (the mtgor.), from obtaining payment of any claim against him:—*Held*: insufficient, for not stating that it was not made to protect the goods "against the creditors of the mtgor." as required by 20 Vict. c. 3.—*BOULTON v. SMITH* (1860), 17 U. C. R. 400; 18 U. C. R. 458.—CAN.

l. ——An affidavit setting forth that "the recitals contained in said assignment were, at the time said assignment was executed true & correct, & the consideration therefor & therein mentioned was truly & honestly stated in said assignment, & same was executed in good faith for the purpose therein mentioned, & not for the purpose of protecting the property, etc.," but omitting to verify the preferred debts, was an insufficient compliance with R. S. (5th Ser.), c. 92, s. 4.—*KIRK v. CHISHOLM, MCPHEE v. CHISHOLM* (1896), 28 N. S. R. 111; 26 S. C. R. 111.—CAN.

m. ——An affidavit that the mtge. was not executed for the purpose of preventing the creditors of such mtgor. from obtaining payment of any claim against — not saying against whom:—*Held*: not a compliance with Chattel Mortgage Act.—*Re ANDREWS* (1877), 2 A. R. 24.—CAN.

n. ——The omission of the word "him," at the conclusion of the affidavit of *bona fides* registered with a chattel mtge., has the effect of destroying the security as against an execution creditor who has seized while the goods remained *in statu quo*, but does not impair the instrument as between the parties.—*DAVIS v. WICKSON* (1882), 1 O. R. 369.—CAN.

o. ——An affidavit stated that an assignment for the benefit of creditors was made "bona fide," omitting the words, "for good consideration":—*Held*: bad.—*MASON v. THOMAS* (1864), 23 U. C. R. 305.—CAN.

p. ——Where the affidavit of *bona fides* did not contain a clear & categorical affirmation that the grantors were justly & truly indebted to the grantees in the sum mentioned, the affidavit was held not to comply with the statute, & consequently the bill of sale was void.—*WINTER v. GAULT BROTHERS, LTD.* (1913), 18 B. C. R. 487; 49 S. C. R. 541.—CAN.

q. — Clerical errors in—Effect of.—*Held*: an affidavit which stated that the conveyance was not for the purpose of enabling "the bargainee to hold," etc., there being two bargainees did not vitiate the instrument.—*TYAS v. MCMASTER* (1859), 8 C. P. 446.—CAN.

r. ——The affidavit stated that the mtgo. was not

Sect. 5.—Registration: Sub-sect. 4, B.; Sub-sect. 5, A.]

witness to a bill of sale under 1878 Act need not state in so many words that he did attest the bill of sale. It is sufficient if this can be inferred from the affidavit.—*YATES v. ASHCROFT* (1882), 47 L. T. 337; 31 W. R. 156, D. C.

513. ————.]—The affidavit of attestation & execution of a bill of sale did not, in terms, state that the attesting solr. was present when the deed was executed, but it did state that the deponent was present, that it was duly attested, & that the deponent & the attesting solr. were the only attesting witnesses:—*Held*: the affidavit in effect stated that the attesting solr. was present when the deed was executed, & it was in compliance with 1878 Act, s. 10.—*COOPER v. ZEFFERT* (1883), 32 W. R. 402, C. A.

granted for the purpose of protecting the goods & chattels against the creditors of the two mtgors., naming them, or preventing the creditors of the said mtgor. from obtaining payment for any claim against him, the said mtgor.:—*Held*: sufficient, for that the word "mtgor." would mean each of the mtgors. previously mentioned.—*FARLINGER v. McDONALD* (1880), 45 U. C. R. 233.—CAN.

s. ————.]—That the mtge. was not made to prevent "the creditor," (instead of creditors) "of such mtgor. obtaining payment of any claims against him":—*Held*: insufficient.—*HARDING v. KNOWLSON* (1859), 17 U. C. R. 564.—CAN.

t. ————.]—H. & I. being indebted to a bank, gave to T., the agent of the branch at H., & to the other pltf., their general manager, as trustees, a mtge. to secure the debt. T. had no express power to take this security, the other pltf. was absent, & the bank on hearing of the transaction repudiated it. The mtgo., made by H., I., & S., of the first part, recited that they were indebted to the mtgees., & had agreed to secure payment of their indebtedness, but H. alone assigned the goods, & there was a proviso that the mtge. should be void if they should pay. The affidavit was that H., I., & S., "the mtgors.," were indebted, that the instrument was not executed for the purpose of protecting the goods against the creditors of the said H., I., & S., "mtgors. therein named, or preventing the creditors of the said mtgors.," etc.:—*Held*: describing the three as mtgors., when only H. conveyed anything, was not a fatal objection.—*TAYLOR v. AINSLIE* (1868), 19 C. P. 78.—CAN.

a. ————.]—The affidavit of *bona fides* in a chattel mtge. taken to secure the mtgee. against his indorsement of two promissory notes, which were referred to in a recital, stated that the mtge. "was executed in good faith & for the express purpose of securing me, the said mtgee. therein named, against his indorsement of a certain promissory note for (sic) or any renewal of the said recited promissory notes":—*Held*: "his indorsement" might be read "my indorsement," as this was clearly a clerical error, but even with this correction, the clause remained vague & incomplete, & the affidavit was therefore fatally defective.—*BOLDRICK v. RYAN* (1890), 17 A. R. 253.—CAN.

b. ————.]—A chattel mtge. used by the Royal Trust Co. was one printed for the "Ranchmen's Trust Co., Ltd." The latter words were struck out of the mtge. & Royal Trust Co." substituted, except in the affidavit of *bona fides*, which read as follows:—"(1) I am the manager of the Royal Trust Co. the mtgee., an incorporated co., (2) that C. S., the mtgor. in the foregoing

chattel mtge. named, is justly & truly indebted to the Ranchmen's Trust Co., Ltd., etc.":—*Held*: the use of the words "Ranchmen's Trust Co., Ltd." in the affidavit was a mere clerical error which did not affect the validity of the mtge.—*ROYAL TRUST CO. v. CASTOR TOWN*, [1917] 3 W. W. R. 5; 37 D. L. R. 277.—CAN.

c. ————.]—An affidavit that the mtge. was made to secure the mtgee. against the payment of such liability "of," instead of "for," the mtgor. by reason of the notes to secure against the indorsement of which it was given:—*Held*: sufficient.—*MATHERS v. LYNCH* (1869), 28 U. C. R. 354.—CAN.

d. ————.]—An affidavit that the deed was not made to enable the assignor (instead of the assignee) to hold the goods against creditors:—*Held*: bad.—*OLMSTEAD v. SMITH* (1858), 15 U. C. R. 421.—CAN.

e. ———— *Statement of indebtedness in—Erroneous statement.*]—The affidavit of *bona fides* attached to a chattel mtge., duly executed & filed, stated that the mtgor. was justly & truly indebted to the mtgee. in a named sum. A loan was made in good faith upon the security of the chattel mtge., but the money was not paid over for five days after the affidavit was made.—*MARTIN v. SAMPSON* (1896), 24 A. R. 1.—CAN.

f. ————.]—In the statement of the indebtedness in the affidavit of *bona fides* sworn to by pltf. & attached to the chattel mtge. was not, in the absence of fraud, fatal to its validity.—*BERNHART v. MCCUTCHEON* (1899), 12 Man. L. R. 394.—CAN.

g. ———— *Omission to state mortgage "justly & truly indebted."*]—A mtgee. under a chattel mtge. to secure an existing indebtedness made the affidavit of *bona fides* required by R. S. O. 1887 (c. 125), s. 6, for a mtge. to secure future advances instead of the affidavit required by s. 2:—*Held*: the affidavit was defective in not stating "that the mtgor. was justly & truly indebted to the mtgee.," & the mtge. could not be looked at to aid the affidavit in this requirement.—*MIDLAND LOAN & SAVINGS CO. v. COWIRSON* (1891), 20 O. R. 583.—CAN.

h. ———— *Amount due & owing.*]—An affidavit of *bona fides* is bad where the amount set forth as consideration for a bill of sale was not due & owing when the affidavit was made.—*MCCURDY v. GRANT* (1900), 32 N. S. R. 520.—CAN.

k. ———— *"Due or accruing due."*] That the mtge. was executed for the purpose of securing the payment of the money so justly "due or accruing due":—*Held*: sufficient, being in the terms of the Act.—*SQUAIR v. FORTUNE* (1859), 18 U. C. R. 547.—CAN.

Annotation:—*Mentd. Re Seaman, Ex p. Furness Finance Co.*, [1896] 1 Q. B. 412.

Description of parties & attesting witnesses.]—*See Sub-sect. 5, post.*

514. Clerical errors—As to date of execution.]—The affidavit filed with a bill of sale, under 1854 Act, stated that the bill of sale was executed "on the day of which same bears date," & in another part, stated the day with a clerical error, substituting 1806 for 1876:—*Held*: a sufficient affidavit of the time of execution.—*LAMB v. BRUCE, DUGGAN v. BRUCE, COOPER v. BRUCE* (1876), 45 L. J. Q. B. 538; 35 L. T. 425; 24 W. R. 645, D. C.

— *In true copy of bill.*]—*See Nos. 492–496, ante.*

— *In jurat of affidavit.*]—*See Nos. 504–506, ante.*

l. ————.]—The affidavit annexed to a chattel mtge. omitted the words, "or accruing due," after those "so justly due":—*Held*: the debt might be stated as due when it really was due, & it need not be necessarily stated as either due or accruing.—*FARLINGER v. McDONALD* (1880), 45 U. C. R. 233.—CAN.

m. ———— *Sufficiency of statement.*]—The consideration mentioned in the bill of sale included two promissory notes not yet matured. The affidavit alleged that the consideration was "justly & honestly owing," omitting the word "due" as in the form annexed to the stat., R. S., c. 92:—*Held*: (1) the affidavit was, under the circumstances of the case, "as nearly as may be" in accordance with the form; (2) the substitution in the affidavit of the word "securing" for the word "protecting," as in the form, was not a departure from the form, but a mere verbal difference.—*PHINNEY v. MORSE* (1893), 25 N. S. R. 502. *reversd. on other grounds*, 22 S. C. R. 563.—CAN.

n. ———— *Antecedent advance.*]—The mtgor. had agreed to deliver lumber to pltf., at specified prices, up to Sept., 1870, which pltf. was only bound to pay for as delivered, & not to make advances; but at the date of the mtge. pltf. had advanced about \$250 beyond the value of the lumber delivered, & to assist the mtgor. still further he advanced \$450 more, on his agreeing to execute the mtge. to secure both amounts, which were to be repaid by lumber or money in two months, the security covering the goods in dispute as well as the lumber:—*Held*: (1) the mtge. was an independent contract, an advance of money to be repaid at an earlier date than that named for the delivery of the lumber; (2) it was not invalid, as not showing the true dealing between the parties; (3) the affidavit, which was in the common form as for a debt due, was sufficient.—*CLARKE v. BATES* (1871), 21 C. P. 348.—CAN.

o. ———— *Amount of indebtedness.*]—The affidavit of *bona fides* was equally defective, as it merely stated that the mtgors. "are fully indebted to me," the mtgee., "in a large sum of money," no sum being mentioned:—*Held*: void, the amount of indebtedness existing or created by the mtge. not being mentioned as required by R. S. O. 1877, c. 119, ss. 1, 2.—*STEVENS v. BARFOOT* (1886), 9 O. R. 692; 13 A. R. 366.—CAN.

amount required to be sworn to in the affidavit is the actual amount secured, not including the nominal consideration.—*CUNNINGHAM v. MORSE* (1887), 20 N. S. R. (8 R. & G.) 110.—CAN.

q. ————.]—The affidavit is not required to allege that the

SUB-SECT. 5.—DESCRIPTION OF PARTIES AND ATTESTING WITNESSES.

See 1878 Act, s. 10 (2); 1882 Act, s. 9.

A. In General.

515. Sufficiency of description—Question for judge.]—Whether the description of the residence in a bill of sale is sufficient, is a question for the judge, & is not for the jury.—*PHILLIPS v. BURTON* (1862), 2 F. & F. 862, N. P.

516. — Time at which ascertained—Whether at time of filing affidavit.]—The description of the residence & occupation of the grantor of a bill of sale, to be contained in the affidavit filed with the bill, must be that which fits the party at the time of giving the security, & not at the time of filing the affidavit.—*LONDON & WESTMINSTER LOAN CO. v. CHASE* (1862), 12 C. B. N. S. 730; 31 L. J. C. P. 314; 6 L. T. 781; 9 Jur. N. S. 412; 10 W. R. 698; 142 E. R. 1329.

Annotations:—*Consd.* *Brodrick v. Sealé* (1871), L. R. 6 C. P. 98; *Button v. O'Neill* (1879), 4 C. P. D. 354; *Castle v. Downton* (1879), 5 C. P. D. 56.

517. — — — — —.]—The description of the residence of the maker of a bill of sale, required by 1854 Act, to be stated in the affidavit filed therewith, must be his residence at the time of swearing the affidavit & not of executing the bill of sale.—*BURTON v. O'NEILL* (1879), 4 C. P. D. 354; 48 L. J. Q. B. 368; 40 L. T. 799; 27 W. R. 592, C. A.

Annotations:—*Consd.* *Castle v. Downton* (1879), 5 C. P. D. 56. *Distd.* *Re Hewer, Ex p. Kahen* (1882), 21 Ch. D. 871. *Reid.* *Blaiberg v. Parke* (1882), 10 Q. B. D. 90.

518. — "Deponent."]—An attesting witness's description of himself as deponent:—*Held*: sufficient affidavit of his description under 1854 Act.—*SLADDEN v. SERGEANT* (1858), 1 F. & F. 322, N. P.

liability is not to exceed a certain sum.—*NEWLANDS v. HIGGINS* (1907), 7 W. L. R. 59; 1 Alta. L. R. 18.—*CAN.*

r. — — — — — Mistake.]—A co. took a chattel mtge. for \$5,066.74 as security. By mistake the affidavit of *bona fides* stated that the mtgor. was justly indebted to the co. in the sum of \$5,000:—*Held*: the mtge. was valid security for \$5,000.—*THOMAS, LTD. v. STANDARD BANK* (1910), 15 O. W. R. 188; 1 O. W. N. 379; *affd.* 1 O. W. N. 548.—*CAN.*

s. — — — — — Made by agent—Statement of knowledge of circumstances.]—A chattel mtge. will not be held void, under R. S. M. 1902 (c. 11), s. 12, because the affidavit of *bona fides* made by an agent stated that he had "a knowledge of all the facts connected with the said mtge.," instead of saying that he was "aware of all the circumstances."—*MEIGHEN v. ARMSTRONG* (1906), 16 Man. L. R. 5.—*CAN.*

t. — — — — —.]—*Held*: it need not appear in the affidavit, or the mtge., or the papers filed therewith, that the agent of the mtgee., making the affidavit, was aware of the circumstances connected with such mtge.—*CARLISLE v. TAIT* (1882), 7 A. R. 10.—*CAN.*

a. — — — — — Made by officer of company—Personal undertaking.]—An affidavit of *bona fides* in support of a bill of sale made to a co., & made by an officer of the co., to the effect that such bill of sale "is not for the purpose of holding or of enabling me this deponent to hold" the goods against the creditors of the bargainor is insufficient.—*WALTER v. LEDUC LUMBER CO.* (1915), 8 W. W. R. 360.—*CAN.*

b. — — — — — Statement of knowledge of circumstances—Manager.]—Where a mtgee. under a chattel mtge.

is an incorporated co. & the affidavit of *bona fides* is made by the "manager," Bills of Sale Ordinance, s. 22, renders it unnecessary for him to state his knowledge of the circumstances connected with the mtge.—*ROYAL TRUST CO. v. CASTOR TOWN*, [1917] 3 W. W. R. 586; 37 D. L. R. 277.—*CAN.*

c. — — — — — President.]—*Held*: the affidavit was defective for whilst made by the president of the firm it did not state that deponent was aware of the circumstances connected with the mtge. & had a personal knowledge of the facts deposed to.—*AVERRILL v. CASWELL & CO.* (1915), 31 W. L. R. 953; 23 D. L. R. 112; 8 Sask. L. R. 269.—*CAN.*

d. — — — — — Insertion of clause in, by mistake.]—*Held*: the insertion in the affidavit of a clause reading "that I am the duly authorised agent of the mtgee.," was an apparent mistake, & did not vitiate it, although it was the affidavit of the mtgees. themselves.—*DYCK v. GRAENING* (1907), 6 W. L. R. 171; 17 Man. L. R. 158.—*CAN.*

PART V. SECT. 5. SUB-SECT. 5.—A.

e. Necessity for description—Of residence & occupation.]—A description of the residence & occupation of the attesting witnesses must accompany every bill of sale registered under 17 & 18 Vict. c. 55, s. 1.—*FONBLANQUE v. LEE* (1858), 7 I. C. L. R. 550; 10 Ir. Jur. 224.—*IR.*

f. Sufficiency of description—General rule.]—The description of the residence & occupation of the grantor in the affidavit required to be filed with the bill of sale must be such as to enable him to be easily found, & where such description is insufficient for that purpose, the bill of sale is invalid as

519. S. P. NICHOLSON v. COOPER (1858), 27 L. J. Ex. 393.

Annotations:—*Reid.* *Bath v. Sutton* (1858), 27 L. J. Ex. 388. *Mentd.* *Hollingsworth v. White* (1862), 6 L. T. 604; *Re Barrand, Ex p. Cochrane* (1876), 34 L. T. 950.

520. — Two grantors.]—Where a bill of sale is executed by two grantors, one only of whom is in possession of the goods at the time of the seizure thereof under a *fi. fa.*, it is not sufficient that the affidavit, filed under 1854 Act, s. 1, gives a description of the one only who was in possession.—*HOOPER v. PARMENTER* (1862), 10 W. R. 648.

521. — To "best of deponent's belief."]—An affidavit annexed to a bill of sale described the grantor's residence & occupation to the "best of the belief" of deponent:—*Held*: a sufficient description to satisfy 1854 Act.—*ROE v. BRADSHAW* (1866), L. R. 1 Exch. 106; 4 H. & C. 178; 35 L. J. Ex. 71; 13 L. T. 641; 12 Jur. N. S. 29; 14 W. R. 284.

— As to name & residence.]—See Nos. 524–550,

As to occupation.]—See Nos. 551–594, *post.*

522. Burden of proof.]—It lies on those who say that the description of the attesting witness is not sufficient to show that the witness was not what he is described (*BLACKBURN, J.*).—*GRANT v. SHAW* (1872), L. R. 7 Q. B. 700; 41 L. J. Q. B. 305; 27 L. T. 602, D. C.

523. — Objection to—When to be taken.]—An objection that the attesting witness was not duly described, not having been made at the trial, was not allowed to be urged on appeal.—*BATH v. SUTTON* (1858), 27 L. J. Ex. 388.

Annotations:—*Mentd.* *Morewood v. South Yorkshire Ry. & River Dun Co.* (1858), 3 H. & N. 798; *Smith v. Choese* (1875), 1 C. P. D. 60; *Castle v. Downton* (1879), 5 C. P. D. 56.

against an execution creditor.—*MOUNT WELLINGTON ROAD BOARD v. VARE* (1889), 9 N. Z. L. R. 641.—*N.Z.*

residence & occupation of an attesting witness, to be added to his signature attesting an instrument under *Chattels Transfer Act*, 1889, s. 49, are not necessarily required to be given with the same particularity as in the affidavit of execution under s. 5. The same particularity only is required as in the case of a deed under the conveyancing Acts requiring attestation in a similar form.

"J. Brown, law clerk, Wellington":—*Held*: sufficient.—*TE ARO LOAN CO. v. CAMERON* (1895), 14 N. Z. L. R. 411.—*N.Z.*

516 i. — Time at which ascertained—When bill registered.]—*Held*: the description required by Bills of Sale Act, 1898, s. 4, must be that of residence & occupation at the time of registration, & not at the time of execution of the bill of sale.—*Re CATIP* (1912), 12 S. R. N. S. W. 552.—*AUS.*

520 i. — Two grantors—Bill in singular.]—Two brothers, one of whom owned a horse & the other of whom owned a horse & dray, & who were not in partnership, executed a bill of sale (which was duly registered) over the two horses & the dray to secure a loan. The instrument, which was on a printed form intended to be signed by one person, stated that the two brothers were thereafter called "the grantors," but in many places, & (*inter alia*), in the covenant to repay, it referred to the grantor in the singular number:—*Held*: the instrument ought to be read throughout as if the plural number had been used where necessary.—*ANDREWS v. FAN TU* (1909), 28 N. Z. L. R. 1042.—*N.Z.*

BILLS OF SALE.

Sect. 5.—Registration :

B. Name and Residence.

524. Name—Son bearing same name as father.]
—*Held*: there was nothing in 1854 Act which required a son bearing the same name as his father, & being the grantor of a bill of sale, to describe himself as “A. the younger” in the bill of sale & affidavit.—*FOULGER v. TAYLOR* (1859), 1 L. T. 57.

525. — Real name used—Party known by assumed name.]—In the affidavit filed with a copy of a bill of sale, the grantor was described as J. W. The grantor's real name was J. W., but he had assumed, & was generally known by the name of J. A. W.:—*Held*: the description was sufficient.

[1854] Act says nothing about the name of the grantor, & scarcely anybody ever dreams of looking at the Christian name of a person for whom he is searching in the register (JAMES, L.J.).—*Re WOOD, Ex p. MCHATTIE* (1878), 10 Ch. D. 398; 48 L. J. Bcy. 26; 27 W. R. 327; *sub nom. Re WOOD, Ex p. HATTIE*, 39 L. T. 373, C. A.

Annotations:—*Consd. Greenham v. Child* (1889), 38 W. R. 94. *Reid. Downs v. Salmon* (1888), 20 Q. B. D. 775; *Central Bank of London v. Hawkins* (1890), 62 L. T. 901; *Stokes v. Spencer*, [1900] 2 Q. B. 483. *Mentd. Re Wood, Ex p. Hall* (1883), 23 Ch. D. 644; *Barron v. Potter*, [1915] 3 K. B. 593.

526. — Assumed or trade name used.]—A bill of sale was given in the name of D., that being the name in which the grantor carried on business:—*Held*: the objection that the bill of sale was not given in the true name failed, as the grantor was carrying on business under the name given.—*COCHRANE v. DIXON* (1887), 3 T. L. R. 717, D. C.

527. — — —.]—A bill of sale was given by the grantor under an assumed name, the only name by which the grantees knew him, & that assumed name was the name by which the grantor was known in the neighbourhood, & under which he had carried on business, & the bill of sale was registered in the assumed name:—*Held*: the bill of sale was duly registered & was valid, as it was registered in the name by which the grantor was known & recognised at the time, & 1878 Act, s. 10 (2), did not necessarily require a bill of sale to be executed & registered in the real name of the grantor.—*CENTRAL BANK OF LONDON v. HAWKINS* (1890), 62 L. T. 901; 6 T. L. R. 181, D. C.

Annotation:—*Fold. Stokes v. Spencer*, [1900] 2 Q. B. 483.

528. — — —.]—An unmarried woman of the name of O., about 1879, went to live with a man as his mistress & took the name of Mrs. S., by which name alone she was thenceforward known. In 1893 the man made a settlement upon her, & in that settlement she was described by her true name of O. In 1899 she executed an absolute deed of assignment of certain personal chattels to the trustees of the settlement, by whom it was registered, & in that deed of assignment & the registration of it she was described by the name of O. alone, no reference being made to the name of S. The chattels comprised in the deed were seized in execution of a judgment, & it was contended by the execution creditor that the deed, not having been registered in the name of S., was invalid:—*Held*: 1878 Act did not require the name of the grantor to be stated at all, & the insertion in the register of a name other than that by which alone the grantor was known would not invalidate the registration, even though the effect of it was to deprive persons searching the register of all means

of ascertaining therefrom whether the grantor was the true owner or not of the chattels which were in her possession.—*STOKES v. SPENCER*, [1900] 2 Q. B. 483; 69 L. J. Q. B. 792; 83 L. T. 199; 49 W. R. 13; 16 T. L. R. 446; 7 Mans. 402, D. C.

— — — **By grantee.]**—See Nos. 284–286, *ante*.

529. — False name purposely used.]—In a bill of sale given by husband & wife, & in the affidavit filed on registration, the grantors' names were described as “A. S. & E. O. S., wife of A. S.” The husband's true name was G. H. A. S., & the misdescriptions were purposely made by both the grantors in order to conceal the fact that they had given a bill of sale:—*Held*: the registration of the bill of sale was not thereby rendered invalid.—*DOWNS v. SALMON* (1888), 20 Q. B. D. 775; 57 L. J. Q. B. 454; 59 L. T. 374; 36 W. R. 810; 4 T. L. R. 488, D. C.

Annotation:—*Expld. Central Bank of London v. Hawkins* (1890), 62 L. T. 901.

530. — — —.]—The grantor of a bill of sale was described in the bill of sale & in the affidavit filed upon registration as “K. T.,” whereas, in fact, his name was F. H. T.:—*Held*: the misdescription rendered the registration of the bill of sale void.—*LEE v. TURNER* (1888), 20 Q. B. D. 773; 59 L. T. 320, D. C.

Annotation:—*Reid. Stokes v. Spencer*, [1900] 2 Q. B. 483.

531. Residence—Place of business—Of employer.]—In the affidavit to a bill of sale the attesting witness was described by name, & as “clerk to Mr. K. of 73, Basinghall Street”:—*Held*: the residence of the attesting witness was described with sufficient certainty.—*ALLEN v. THOMPSON* (1856), 2 Jur. N. S. 451; 4 W. R. 506.

Annotations:—*Consd. England v. Blackwell* (1857), 6 W. R. 59; *Re Lowenthal, Ex p. Lowenthal* (1874), 9 Ch. App. 324; *Blaiberg v. Parke* (1882), 10 Q. B. D. 90. *Mentd. Morewood v. South Yorkshire Ry. & River Dun Co.* (1858), 3 H. & N. 798; *Sutton v. Bath* (1858), 1 F. & F. 152; *Tuton v. Sanoner* (1858), 3 H. & N. 280; *Adams v. Graham & Hamber* (1864), 9 L. T. 606; *Re Vining, Ex p. Hooman* (1870), L. R. 10 Eq. 63; *Jones v. Harris* (1871), L. R. 7 Q. B. 157; *Sharp v. McHenry, Sharp v. Brown* (1887), 38 Ch. D. 427; *Barron v. Potter*, [1915] 3 K. B. 593.

532. — — —.]—The execution of a bill of sale was attested by a witness who signed as “C., clerk to B. & R., solrs., Temple.” It was in due time filed with an affidavit, which commenced “I. C., of King's Bench Walk, Inner Temple, in the city of London, clerk to B. & R. of the same place, solrs., make oath & say.” In the body of the affidavit it was stated that the bill of sale was executed in the presence of the deponent, but there was no further description of the residence of the attesting witness. It was proved that C. was clerk to the solrs. whose office was in King's Bench Walk, that all his business hours were passed there, & that it was the place where he would be most readily heard of, but that he took his meals & slept elsewhere:—*Held*: the description of the residence was sufficient.—*BLACKWELL v. ENGLAND* (1857), 8 E. & B. 541; 27 L. J. Q. B. 124; 3 Jur. N. S. 1302; 120 E. R. 202; *sub nom. ENGLAND v. BLACKWELL*, 30 L. T. O. S. 148; 6 W. R. 59.

Annotations:—*Expld. Attenborough v. Thompson* (1857), 27 L. J. Ex. 23. *Consd. Hewer v. Cox* (1860), 3 E. & E. 428. *A.-G. v. McLean* (1863), 1 H. & C. 750. *Expld. Re Bowie, Ex p. Breull* (1880), 16 Ch. D. 484. *Reid. Stoke-upon-Trent Corp'n. v. Cheshire County Council* (1915), 85 L. J. K. B. 36; *R. v. Braithwaite*, [1918] 2 K. B. 319. *Mentd. Lamb v. Bruce, Duggan v. Bruce, Cooper v. Bruce* (1870), 35 L. T. 425; *St. Pancras Grdns. v. Norwich Incorporation Grdns.* (1887), 18 Q. B. D. 521.

533. — — —.]—In the affidavit filed with a bill of sale the attesting witness described

PART V. SECT. 5, SUB-SECT. 5.—B.

k. Name—Second Christian name not in full.]—It is no objection that

the second Christian name of a deponent to an affidavit of the execution of a chattel mtge. is not written in full,

but the initial only given.—*DE FORREST v. BUNNELL* (1858), 15 U. C. R. 370.—**CAN.**

himself as "A., clerk to M. & S. of No. 18, B. Street, in the city of London":—*Held*: sufficient, though he did not sleep there.—*ATTENBOROUGH v. THOMPSON* (1857), 2 H. & N. 559; 27 L. J. Ex. 23; 30 L. T. O. S. 154; 3 Jur. N. S. 1307; 6 W. R. 135; 157 E. R. 230.

Annotations:—*Consd.* *Hewer v. Cox* (1860), 3 E. & E. 428. *Mentd.* *Picards v. Bretz* (1859), 1 L. T. 45.

534. ———.—]—The execution of a bill of sale was attested by a witness, who added as his address & description, "clerk to the D. bank of London, 6, D. Street, Charing Cross":—*Held*: it was not necessary that the attesting witness should give his private address, if he gave a business address where he was employed, & could be found.—*SIMMONS v. WOODWARD*, [1892] A. C. 100; 61 L. J. Ch. 252; 66 L. T. 534; 40 W. R. 641; 8 T. L. R. 395, H. L.; *reversg.* S. C. *sub nom.* *Re HESELTINE, WOODWARD v. HESELTINE*, [1891] 1 Ch. 464, C. A.

Annotations:—*Mentd.* *Monson v. Milner* (1892), 8 T. L. R. 447; *Linfoot v. Pockett*, [1895] 2 Ch. 835; *De Braam v. Ford*, [1900] 1 Ch. 142; *Pettit v. Lodge & Harper*, [1908] 1 K. B. 744; *Rosefield v. Provincial Union Bank*, [1910] 2 K. B. 781.

535. ———.—]—& H., printers carrying on business in co-partnership in N. Street, Blackfriars, in the city of London, but not sleeping there, having made a bill of sale of the partnership goods, the description filed with the bill stated that they were printers & co-partners, residing at N. Street, Blackfriars:—*Held*: N. Street, Blackfriars, was the residence of G. & H. within 1854 Act.—*HEWER v. COX* (1860), 3 E. & E. 428; 30 L. J. Q. B. 73; 3 L. T. 508; 6 Jur. N. S. 1339; 9 W. R. 143; 121 E. R. 503.

Annotations:—*Apld.* *Blount v. Harris* (1878), 4 Q. B. D. 603. *Consd.* *Re Wood, Ex p. McHattie* (1878), 10 Ch. D. 398. *Fold.* *Greenham v. Child* (1889), 24 Q. B. D. 29. *Refd.* *Briggs v. Boss* (1868), 37 L. J. Q. B. 101; *Jones v. Harris* (1871), L. R. 7 Q. B. 157. *Mentd.* *Murray v. Mackenzie* (1875), 32 L. T. 777.

536. ———.—]—Principal office of company.]—An affidavit filed with a bill of sale given by a co. established for trade purposes, describing the co. by its name, & stating the address of its principal office, is a sufficient compliance with 1854 Act, s. 1.

The affidavit does contain a sufficient description of the co. & of its place of business (*ERLE, C.J.*).—*SHEARS v. JACOB* (1866), L. R. 1 C. P. 513; Har. & Ruth. 492; 35 L. J. C. P. 241; 14 L. T. 286; 12 Jur. N. S. 785; 14 W. R. 609.

Annotations:—*Mentd.* *Deffell v. White* (1866), L. R. 2 C. P. 144; *Re Standard Manufacturing Co., Ex p. Lowe* (1891), 39 W. R. 369; *Re Coal Co-op. Soc., G. N. Ry. Co. v. Coal Co-op. Soc.* (1895), 2 Mans. 621.

537. ———.—]—Party with two or more residences or places of business.]—A bill of sale was executed by a licensed victualler, who resided & carried on his business in a public-house called the Three Cups. He also owned another public-house, called the Golden Anchor, the business of which was carried on for him by his father, in whose name the licence

was taken out. The bill of sale comprised only property in the Three Cups. On the registration of the deed he was described as a licensed victualler but only as of the Three Cups, no reference being made to the Golden Anchor. He having become bkpt. it was urged that the deed was void as against the trustee on the ground that the grantor ought to have been described as of the Golden Anchor as well as of the Three Cups:—*Held*: 1878 Act, s. 10, had been literally complied with.—*Ex p. PROBYN* (1880), 24 Sol. Jo. 344, C. A.

538. ———.—]—The proprietor of a travelling circus, which was then at Southampton, granted a bill of sale upon his circus property, in which he was described as "T. B., of No. 9, P. Terrace, Nine Elms, in the county of Surrey, but now carrying on business at B. Street, in the town & county of the town of Southampton, & lodging at No. 3., W. Terrace, in the town of Southampton, circus proprietor." In the affidavit it was stated that "T. B. at present resides at 3, W. Terrace, & carries on business at B. Street, in the town of Southampton, & has a permanent residence at 3, P. Terrace, Nine Elms, in the county of Surrey." He had not resided at P. Terrace for six years, but was the owner of the house, & lent it to his brother-in-law:—*Held*: it was a sufficient & proper description.—*COOPER v. IBERSON, COOPER v. WARNLOW* (1881), 44 L. T. 309; 29 W. R. 566.

539. ———.—]—A statement in the affidavit filed with a bill of sale that the grantor "resides at 18, S. Place, Bradford, in the county of York, & is a stone merchant & quarry owner":—*Held*: to be sufficient, although he carried on business as lessee of stone quarries at two other places.—*Re MOULSON, Ex p. KNIGHTLY* (1882), 51 L. J. Ch. 823; 46 L. T. 776; 30 W. R. 844.

Annotation:—*Refd.* *Greenham v. Child* (1889), 24 Q. B. D. 29.

540. ———.—]—The residence & occupation of the grantor of a bill of sale, a railway contractor, engaged at the time in the construction of a railway at Bury, in Lancashire, with business chambers in Westminster, & a private residence in Kilburn:—*Held*: not sufficiently described in the bill of sale & affidavit by the words: "residing at No. 1, W. Chambers, V. Street, Westminster, in the county of Middlesex, railway contractor."—*WALLIS v. SMITH*, [1882] W. N. 77.

Annotation:—*Dbtd.* & *N.F.* *Greenham v. Child* (1889), 24 Q. B. D. 29.

541. ———.—]—Erroneous addition as to locality.]—G. & H., printers carrying on business in co-partnership in N. Street, Blackfriars, in the city of London, having made a bill of sale of the partnership goods, the description filed with the bill stated that they were printers & co-partners, residing at N. Street, Blackfriars, in the county of Middlesex:—*Held*: the description was sufficient, for no creditor of G. & H. could have been misled as to their identity with the persons described, had the

537 i. *Residence—Party with two or more residences or places of business.*]—H., a boarding house keeper, rented a hotel in another part of the town, & having resided there three days—though still superintending the boarding house—executed a bill of sale. The verifying affidavit described her as a resident at Thorndon Quay, the locality in which the boarding house was situate, & as being by occupation a boarding house keeper & hotel-proprietor:—*Held*: a sufficient description under 1867 Act.—*PLIMMER v. DUGGAN* (1882), 1 N. Z. L. R. 35.—N.Z.

537 ii. ———.—]—The residence of the attesting witness to a bill of sale was given as "No. 430, Bourke Street, Melbourne," & in the introductory

part of the affidavit by him of due execution he described himself as of "No. 430, Bourke Street, Melbourne, solr.," but in the body of the affidavit stated that he resided at "Treasury Place, Melbourne," & was by occupation a solr.:—*Held*: as the introductory part was to be taken as part of the affidavit, there was a sufficient description to enable him to be found by any of the grantor's creditors.—*ANDERSON v. WATSON* (1891), 17 V. L. R. 263.—AUS.

541 i. ———.—]—Erroneous addition as to locality.]—A farmer executed a bill of sale in which his residence was inaccurately described as "Ballycarton, Limavady, Co. Derry." The same description of his address was given in

the affidavit filed on the registration of the bill of sale, the mistake being due to a slip on the part of a solr.'s clerk. In reality his farm was in the adjacent townland of Ballymaglin, & about a hundred yards from the boundary line between the two townlands. There was no other farmer of the same name in either of the townlands or anywhere in the immediate neighbourhood:—*Held*: the bill of sale was invalid by reason of the inaccuracy.—*JACKSON v. EATON* (1904), 39 I. L. T. 41.—IR.

541 ii. ———.—]—The affidavit for registration stated that the grantor "resides at No. 39, Clarinda Mount, in the county of Dublin":—*Held*: sufficient.—*SMITH v. WHITE* (1869), 5 I. L. T. 74.—IR.

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description merely specified N. Street, Blackfriars, as their place of residence, & the erroneous addition, "in the county of Middlesex," instead of "in the city of London," was only *falsa demon-*

—HEWER v. COX (1860), 3 E. & E. 428; 30 L. J. Q. B. 73; 3 L. T. 508; 6 Jur. N. S. 1339; 9 W. R. 143; 121 E. R. 503.

Annotations:—*Appld.* Blount v. Harris (1878), 4 Q. B. D. 603. *Consd.* *Re* Wood, *Ex p.* McHattie (1878), 10 Ch. D. 398. *Foll.* Greenham v. Child (1889), 24 Q. B. D. 29. *Refd.* Briggs v. Boss (1868), 37 L. J. Q. B. 101; Jones v. Harris (1871), L. R. 7 Q. B. 157; Murray v. Mackenzie (1875), 32 L. T. 777.

542. ———.]—The affidavit to a bill of sale described the maker as of W. Rectory, near Emsworth, in the county of Hants. W. Rectory was, in fact, in the county of Sussex, & adjoined Emsworth, which was in the county of Hants:—*Held*: sufficient.—BELLAMY v. SALE (1862), 1 New Rep. 18; 7 L. T. 269.

543. ———.]—In the affidavit filed with a bill of sale the attesting witness, a solr. carrying on business in the city of London, stated that he resided at "Acton, in the city of London." Acton was in Middlesex, & there was no Acton in the city of London:—*Held*: the residence of the attesting witness was sufficiently stated, for the words "in the city of London" might be rejected, & then it would become clear that Acton, in Middlesex, was the place intended to be mentioned.—BLOUNT v. HARRIS (1878), 4 Q. B. D. 603; 48 L. J. Q. B. 159; 39 L. T. 465; 43 J. P. 156; 27 W. R. 202, C. A.

544. ———.]—In the affidavit filed with a copy of a bill of sale, the grantor was described as "of L. H. farm, in the county of Chester, farmer." The farm was not in the county of Chester, but in the county of the city of Chester. There was no evidence that there was any farm of the same or any similar name in the county of Chester:—*Held*: the description was sufficient.—*Re* WOOD, *Ex p.* MCHATTIE (1878), 10 Ch. D. 398; 48 L. J. Bcy. 26; 27 W. R. 327; *sub nom.* *Re* WOOD, *Ex p.* HATTIE, 39 L. T. 373, C. A.

Annotations:—*Consd.* Greenham v. Child (1889), 38 W. R. 94. *Mentd.* *Re* Wood, *Ex p.* Hall (1883), 23 Ch. D. 644; Downs v. Salmon (1888), 20 Q. B. D. 775; Central Bank of London v. Hawkins (1890), 62 L. T. 901; Stokes v. Spencer, [1900] 2 Q. B. 483; Barron v. Potter, [1915] 3 K. B. 593.

545. ——— Name of town only.]—*Qu.*: whether the name of the town where the attesting witness lives is a sufficient description of his residence.—TUTON v. SANONER (1858), 3 H. & N. 280; 27 L. J. Ex. 293; 31 L. T. O. S. 118; 4 Jur. N. S. 365; 6 W. R. 545; 157 E. R. 477.

Annotations:—*Mentd.* Pickard v. Bretts (1859), 29 L. J. Ex. 18; Pickard v. Marriage (1876), 1 Ex. D. 364; Sharp v. McHenry, Sharp v. Brown (1887), 38 Ch. D. 427; Barron v. Potter, [1915] 3 K. B. 593.

546. ———.]—In the affidavit filed with a bill of sale, the attesting witness, M., stated: "I reside at Hanley, in the county of Stafford." M. was clerk to H., an accountant, at Manchester, & managed the business for him at Hanley, & the name of H., & not M., was over the door of the

place of business. The parliamentary borough of Hanley contained a population of 40,000 persons. Hundreds of letters had reached M. by the post with the address of Hanley only:—*Held*: the affidavit contained a sufficient description of the residence of the attesting witness.—BRIGGS v. BOSS (1868), L. R. 3 Q. B. 268; 37 L. J. Q. B. 101; 17 L. T. 599; 16 W. R. 480.

Annotations:—*Consd.* Jones v. Harris (1871), L. R. 7 Q. B. 157. *Mentd.* Larchin v. North Western Deposit Bank (1875), L. R. 10 Exch. 64; Murray v. Mackenzie (1875), L. R. 10 C. P. 625; Lamb v. Bruce, Duggan v. Bruce, Cooper v. Bruce (1876), 35 L. T. 425; Cooper v. Davis (1883), 48 L. T. 831.

547. ——— Solicitor with unusual name.]—The attesting witness to a bill of sale was described in the affidavit as "W. Neve, of Luton in the County of Bedford, solr.":—*Held*: the description was sufficient.—GARDNER v. SMART (1883), 1 Cab. & El. 14.

548. ———.]—In a bill of sale the attesting witness was described as "C. B., clerk to Mr. E., solr., Aldershot." There was evidence that that was his usual address, & that letters addressed "C. B., Aldershot," would reach him in the ordinary course of post:—*Held*: the description was sufficient.—HICKLEY v. GREENWOOD (1890), 63 L. T. 288; 38 W. R. 686, D. C.

Annotation:—*Mentd.* *Re* Heseltine, Woodward v. Heseltine, [1891] 1 Ch. 464.

549. ——— Grantor afterwards absconding.]—The affidavit filed on registration of a bill of sale stated as the grantor's residence the place where he resided when he gave the bill of sale. He had absconded in the meantime:—*Held*: his residence was sufficiently described.—*Re* HEWER, *Ex p.* KAHEN (1882), 21 Ch. D. 871; 51 L. J. Ch. 904; 46 L. T. 856; 30 W. R. 954.

550. ——— Club address.]—The address of the grantor of a bill of sale appearing in the body of the bill need not be his actual place of residence or his place of business.

The grantor of a bill of sale carried on business at one address, resided at a second, & was a member of a club at a third, to which last-named address letters might be sent to him with the certainty that they would be received by him. His address given in the body of the bill of sale was that of the club:—*Held*: the bill of sale was not void for deviating from the statutory form.—DOLCINI v. DOLCINI, [1895] 1 Q. B. 898; 64 L. J. Q. B. 427; 43 W. R. 542; 11 T. L. R. 344; 15 R. 408, D. C.

C. Occupation.

551. General rule.]—"Occupation" in 1854 Act, s. 1, means trade or profession by which the maker of the bill tries to gain a livelihood, or in which he is to the knowledge of his neighbours engaged.—LUCKIN v. HAMLYN (1869), 21 L. T. 366; 18 W. R. 43.

Annotations:—*Consd.* *Re* Haynes, *Ex p.* National Mercantile Bank (1880), 15 Ch. D. 42; Feast v. Robinson (1894), 63 L. J. Ch. 321; Neverson v. Seymour (1907), 97 L. T. 788; Barron v. Potter, [1915] 3 K. B. 593. *Refd.* Downs v. Salmon (1888), 20 Q. B. D. 775; Kemble v. Addison,

Held: upon the evidence the jury were warranted in finding that the grantor had changed his residence to the county in which the mtge. was registered, though he had left his family in the county as of which he was described.—MELLISH v. VAN NORMAN (1855), 13 U. C. R. 451.—CAN.

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n. Whether necessary to state — *Affidavit of bona fides.*—R. S. M. c. 11,

545 i. ——— Name of town only. An attesting witness is sufficiently described in the affidavit of verification of a bill of sale, as "of Kerang, in the colony of Victoria, storeman," there being evidence that he could easily be identified & found by that description.—O'DONNELL v. PATCHELL (1879), 5 V. L. R. 360.—AUS.

545 ii. ———.]—"P., of city of Cork, law clerk," is an insufficient description of the witness to a bill of sale in the registering affidavit. The residence of the witness must be described in such a manner as that a

stranger may thereby be able to discover it with reasonable certainty.—*Re* HAMS (1860), 10 I. Ch. R. 100; 5 Ir. Jur. 59.—IR.

545 iii. ———.]—"Law Clerk of Carlow, in the county of Carlow" *Held*: a sufficient description of the residence of an attesting witness to a bill of sale.—M'CUE v. JAMES (1870), 5 I. L. T. 77.—IR.

m. ——— Change of residence.]—The description of the mtgor. in the mtge. is at most only *prima facie* proof of his residence.

[1900] 1 Q. B. 430; *Re Boddington, Ex p. Salaman* (1915), 84 L. J. K. B. 2119.

552. — Rejection of surplusage.]—A bill of sale & the affidavit filed on its registration described the grantors, father & son, by their true addresses, & added that they were mantle manufacturers carrying on business together under a specified firm. They had in fact formerly carried on the business of mantle manufacturers in partnership, but, at the time when the bill of sale was executed, the partnership had been dissolved, & the business was being carried on by the father alone, the son being in his employment as a clerk. The property comprised in the deed in fact belonged to the father alone, though both father & son joined in the assignment. The father alone filed a liquidation petition:—*Held*: there was no misdescription of the grantors such as to affect the validity of the registration, because (1), the son not being bkpt., any misdescription of him was immaterial, & (2) as to the father, the statement that he was carrying on business with the son was mere surplusage, & was not misleading.—*Re STOREY, Ex p. POPPLEWELL* (1882), 21 Ch. D. 73; 52 L. J. Ch. 39; 47 L. T. 274; 31 W. R. 35, O. A.

Annotations:—*Reid. Brandon Hill v. Lane* (1914), 84 L. J. K. B. 347. *Mentd. Blalberg v. Beckett* (1886), 18 Q. B. D. 96.

Grantor described as—"Gentleman."]—See Nos. 553, 555, 558–560. 568–570, 573, 575, *post*.

—— **"Married woman."]**—See Nos. 562–565, *post*.

—— **"Widow."]**—See Nos. 566, 577, *post*.

Attesting witness described as—"Gentleman."]—See Nos. 554, 556, 557, 576, *post*.

—— **"Clerk."]**—See Nos. 586–589, *post*.

553. Person having occupation—Described as "gentleman"—Clerk in public department.]—The object of 1854 Act is to give the assignee & creditor a true idea of the position in life of the assignor, & a misdescription or absence of due description in regard to his occupation is substantial, & invalidates the transaction.

Under that Act it is not a sufficient description of the occupation of the assignor, if he have any office or occupation, to term him simply "gentleman."

In the case of a clerk in a public department, e.g., the Audit Office, he should be described as "clerk in the Audit Office." *Semble*: even were he at the head of a department, he should be so described.—*ALLEN v. THOMPSON* (1856), 1 H. & N. 15; 25 L. J. Ex. 249; 27 L. T. O. S. 82; 2 Jur. N. S. 451; 4 W. R. 506; 156 E. R. 1099.

Annotations:—*Distd. Sutton v. Bath* (1858), 1 F. & F. 152. *Appld. Tuton v. Sanoner* (1858), 3 H. & N. 280. *Reid. Morewood v. South Yorkshire Ry. & River Dun Co.* (1858), 3 H. & N. 798; *Adams v. Graham & Hamber* (1864), 9 L. T. 606; *Re Vining, Ex p. Hooman* (1870), L. R. 10 Eq. 63; *Sharp v. McHenry, Sharp v. Brown* (1887), 38 Ch. D. 427; *Barron v. Potter*, [1915] 3 K. B. 593. *Mentd. England v. Blackwell* (1857), 6 W. R. 59; *Jones v. Harris* (1871), L. R. 7 Q. B. 157; *Re Lowenthal, Ex p. Lowenthal* (1874), 9 Ch. App. 324; *Blalberg v. Parke* (1882), 10 Q. B. D. 90.

554. — Solicitor's clerk.]—Under 1854 Act it is necessary that the occupation of the attesting witness, as well as that of the assignor, should duly be described in the affidavit on registry, & an attorney or an attorney's clerk, long known as such, is not duly described merely by the term "gentleman" without the mention of his profession.—*TUTON v. SANONER* (1858), 3 H. & N.

280; 27 L. J. Ex. 293; 31 L. T. O. S. 118; 4 Jur. N. S. 365; 6 W. R. 545; 157 E. R. 477.

Annotations:—*Consd. Sharp v. McHenry, Sharp v. Brown* (1887), 38 Ch. D. 427. *Reid. Pickard v. Bretts* (1859), 29 L. J. Ex. 18; *Pickard v. Marriage* (1876), 1 Ex. D. 364; *Barron v. Potter*, [1915] 3 K. B. 593.

555. — — — — —.]—A., whose situation in life was that of attorney's clerk, gave a bill of sale, which was registered. He described himself in the bill of sale as "gentleman." At the time of giving the bill of sale, he had no definite employment, but had been employed in making out the bills & accounts of a firm of attorneys:—*Held*: the description was improper.—*BEALES v. TENNANT* (1860), 29 L. J. Q. B. 188; 1 L. T. 295; 6 Jur. N. S. 628.

556. — — — — —.]—A bill of sale was attested by A., described as "clerk to" B., a solr. The affidavit was made by A., described as a "gentleman":—*Held*: the description was incorrect, & the affidavit was insufficient.—*BRODRICK v. SCALÉ* (1871), L. R. 6 C. P. 98; 40 L. J. C. P. 130; 23 L. T. 864; 19 W. R. 386.

Annotations:—*Mentd. Jones v. Harris* (1871), L. R. 7 Q. B. 157; *Blalberg v. Parke* (1882), 10 Q. B. D. 90.

557. — — — — — Solicitor.]—*TUTON v. SANONER* No. 554, *ante*.

558. — — — — — Buyer.]—In a bill of sale the grantor was described as "J. V., of No. 25, B. Street, R. Square, in the county of Middlesex, gentleman." In the affidavit filed therewith, he was described in the same way. The description of his residence was correct, but he was in reality at the time of giving the bill of sale in the employ of C. & Co. of W. Street, in the city of London, as a buyer of silk:—*Held*: the bill of sale was invalid by reason of the description being incorrect.—*ADAMS v. GRAHAM* (1861), 3 New Rep. 372; 33 L. J. Q. B. 71; 9 L. T. 606; 10 Jur. N. S. 356; 12 W. R. 282.

Annotations:—*Consd. Barron v. Potter*, [1915] 3 K. B. 593. *Reid. Re Vining, Ex p. Hooman* (1870), L. R. 10 Eq. 63.

559. — — — — — Described as "gentleman of no occupation"—Commercial traveller.]—The grantor of a bill of sale was described as a "gentleman of no occupation." It was proved that he solicited orders for a hop merchant, & was paid a commission:—*Held*: the description was not correct.—*MATTHEWS v. BUCHANAN* (1889), 5 T. L. R. 373, C. A.

560. — — — — — Partner in business.]—The grantor of a bill of sale was described therein & in the affidavit thereof as a "gentleman of no occupation." In fact, at the date of the bill of sale Nov. 3, 1913, he was in partnership with another in a business of soap manufacturers & agents:—*Held*: the description in the bill of sale & affidavit was erroneous & misleading.—*Re BODDINGTON, Ex p. SALAMAN* (1915), 84 L. J. K. B. 2119; 113 L. T. 1114; [1915] H. B. R. 183.

561. — — — — — Described as "esquire"—Lessee & manager of theatre.]—At the date of the execution & registration of a bill of sale, the assignor was lessee & manager of a theatre, but was described in such bill of sale simply as "Esquire":—*Held*: the description was insufficient.—*Re VINING, Ex p. HOOMAN* (1870), L. R. 10 Eq. 63; 39 L. J. Bcy. 4; 22 L. T. 179; 18 W. R. 450.

Annotations:—*Mentd. Re Blenkhorn, Ex p. Jay* (1874), 9 Ch. App. 697; *Taylor v. Eckersley* (1877), 5 Ch. D. 740.

562. — — — — — Described as "married woman"—Hotel-keeper—Licence held by husband.]—In a bill of sale on the furniture of an hotel, the grantor,

s. 5, does not require that the occupation of the mtgoe. should be stated in the affidavit of *bona fides*.—*DYOR v.*

GRAENING (1907), 6 W. L. R. 171; 17 Man. L. R. 158.—*CAN.*

o. Person having occupation—De-

scribed as "esquire"—*Merchant*—*Re O'CONNOR* (1856), 27 L. T. O. S. 27. —*IR.*

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who carried on the business of the hotel, was described as "married woman." The licence was held by her husband:—*Held*: a sufficient description.—*USHER & Co. v. MARTIN* (1889), 61 L. T. 778, D. C.

Annotation:—*Mentd.* *Jennings v. Mather*, [1901] 1 K. B. 108.

563. ——— Farmer.]—In a bill of sale on farm stock the grantor, who farmed the farm herself, was merely described as "S J., of Y. farm, in the county of Glamorganshire, married woman":—*Held*: the point raised as to the sufficiency of the description of the grantor's occupation must be decided in favour of the validity of the document.—*DAVIES v. JENKINS* (1899), 48 W. R. 286; 44 Sol. Jo. 103, D. C.

Annotation:—*Mentd.* *Burchell v. Thompson* (1919), 64 Sol. Jo. 68.

564. ——— Dressmaker—Living apart from husband.]—In a bill of sale given by a married woman living apart from her husband, & in the affidavit filed on registration, she was simply described as a married woman, no occupation being given. She was in fact employed as manager in a dressmaking business at a weekly salary:—*Held*: the registration of the bill was invalid, since her occupation ought to have been described.—*KEMBLE v. ADDISON*, [1900] 1 Q. B. 430; 69 L. J. Q. B. 299; 82 L. T. 91; 48 W. R. 331; 7 Mans. 156, D. C.

Annotations:—*Reid.* *Neverson v. Seymour* (1907), 97 L. T. 788; *Barron v. Potter*, [1915] 3 K. B. 593.

565. ——— Lodging-house keeper.]—A married woman living with her husband carried on a separate business as a lodging-house keeper. In the affidavit filed upon the registration of a bill of sale she was described as "the wife of A., of the same place, commission agent":—*Held*: the question whether the description given of the woman was insufficient, in that it did not describe her occupation, was one of degree, & the test to be applied is that laid down by *MARTIN, B.*, in *Luckin v. Hamlyn*, No. 551, *supra*.—*NEVERSON v. SEYMOUR* (1907), 97 L. T. 788; 52 Sol. Jo. 12, D. C.

Annotation:—*Reid.* *Barron v. Potter*, *Potter v. Berry* (1914), 84 L. J. K. B. 751.

566. ——— Described as "widow"—Executrix managing farm.]—Where the extrix. & sole legatee of a man, who shortly before his death had taken a farm in Kent, carried on same through means of a bailiff & farm servants until she could dispose of it, & though not resident on the farm, occasionally visited it, was described in a bill of sale of goods supplied for the farm as "widow," with the address of the house in Essex at which she lived, & not as "farmer":—*Held*: such description was sufficient to satisfy the requirements of the above sect.—*LUCKIN v. HAMLYN* (1869), 21 L. T. 366; 18 W. R. 43.

Annotations:—*Consd.* *Downs v. Salmon* (1888), 20 Q. B. D. 775; *Barron v. Potter*, [1915] 3 K. B. 593. *Reid.* *Re Haynes, Ex p. National Mercantile Bank* (1880), 15 Ch. D. 42; *Feast v. Robinson* (1894), 63 L. J. Ch. 321; *Kemble v. Addison*, [1900] 1 Q. B. 430; *Neverson v. Seymour* (1907), 97 L. T. 788; *Re Boddington, Ex p. Salaman* (1915), 84 L. J. K. B. 2119.

567. ——— Described as "until lately" of occupation.]—The affidavit filed with a registered bill of sale stated that the grantor "was until lately" a commercial traveller. The grantor was

a commercial traveller at the date of the execution of the bill of sale:—*Held*: the description of his occupation was insufficient.—*CASTLE v. DOWNTON* (1879), 5 C. P. D. 56; 49 L. J. Q. B. 6; 41 L. T. 528; 28 W. R. 257.

568. Person having no occupation—Described as "gentleman"—Subsequent occupation of commission agent.]—An uncertificated bkpt., following no occupation at the time of granting the bill of sale, may properly be described in the affidavit as a "gentleman," although at the time of filing the affidavit he carries on the business of a commission agent.—*LONDON & WESTMINSTER LOAN Co. v. CHASE* (1862), 12 C. B. N. S. 730; 31 L. J. C. P. 314; 6 L. T. 781; 9 Jur. N. S. 412; 10 W. R. 698; 142 E. R. 1329.

Annotations:—*Consd.* *Brodrick v. Scalé* (1871), L. R. 6 C. P. 98; *Castle v. Downton* (1879), 5 C. P. D. 56. *Mentd.* *Button v. O'Neill* (1879), 4 C. P. D. 354.

569. ———.]—One who up to & at the time of the execution of a bill of sale has never been actually engaged in any trade or occupation, is properly described therein, or in the affidavit filed therewith, as a "gentleman."—*GRAY v. JONES* (1863), 14 C. B. N. S. 743; 143 E. R. 636; *sub nom. GREY v. JONES*, 2 New Rep. 281.

570. ——— Described as "gentleman of no occupation"—Sleeping partner.]—A person leading the ordinary life of a country gentleman, but being a sleeping partner in several businesses, in some only of which his name appeared, & in none of which he took any active part whatever, granted a bill of sale on his furniture & other effects. He was described in the affidavit as a "gentleman of no occupation":—*Held*: in the circumstances the description of the grantor was correct.—*FEAST v. ROBINSON* (1894), 63 L. J. Ch. 321; 70 L. T. 168; 10 T. L. R. 203; 8 R. 531.

Annotations:—*Consd.* *Kemble v. Addison*, [1900] 1 Q. B. 430. *N.F.* *Re Boddington, Ex p. Salaman* (1915), 84 L. J. K. B. 2119. *Reid.* *Neverson v. Seymour* (1907), 97 L. T. 788; *Barron v. Potter*, [1915] 3 K. B. 593.

571. ——— Described as "actress"—Known as such.]—The grantor of a bill of sale was described in the bill of sale & in the affidavit as an actress. She had never been on the stage, but she had "actress" on her cards & was known to her friends as an actress:—*Held*: the misdescription was not calculated to mislead, & was not sufficient to avoid the bill of sale.—*Re DAVIES, Ex p. EQUITABLE INVESTMENT Co., LTD.* (1897), 77 L. T. 567; 4 Mans. 358.

Annotations:—*Reid.* *Barron v. Potter*, *Potter v. Berry* (1914), 84 L. J. K. B. 751. *Mentd.* *Parsons v. Equitable Investment Co.*, [1916] 2 Ch. 527.

572. ——— Blank left.]—Where the attesting witness to a bill of sale is a person of no occupation, his description in the affidavit of execution may be left blank.—*Re SYMONDS, Ex p. YOUNG* (1880), 42 L. T. 744; 28 W. R. 924.

Annotation:—*Distd.* *Sims v. Trollope*, [1897] 1 Q. B. 24.

573. Person having casual or temporary occupation—Described as "gentleman"—Surgeon's assistant.]—Though where a person has any fixed profession, or business, or avocation by which he gains his living it must be mentioned in such description, it is not necessary to insert a description of an occupation which he has only casually & temporarily followed; & where the assignor was a medical student who had for some short time acted as surgeon's assistant, but for six months

p. ——— Described as "trader"—Spirit retailer.]—*Held*: description of the grantor, a spirit retailer or publican, as "trader" was too general.—*JAMES v. MACKEN, Re CAMPBELL* (1878), 12 L. T. 161.—*IR.*

q. ——— Described as "merchant"

—Commission agent.]—*Held*: the settlor was sufficiently described in the deed & in the affidavit as a merchant, although in fact he was a commission agent only & it was sufficient to mention the street in which he lived, without adding the number of his house.

—*COHEN v. SLADE* (1871), 12 N. S. W. S. C. R. 88.—*AUS.*

r. ——— Described as "Secretary of Board of Arts & Manufactures."]—*NOELL v. PELL* (1861), 7 L. C. L. J. 322.—*CAN.*

before action had been in no business :—*Held* : he was sufficiently described as “gentleman.”—*SUTTON v. BATH* (1858), 3 H. & N. 382; 31 L. T. O. S. 186; 157 E. R. 518; *sub nom.* *BATH v. SUTTON*, 27 L. J. Ex. 388.

Annotations :—*Consd.* *Smith v. Cheese* (1875), 1 C. P. D. 60. *Refd.* *Morewood v. South Yorkshire Ry. & River Dun Co.* (1858), 3 H. & N. 798; *Castle v. Downton* (1879), 6 C. P. D. 56.

574. Person not actively pursuing occupation—Described as of such occupation.—The object of 1878 Act, s. 10 (2), in requiring that a bill of sale shall describe the “occupation” of the grantor, as well as his residence, is to identify him, & if the description gives a true indication of his profession, business, or calling in life by which he can be identified, although he may not be actively carrying on such profession, business, or calling at the date of the bill of sale, that is a sufficient compliance with the sub-section.

Where a bill of sale described the grantor as a “contractor & financial agent,” a proper description of his calling in life, though, in consequence of his time & attention having been taken up by litigation with a foreign railway co. to whom he had acted for some years as financial agent in England, he had ceased, for five years prior to the date of the bill of sale, actively to carry on business :—*Held* : his occupation was sufficiently described.—*SHARP v. MCHENRY, SHARP v. BROWN* (1887), 38 Ch. D. 427; 57 L. J. Ch. 961; 57 L. T. 606; 3 T. L. R. 847.

Annotations :—*Consd.* *Barron v. Potter*, [1915] 3 K. B. 593. *Mentd.* *Re McHenry, Ex p. McDermott* (1888), 21 Q. B. D. 580; *Tuck v. Southern Counties Deposit Bank* (1889), 42 Ch. D. 471; *Burchell v. Thompson*, [1920] 2 K. B. 80.

575. Person having ceased to follow occupation—Described as “gentleman”—Formerly coal agent.—In a bill of sale & affidavit of registration A. was described as a “gentleman.” He had been formerly a coal agent, but having been dismissed, he was at the time of the bill of sale out of employment :—*Held* : there was no such misdescription as affected the validity of the bill of sale.—*MOREWOOD v. SOUTH YORKSHIRE RY. & RIVER DUN CO.* (1858), 3 H. & N. 798; 28 L. J. Ex. 114; 157 E. R. 690.

Annotations :—*Refd.* *Beales v. Tennant* (1860), 29 L. J. Q. B. 188; *Smith v. Cheese* (1875), 1 C. P. D. 60. *Mentd.* *Karet v. Kosher Meat Supply Assocn.* (1877), 46 L. J. Q. B. 548; *Hopkins v. Gudgeon*, [1906] 1 K. B. 690; *Re Hart, Ex p. Green*, [1912] 2 K. B. 111.

576. Formerly proctor’s clerk.—The attesting witness to a bill of sale was described in the affidavit as “gentleman.” He had been a proctor’s managing clerk, but had ceased to be so for six years. Since that time he had lived on an allowance from his mother, & had, on a few occasions, collected debts & written letters for other persons, & had drawn four bills of sale, but he had no regular occupation :—*Held* : the description “gentleman” was sufficient.—*SMITH v. CHEESE* (1875), 1 C. P. D. 60; 45 L. J. Q. B. 156; 33 L. T. 670; 40 J. P. 359; 24 W. R. 368.

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577. Described as “widow”—Intention to resume former occupation of publican.—A

a. *Person having ceased to follow occupation—Described as “gentleman”—Of late occupation.*—The affidavit for registration stated that the grantor “is a gentleman, lately soda-water manufacturer” :—*Held* : sufficient.—*SMITH v. WHITE* (1869), 5 L. T. 74.—*IR.*

t. — Described as “now in no occupation”—Witness formerly in J.—VOL. VII.

militia.]—A bill of sale, & affidavit, described the attesting witness as “now in no occupation.” The witness had been in the militia, but, at the time of the execution of the bill of sale, had no occupation :—*Held* : a sufficient description to satisfy 1854 Act, s. 1.—*TROUSDALE v. SHEPPARD* (1862), 14 L. C. L. R. 370; 14 Ir. Jur. 275.—*IR.*

a. *Person having several occupa-*

widow who, at the time of giving a bill of sale, had actually ceased to carry on her former occupation of a publican, but who intended shortly to, & did afterwards, resume such occupation :—*Held* : to be sufficiently described in the bill of sale as “widow” only.—*Re DAVEY, Ex p. CHAPMAN* (1881), 45 L. T. 268, C. A.

578. — Described as of former occupation—“Commercial clerk.”—The grantor of a bill of sale was described as a “commercial clerk.” He had been employed as such, but for about three weeks before the bill was given was out of employment :—*Held* : the description was correct.—*MARTINSON v. CONSOLIDATED CO., LTD.* (1889), 5 T. L. R. 353, C. A.

579. Person changing occupation—Described as of former occupation—Former sole owner of business employed as manager.—In the affidavit filed on the registration of a bill of sale, the grantor was described as “carrying on business as a wine & spirit merchant & dealer in provisions & goods, at 4A, D. Street, Liverpool, under the style of the L. & W. Supply Assocn., E. R., general manager.” The grantor had formerly carried on the business as sole owner, but prior to the execution of the bill of sale he had ceased to be the owner or to have any share in it, but was a paid manager under the new owner :—*Held* : the occupation of the grantor was untruly stated, & the bill of sale was void against an execution creditor.—*COOPER v. DAVIS* (1884), 32 W. R. 329, C. A.

580. — — ——The grantor was described in a bill of sale as an auctioneer & valuer. He had ceased to hold an auctioneer’s licence & to carry on the business about a month before the bill of sale was given, & from that time carried on a different business :—*Held* : the description was misleading.—*PROCTOR v. LUCIUS* (1903), 19 T. L. R. 458, D. C.

581. Person having several occupations—Described as “merchant”—Ship broker & coal merchant.—The assignor of chattels under a deed, who carried on business as a ship broker, & also as a coal merchant, was described as a “merchant” :—*Held* : the description was sufficient.—*GUGEN v. SAMPSON* (1866), 4 F. & F. 974, N. P.

Annotations :—*Mentd.* *Mason v. Wood* (1875), 1 C. P. D. 63. *Emmott v. Marchant* (1878), 3 Q. B. D. 555.

582. — Described as “tailor’s cutter”—Wife also keeping school & taking lodgers.—The grantor of a bill of sale carried on the business of a “tailor’s cutter,” his wife keeping a school & taking lodgers :—*Held* : a description of the occupation of the grantor as that of a “tailor’s cutter” was sufficient, that being his substantive occupation.—*Re WILLS, Ex p. NATIONAL DEPOSIT BANK* (1878), 26 W. R. 624, C. A.

583. — Described as “farmer”—Farmer accustomed to discount bills.—The occupation of the grantor of a bill of sale is sufficiently described in the affidavit if the substantial occupation is stated, so that if a farmer has been in the habit of discounting bills he is sufficiently described as “farmer,” & it is not necessary to add “bill-discounter” to his description.—*Re HAYNES, Ex p. NATIONAL MERCANTILE BANK* (1880), 15

tions—Described as “widow & farmer”—*Farmer, grocer & licensed vintner.*—The grantor, a widow, at the time of the execution, of a bill of sale, besides being possessed of a farm, carried on the business of a grocer & licensed vintner. She was described in the affidavit of the attesting witness as “widow & farmer” :—*Held* : an insufficient description.—*Re FITZPATRICK* (1886) 19 L. R. Ir. 206.—*IR.*

5.—Registration: Sub-sect. 5, C. D. & E.]

Ch. D. 42; 49 L. J. Bcy. 62; 43 L. T. 36; 28 W. R. 848, C. A.

Annotations:—**Consd.** Throssell v. Marsh (1885), 53 L. T. 321. **Refd.** Barron v. Potter, Potter v. Berry (1914), 84 L. J. K. B. 751. **Mentd.** Credit Co. v. Pott (1880), 6 Q. B. D. 295; *Re* Parker, *Ex p.* Charing Cross Advance & Deposit Bank (1880), 16 Ch. D. 35; *Re* Rogers, *Ex p.* Challinor (1880), 16 Ch. D. 260; Hamilton v. Chalme (1881), 7 Q. B. D. 319; Seal v. Claridge (1881), 7 Q. B. D. 516; *Re* Spindler, *Ex p.* Rolph (1881), 19 Ch. D. 98; *Re* Cowburn, *Ex p.* Firth (1882), 19 Ch. D. 419; *Re* Roper, *Ex p.* Holland (1882), 21 Ch. D. 543; *Re* Chapman, *Ex p.* Johnson (1884), 26 Ch. D. 338; Richardson v. Harris (1889), 22 Q. B. D. 268; *Re* Smith, *Ex p.* Tarbuck (1894), 72 L. T. 59; Parsons v. Equitable Investment Co., [1916] 2 Ch. 527.

584. — Described as “grocer” — Grocer & greengrocer.]—Where the grantor of a bill of sale is otherwise rightly described, the omission of some other description, which was not intended nor calculated to deceive, & did not in fact deceive, does not invalidate the bill of sale.

The *onus* of proof of the omission being intended or calculated to deceive is upon the person who impugns the validity of the bill of sale on such ground.

The grantor of a bill of sale was described in the bill of sale & attesting affidavit as W. F. of 57, H. Road, Upper Holloway, grocer. In fact he carried on at that address the two trades of grocer & greengrocer:—**Held**: the description not having been shown to be misleading or intended to mislead, was sufficient.—THROSSELL v. MARSH (1885), 53 L. T. 321, D. C.

Annotation:—**Refd.** Barron v. Potter, Potter v. Berry (1914), 84 L. J. K. B. 751.

585. — Described as “Baptist minister” — Minister & company director.]—In the affidavit filed with a bill of sale the grantor was described as a “Baptist minister.” He lived in Essex & was a qualified Baptist minister. Until four or five years before the making of the bill of sale he had been in regular occupation as a pastor, but had held no pastorate since. In the interval he had preached, lectured, & visited the poor, but not in connection with any particular church. Since making the bill of sale he had preached on several occasions in Chelmsford. He was a director of three or four cos., & with the assistance of a secretary, conducted his business in connection with them from an address in London:—**Held**: he was not properly described as a “Baptist minister.”—BARRON v. POTTER, [1915] 3 K. B. 593; 84 L. J. K. B. 2008; 113 L. T. 800; 59 Sol. Jo. 650, C. A.

Annotations:—**Folld.** *Re* Boddington, *Ex p.* Salaman (1915), 84 L. J. K. B. 2119. **Mentd.** Cain v. Butter, [1916] 1 K. B. 759.

586. Clerk — Whether description of “clerk” sufficient.]—The attesting witness to a bill of sale was described by name, & as “clerk to Mr. K. of 73, B. Street”:—**Held**: the occupation of the attesting witness was described with sufficient certainty.—ALLEN v. THOMPSON (1856), 2 Jur. N. S. 451; 4 W. R. 506.

Annotations:—**Consd.** Tuton v. Sanoner (1858), 3 H. & N. 280; Blalberg v. Parke (1882), 10 Q. B. D. 90. **Refd.** England v. Blackwell (1857), 6 W. R. 59; Morewood v. South Yorkshire Ry. & River Dun Co. (1858), 3 H. & N. 798; Sutton v. Bath (1858), 1 F. & F. 152; Adams v. Graham & Hamber (1864), 9 L. T. 606; *Re* Vining, *Ex p.*

b. Clerk—Described as “law clerk.” —“Law clerk of Carlow, in the county of Carlow”:—**Held**: a sufficient description of the occupation of an attesting witness to a bill of sale.—M’CUE v. JAMES (1870), 5 I. L. T. 77.—**IR.**

c. — — —.]—In the affidavit accompanying the registration of a bill of sale, the description of the

attesting witness was W. T. P. of S. Street, in the City of M., law clerk:—**Held**: sufficient.—TREACEY v. BALDERSON (1871), 2 V. R. (Law) 3.—**AUS.**

d. — Described as “managing law clerk.”]—The description of an attesting witness to a bill of sale as “managing law clerk” without stating whose clerk he is, is sufficient.—O’CONNOR v. PAUL (1868), 5 W. W.

Hooman (1870), L. R. 10 Eq. 63; Jones v. Harris (1871), L. R. 7 Q. B. 157; Sharp v. McHenry, Sharp v. Brown (1887), 38 Ch. D. 427; Barron v. Potter, [1915] 3 K. B. 593. **Mentd.** *Re* Lowenthal, *Ex p.* Lowenthal (1874), 9 Ch. App. 324.

587. — — —.]—The affidavit filed on registering a bill of sale stated the residence & occupation of the attesting witness as follows: “a clerk at No. 43, L. Street,” & it gave also his residence at another address:—**Held**: the description of the occupation of the attesting witness as a “clerk,” being true, & his residence being correctly given, the description was sufficient.—LAMB v. BRUCE, DUGGAN v. BRUCE, COOPER v. BRUCE (1876), 45 L. J. Q. B. 538; 35 L. T. 425; 24 W. R. 615, D. C.

588. — Described as “insurance clerk.”]—**Semble**: “insurance clerk” is sufficient description of the occupation of the attesting witness to a bill of sale.—GRANT v. SHAW (1872), L. R. 7 Q. B. 700; 41 L. J. Q. B. 305; 27 L. T. 602, D. C.

589. — Of accountant—Described as “accountant.”]—M., the attesting witness to a bill of sale, described himself in the affidavit as an “accountant.” M. carried on the business of accountant as clerk or agent to a principal, whose name, & not that of M., was over the door of the place of business, but M. was also allowed to transact business on his own account:—**Held**: the description was sufficient, as it would enable a stranger to find out the attesting witness without unreasonable trouble.—BRIGGS v. BOSS (1868), L. R. 3 Q. B. 268; 37 L. J. Q. B. 101; 17 L. T. 599; 16 W. R. 480.

Annotations:—**Consd.** Jones v. Harris (1871), L. R. 7 Q. B. 157; Larchin v. North Western Deposit Bank (1875), L. R. 10 Exch. 64; Murray v. Mackenzie (1875), L. R. 10 C. P. 625. **Refd.** Lamb v. Bruce, Duggan v. Bruce, Cooper v. Bruce (1876), 35 L. T. 425; Cooper v. Davis (1883), 48 L. T. 831.

590. — — —.]—The grantor of a bill of sale was described in the affidavit as an “accountant.” He was in fact a clerk in the accountant’s department of the London & North Western Railway Co., but in his leisure time was occasionally employed to balance tradesmen’s books:—**Held**: an insufficient description.—LARCHIN v. NORTH WESTERN DEPOSIT BANK (1875), L. R. 10 Exch. 64; 44 L. J. Ex. 71; 33 L. T. 124; 39 J. P. 182; 23 W. R. 325, Ex. Ch.

Annotations:—**Apld.** *Re* Boddington, *Ex p.* Salaman (1915), 84 L. J. K. B. 2119. **Refd.** Murray v. Mackenzie (1875), L. R. 10 C. P. 625; Smith v. Cheese (1875), 1 C. P. D. 60; Barron v. Potter, [1915] 3 K. B. 593.

591. In Admiralty—Described as “government clerk.”]—S., who was a clerk in the Admty., was described in a bill of sale given by himself & in the affidavit as a “govt. clerk”:—**Held**: the description was sufficient.—GRANT v. SHAW (1872), L. R. 7 Q. B. 700; 41 L. J. Q. B. 305; 27 L. T. 602, D. C.

592. — In Audit Office.]—ALLEN v. THOMPSON, No. 553, *ante*.

593. Company—Whether name of company sufficient.]—A co., called “The Glucose Sugar & Colouring Co.,” gave a bill of sale:—**Held**: its name was a sufficient description of its trade or occupation to satisfy 1854 Act, as to stating the occupation of the person giving the bill of sale.—SHEARS v. JACOB (1866), L. R. 1 C. P. 513; Har. &

& A’B. 97.—**AUS.**

e. — Described as “articled clerk.” —In the affidavit of an attesting witness to a bill of sale, the deponent described himself as an “articled clerk”:—**Held**: sufficient, although he did not state to whom he was articled or in what trade or profession he was serving his articles.—*Re* CATIN (1912), 12 S. R. N. S. W. 552.—**AUS.**

Ruth. 492; 35 L. J. C. P. 241; 14 L. T. 286; 12 Jur. N. S. 785; 14 W. R. 609.

Annotations:—**Mentd.** Deffell v. White (1866), 2 C. P. 144; *Re* Standard Manufacturing Co., *Ex p.* Lowe (1891), 39 W. R. 369; G. N. Ry. Co. v. Coal Co-op. Soc., [1896] 1 Ch. 187.

594. Schoolmaster—Described as “tutor.”—The grantor of a bill of sale was described in the bill of sale & in the affidavit as “tutor” instead of “schoolmaster,” which was his true occupation:—*Held*: the misdescription rendered the registration of the bill of sale void.—**LEE v. TURNER** (1888), 20 Q. B. D. 773; 59 L. T. 320, D. C.

Annotation:—**Refd.** Stokes v. Spencer, [1900] 2 Q. B. 483.

D. Discrepancy between Bill of Sale and Affidavit.

595. Name.—A variation in one of the christian names of the grantor of a bill of sale between the bill itself & the accompanying affidavit, which could not mislead:—*Held*: to be immaterial.—**CORBETT v. ROWE** (1876), 25 W. R. 59.

596. Residence.—The grantor of a bill of sale was therein correctly described as of “No. 37, M. Road, Deptford, in the county of Kent,” & the attesting witness to such bill of sale was therein also correctly stated to be of “2, S. Terrace, H. P. Road, New Cross.” In the affidavit the residence of the grantor was described as “No. 73, M. Road, Deptford, in the county of Kent,” & the residence of the attesting witness was described as “3, S. Terrace, H. P. Road, New Cross”:—*Held*: there was not a true description of residence of the grantor & attesting witness thereto filed as required by 1854 Act.—**MURRAY v. MACKENZIE** (1875), L. R. 10 C. P. 625; 44 L. J. C. P. 313; 32 L. T. 777; 39 J. P. 663; 23 W. R. 595.

Annotations:—**Expld. & Distd.** Button v. O'Neill (1879), 4 C. P. D. 354. **Consd.** Cooper v. Davis (1883), 48 L. T. 831. **Fold.** Marks v. Derrick (1899), 80 L. T. 60. **Refd.** Blount v. Harris (1878), 47 L. J. Q. B. 596. **Mentd.** *Re* Wood, *Ex p.* McHattie (1878), 10 Ch. D. 398; Barron v. Potter, [1915] 3 K. B. 593.

597.—A grantor was described in a bill of sale as “of” 28 G. Street, a club of which he was a member. He resided elsewhere & carried on business at yet another address. In the affidavit of attestation he was described, not as of 28 G. Street, but as of his actual residence as well as of his place of business. There was no intention to mislead, & no one was misled:—*Held*: the bill of sale was not invalid, nor its registration defective.—

PART V. SECT. 5, SUB-SECT. 5. —D.

595 i. Name.—The grantor's name was Catip; in the affidavit her name was spelt Katip, & the name was entered in the register under the letter K. The name was by an alteration made at time of execution correctly stated in the original & copy bill of sale:—*Held*: this did not invalidate the bill of sale against the official assignee of the grantor.—*Re* CATIP (1912), 12 S. R. N. S. W. 552.—**AUS.**

596 i. Residence.—*Qu.*: whether a bill of sale can be referred to, in order to supplement the descriptions of the residences given in the affidavit, where they contradict those given in the bill of sale.—*Re* CAMPBELL, JAMES v. MACKEN (1878), 66 L. T. Jo. 139.—**IR.**

596 ii.—In a bill of sale the grantor was described as being of Burnley Street, Richmond, near Melbourne in the colony of Victoria; in the affidavit she was described as residing at Drummond Street, Coulton:—*Held*: the variation made the filing of the bill of sale bad.—**ANDERSON v. WATSON** (1891), 17 V. L. R. 263.—**AUS.**

599 i. Occupation.—A bill of sale described the occupation of the grantor as being a “spirit retailer,” but the affidavit filed on registration stated that he was a “trader”:—*Held*: the description in the affidavit might be supplemented by reference to the description in the bill of sale.—**JAMES v. MACKEN, Re** CAMPBELL (1878), 12 L. L. T. 161.—**IR.**

599 ii.—In a bill of sale the occupation of the grantor was described as married woman, carrier, & in the affidavit of due execution she was described as being of no occupation, but about to enter into business as a carrier:—*Held*: such a variation made the filing of the bill of sale bad.—**ANDERSON v. WATSON** (1891), 17 V. L. R. 263.—**AUS.**

PART V. SECT. 5, SUB-SECT. 5. —E.

600 i. From affidavit.—The want of deponent's addition is no objection to an affidavit made for registration of a chattel mtge.—**BRODIE v. RUTAN** (1858), 16 U. C. R. 207.—**CAN.**

600 ii.—The omission of the occupation of deponent from the body of the affidavit accompanying a bill of

DOLCINI v. DOLCINI, [1895] 1 Q. B. 898; 64 L. J. Q. B. 427; 43 W. R. 542; 11 T. L. R. 344; 15 R. 408, D. C.

598.—In a bill of sale the grantors were described as W. D. of 25, B. F. Road, L.D., of 93, B. F. Road, & K. of 94, W. Road. In the affidavit the addresses were 23, B. F. Road; 23, B. F. Road; 24, W. Road:—*Held*: the bill of sale was void for misdescription.—**MARKS v. DERRICK** (1899), 80 L. T. 60, D. C.

599. Occupation.—A bill of sale was duly given & attested by “J. W., clerk to Mr. T., solr., of,” etc. The affidavit of the attesting witness described him as “gentleman” not as an attorney's clerk; but the affidavit proceeded to state that he was the witness attesting the execution:—*Held*: the affidavit was insufficient.—**DRYDEN v. HOPE** (1860), 3 L. T. 280; 9 W. R. 18.

E. Omission of Description.

600. From affidavit—Description in bill.—A bill of sale, which was filed, contained a description of the residence & occupation, but the affidavit, which was filed with it, did not contain such description:—*Held*: the bill of sale was void.—**HATTON v. ENGLISH** (1857), 7 E. & B. 94; 26 L. J. Q. B. 161; 28 L. T. O. S. 231; 119 E. R. 1183; *sub nom.* **WALTON v. ENGLISH**, 3 Jur. N. S. 294.

Annotations:—**Consd.** Picards v. Bretz (1859), 1 L. T. 45; Brodrick v. Scalé (1871), L. R. 6 C. P. 98. **Distd.** Jones v. Harris (1871), 41 L. J. Q. B. 6; Button v. O'Neill (1879), 4 C. P. D. 354. **Refd.** London & Westminster Loan & Discount Co. v. Chase (1862), 12 C. B. N. S. 730. **Mentd.** Edwards v. English (1857), 3 Jur. N. S. 934.

601.—The attestation of the execution of a bill of sale purported to be by “I. S., clerk to F. L.” The affidavit filed with it, commencing, “I, I. S., clerk to F. L., of,” etc., stated that he was present, & saw the bill of sale executed, & was signed “I. S.”:—*Held*: by reasonable inference, the attesting witness to the execution of the bill of sale & deponent were the same person, & the affidavit contained a description of the residence & occupation of the attesting witness as required by 1854 Act, s. 1.—**ROUTH v. ROUBLOT** (1859), 1 E. & E. 850; 28 L. J. Q. B. 240; 120 E. R. 1129; *sub nom.* **ROUBLOT v. BOUTELL**, 33 L. T. O. S. 121; 5 Jur. N. S. 548; *sub nom.* **BOUTILL v. ROUBLET**, 7 W. R. 444.

Annotations:—**Distd.** Pickard v. Bretz (1859), 5 H. & N. 9. **Consd.** Jones v. Harris (1871), L. R. 7 Q. B. 157. **Distd.**

sale is not a fatal defect, the affidavit being made out of ct.—**CUNNINGHAM v. MORSE** (1887), 20 N. S. R. 110.—**CAN.**

600 iii.—An affidavit under 1854 Act, s. 1, omitted the description of the residence & occupation of one of the attesting witnesses to the bill of sale:—*Held*: the bill of sale was, by reason of such omission, rendered void as against an execution creditor.—**FONBLANQUE v. LEE** (1858), 7 L. C. L. R. 550; 10 Ir. Jur. 224.—**IR.**

600 iv.—*Description in bill.*—An affidavit filed under Act No. 141, s. 2, did not on the face of it describe the residence or occupation of an attesting witness & contained no reference to the addition or description subscribed in the bill of sale. In the heading of the affidavit the witness gave his addition as “gentleman” & his residence as “Melbourne”:—*Held*: the bill of sale was void as against an execution under process of law.—**NATHAN v. NAYLOR** (1863), 2 W. & W. 263.—**AUS.**

600 v.—The affidavit omitted to state the occupation of the grantor:—*Held*: as the affidavit referred in terms to the instrument

Sect. 5.—Registration: Sub-sect. 5, E.; Sub-sects. 6, 7 & 8.]

Button v. O'Neill (1879), 4 C. P. D. 354. *Consd. Blalberg v. Parke* (1882), 10 Q. B. D. 90.

602. ———.]—The affidavit accompanying a bill of sale under 1854 Act must contain, in itself or by reference, a description of the residence & occupation of the grantor, & it is not enough to state that he is the person mentioned in the bill of sale, unless it is averred that he is truly described therein.—*PICKARD v. BRETZ* (1859), 5 H. & N. 9; 29 L. J. Ex. 18; 157 E. R. 1079; *sub nom. PICARDS v. BRETZ*, 1 L. T. 45; 5 Jur. N. S. 1131; 8 W. R. 90.

Annotations:—Folld. Dryden v. Hope (1860), 3 L. T. 280. *Consd. Jones v. Harris* (1871), L. R. 7 Q. B. 157. *Distd. Button v. O'Neill* (1879), 4 C. P. D. 354. *Consd. Blalberg v. Parke* (1882), 10 Q. B. D. 90. *Refd. Hanbury v. White* (1863), 2 H. & C. 300.

603. ———.]—An affidavit of an attesting witness of a bill of sale in the following form: "The paper writing hereunto annexed is a true copy of a bill of sale, bearing date, etc., & made between W. T., of, etc., of the one part, & G. S., of, etc., of the other part," following the description in the bill of sale, is a sufficient description by deponent of the residence, etc., of the parties.—*WILCOXON v. SEARBY*, *FOULGER v. TAYLOR* (1860), 5 H. & N. 202; 29 L. J. Ex. 154; 1 L. T. 481; 24 J. P. 167; 8 W. R. 279; 157 E. R. 1157.

Annotation:—Mentd. Hughes v. Smallwood (1890), 25 Q. B. D. 306.

604. ———.]—The attesting witness to an instrument within 1854 Act was clerk to an attorney at the time of its execution, & was described as such in the attestation clause. The affidavit filed with the bill of sale on registration was made by the attesting witness, & after verifying his signature to the bill of sale as attesting witness, described him as a gentleman residing at No. 3, B. Road, Brixton:—*Held*: the affidavit was insufficient, inasmuch as it did not, either directly or indirectly, by reference to the bill of sale, contain a description of the occupation of the attesting witness, & the bill of sale was void as against an execution creditor.—*BRODRICK v. SCALE* (1871), L. R. 6 C. P. 98; 40 L. J. C. P. 130; 23 L. T. 864; 19 W. R. 386.

Annotations:—Consd. Jones v. Harris (1871), L. R. 7 Q. B. 157. *Refd. Blalberg v. Parke* (1882), 10 Q. B. D. 90.

605. ———.]—In the affidavit filed with a copy of a bill of sale, deponent stated "that the paper writing hereunto annexed is a true copy of a bill of sale made by I. A.," & "that I. A. resides at D. Lodge, & is an auctioneer." By the copy of the bill of sale annexed to the affidavit, I. A. was described as "of D. Lodge, in the parish of Llanarthney, in the county of Carmarthen, auctioneer," which was the true residence:—*Held*: the description in the affidavit of the residence was not sufficient, but the copy of the bill of sale, in which the situation of the residence was stated with particularity enough to guide any inquiry as to the identity of the individual, might be referred to, in order to explain & supplement the description given by the affidavit.—*JONES v. HARRIS* (1871), L. R. 7 Q. B. 157; 41 L. J. Q. B. 6; 25 L. T. 702; 20 W. R. 143.

itself, in which the occupation of the deponent was stated, 5th R. S. N. S. (c. 92), s. 4, was complied with.—*SMITH v. McLEAN* (1892), 21 S. C. R. 355.—*CAN.*

h. ——— & bill.]—Where neither the bill of sale itself, nor the affidavit, gave the residence & occupation of the second subscribing witness:—*Held*: the registration of same was invalid.—*Re O'CONNOR* (1856), 1 Ir. Jur. 198.—*IR.*

registration of a chattel mtge. is not rendered void by reason of the witness' address & occupation being omitted after his signature to the deed, & also in the body of the affidavit.—*COMMERCIAL BANK OF MANITOBA v. FEBRENBACH* (1900), 4 Terr. L. R. 335.—*CAN.*

606 i. From body of affidavit Description in introductory part.]—An affidavit under Act No. 141 of the attesting witness to the execution of

Annotations:—Consd. Murray v. Mackenzie (1875), L. R. 10 C. P. 625; *Re Wood, Ex p. McHattie* (1878), 10 Ch. D. 398. *Distd. Button v. O'Neill* (1879), 4 C. P. D. 354. *Consd. Re Parker, Ex p. Charing Cross Advance & Deposit Bank* (1880), 16 Ch. D. 35. *Refd. Re Bent, Ex p. Mackenzie* (1873), 42 L. J. Bcy. 25.

606. ———.]—An insufficient description of the attesting witness to a bill of sale contained in his affidavit registered therewith may be cured by reference to a sufficient description of him in the attestation clause of the bill of sale.—*Re BENT, Ex p. MACKENZIE* (1873), 42 L. J. Bcy. 25; 28 L. T. 486, L. J.

Annotations:—Consd. Re Parker, Ex p. Charing Cross Advance & Deposit Bank (1880), 16 Ch. D. 35; *Blalberg v. Parke* (1882), 10 Q. B. D. 90. *Mentd. Re Softley, Ex p. Winter* (1875), 24 W. R. 68.

607. ———.]—The execution by the grantor of a bill of sale, which required registration, was attested by two witnesses, & contained a description of the residence & occupation of each witness. The affidavit filed with the bill contained a description of the residence & occupation of only one of the attesting witnesses:—*Held*: the affidavit was not sufficient, since it did not contain a description of the residence & occupation of "every attesting witness."—*PICKARD v. MARRIAGE* (1876), 1 Ex. D. 364; 45 L. J. Q. B. 594; 35 L. T. 343; 24 W. R. 886.

Annotations:—Refd. Blalberg v. Parke (1882), 10 Q. B. D. 90. *Mentd. Gibbons v. Hickson* (1885), 55 L. J. Q. B. 119.

608. ———.]—The grantor of a bill of sale lived & carried on business at A., & had two other places of business. There were goods comprised in the bill of sale at all three places, & the three addresses were stated in the bill of sale. The affidavit filed with the bill of sale stated that the grantor resided at A., but did not mention the other two places of business:—*Held*: the description of the grantor's residence in the affidavit was sufficient.—*GREENHAM v. CHILD* (1889), 24 Q. B. D. 29; 59 L. J. Q. B. 27; 61 L. T. 563; 38 W. R. 94, D. C.

Annotation:—Refd. Barron v. Potter (1914), 84 L. J. K. B. 751.

609. From body of affidavit—Description in introductory part.]—The affidavit filed on registration of a bill of sale contained in the introductory part describing deponent an accurate description of his residence. The body of the affidavit contained the following statements: "I (deponent) was present & saw the grantor of the bill of sale duly execute the bill of sale on Dec. 15, 1881. The name subscribed to the bill of sale as that of the witness attesting the due execution thereof is in the proper handwriting of this deponent. I am a solr. of the Supreme Ct., & reside at ———"; there being thus no description of the residence of the attesting witness in the body of the affidavit:—*Held*: the affidavit was sufficient in respect of the description of the residence of the attesting witness, as (1) the body of the affidavit sufficiently incorporated by reference the description of the residence of the attesting witness contained in the introductory part, & (2) it was sufficient that the description of the occupation & residence of the attesting witness should be found in the introductory part of the affidavit.—*BLAIBERG v. PARKE*

a bill of sale did not in its swearing part contain a description of the occupation of the witness but did in its heading give such description:—*Held*: the affidavit did not give either in itself or by reference to the attestation clause the information or oath required by the Act & the bill of sale was void as against a person entitled to impeach it.—*McCULLOUGH v. HARFOOT* (1863), 2 W. & W. 267.—*AUS.*

(1882), 10 Q. B. D. 90; 52 L. J. Q. B. 110; 48 L. T. 311; 31 W. R. 246.

From attestation clause—Description in affidavit.]
—See Nos. 473, 474, *ante*.

SUB-SECT. 6.—TRANSFERS OR ASSIGNMENTS.
See Part VII., Sect. 3, *post*.

SUB-SECT. 7.—LOCAL REGISTRATION.

See 1882 Act, s. 11.

610. Omission of registrar to transmit abstract of bill to county court—Whether bill avoided.]—The omission of the registrar of bills of sale to transmit an abstract of a registered bill of sale to the registrar of the county ct. within the district of which the chattels enumerated in the bill are situated, does not avoid the bill.—*TRINDER v. RAYNOR* (1887), 56 L. J. Q. B. 422, D. C.

SUB-SECT. 8.—RENEWAL OF REGISTRATION.
See 1878 Act, ss. 11, 14, 23.

611. What bills—Bill void for want of renewal at commencement of 1878 Act.]—*Held*: a bill of sale, void for want of renewal of registration at the commencement of 1878 Act, could not be renewed under s. 14 of that Act.—*ASKEW v. LEWIS* (1883), 10 Q. B. D. 477; 1 Cab. & El. 34; 48 L. T.

PART V. SECT. 5, SUB-SECT. 8.

l. Necessity for renewal—Possession taken on default.]—Where possession has been taken under default in the mtge. within a year from its filing, re-filing is not necessary.—*ROSS v. ELLIOTT* (1861), 11 C. P. 221.—**CAN.**

m. — Satisfaction of mortgage.]—B., the customer of a bank, executed a chattel mtge. on his household effects, by way of collateral security, in favour of the bank, which was allowed to run into default, whereupon the mtgees. proceeded to a sale, & appointed W. their bailiff for that purpose, who had the property appraised & sold it to pltf., a creditor of B., by private sale for \$900, & executed a bill of sale thereof. Pltf. swore that B. owed him about \$1,000 & he thought there was ample security for the \$900 & also additional security for B.'s indebtedness to himself, & that the goods seemed to be worth about \$5,000; & without disturbing in any way the possession of B., pltf. rented the property to him, & he remained, as he had theretofore been, in possession. In order effectually to carry out the proposed arrangement with B., the bank by special power appointed their local manager agent to accept the chattel mtge. & as such agent to make the affidavits required to be made by mtgees.:—*Held*: in the circumstances the chattel mtge. was satisfied quoad the goods, the mtge. could not properly be re-filed; & notwithstanding the continued possession of the mtgor. it was not necessary for pltf. to file a bill of sale from the bank to himself in order to preserve his rights as against execution creditors of, or *bond fide* purchasers from, the mtgor.—*CARLISLE v. TAIT* (1882), 7 A. R. 10.—**CAN.**

Act.—The bill of sale having been made & filed prior to 1899 Act:—*Held*: it was validly filed subject to the special clause as to the filing of a renewal statement, & the time prescribed for the filing of a renewal statement not having elapsed, that the bill of sale was in no way affected by

such provision.—*FRASER v. MURRAY* (1901), 34 N. S. R. 186.—**CAN.**

o. What bills—Under 20 Vict. c. 3—Not mortgages filed under 12 Vict. c. 3.]—*GRAND TRUNK RY. Co. v. LEES* (1860), 9 C. P. 249.—**CAN.**

p. S. P. CULLODEN v. McDOWELL (1858), 17 U. C. R. 359.—**CAN.**

q. — Absolute assignment—Delivery of possession.]—A husband executed a post-nuptial deed of gift of chattels in favour of his wife, which was registered under 55 Vict. No. 23, s. 3, but the registration was not renewed within twelve months. The gift was followed by delivery of possession:—*Held*: being an absolute assignment, & not a security for money, renewal was not required by the Act.—*Re DUNSTAN* (1895), 6 Q. L. J. 182.—**AUS.**

r. Affidavit on renewal—Necessity for.]—The affidavit of execution need not be repeated, or any copy of it filed, on re-filing, a mtge.—*BEATY v. FOWLER* (1852), 10 U. C. R. 382.—**CAN.**

s. — —.]—No affidavit is necessary to verify the statement of the mtgee.'s interest required by the Act on re-filing.—*ARMSTRONG v. AUSMAN* (1854), 11 U. C. R. 498.—**CAN.**

t. — Before whom sworn.]—A notary public in Quebec has no power to take an affidavit on renewal.—*REYNOLDS v. WILLIAMSON* (1875), 25 C. P. 49.—**CAN.**

v. — Sufficiency of expressions in.]—*R. S. M.*, 1902 (c. 11), s. 20, is sufficiently complied with by the use of the expression "kept on foot" in the mtgee.'s affidavit for renewal of a chattel mtge., instead of the words "kept alive" used in that sect., as the two expressions mean the same thing.—*WALLACE v. SCOTT, GALBRAITH v. SCOTT, ROPER v. SCOTT* (1907), 5 W. L. R. 341; 16 Man. L. R. 594.—**CAN.**

z. — Who may make—Agent.]—The affidavit required by Act No. 557, s. 13, to be made & filed every

534; 31 W. R. 567; *sub nom.* *LEWIS v. DRISCOLL*, 47 J. P. 312.

Annotations:—*Apprvd. Re Emery, Ex p. Chief Official Receiver* (1888), 21 Q. B. D. 405. *Reid. Re Parsons, Ex p. Furber*, [1893] 2 Q. B. 122.

612. — —.]—Where a bill of sale was, at the commencement of 1878 Act, void for want of renewal of registration:—*Held*: the time for renewal could not be extended under s. 14 of that Act.—*Re EMERY, Ex p. CHIEF OFFICIAL RECEIVER* (1888), 21 Q. B. D. 405; 57 L. J. Q. B. 629; 37 W. R. 21; 4 T. L. R. 701, C. A.

Annotation:—*Consd. Re Parsons & Furber* (1893), 62 L. J. Q. B. 365.

613. By whom—Assignee from grantee.]—*Held*: 1866 Act, s. 4, was equally imperative when the grantee, before the period for renewal, assigned his interest under the bill of sale to a third person, & the assignee, if the registration was not renewed, had no title as against an execution creditor.—*KARJET v. KOSHER MEAT SUPPLY ASSOCN.* (1877), 2 Q. B. D. 361; 46 L. J. Q. B. 548; 36 L. T. 694; 25 W. R. 691.

Annotations:—*Consd. Antoniadi v. Smith*, [1901] 2 K. B. 589. *Reid. Hopkins v. Gudgeon*, [1906] 1 K. B. 690.

614. Affidavit on renewal—Statement of date of original registration—Sufficiency.]—Affidavits presented at the office of the masters of the Queen's Bench Ct., for obtaining a renewal of the registration of two bills of sale under 1866 Act, stated the original registration to have been respectively "on or about Apr. 6, 1858," & "on July 31, 1861." The former was registered on Apr. 7, 1858, & the latter on July 30, 1861. *Qu.*: whether the

year to keep alive a bill of sale, must be made by the person entitled to the money secured, & cannot be made by the attorney under power of such person.—*MARTIN v. BLAMIRE* (1878), 4 V. L. R. 498.—**AUS.**

b. — — Principal officer of company—Statement of authority & knowledge.]—Under Bills of Sale & Chattel Mortgage Act, s. 10, as enacted by 3 Edw. VII., c. 7, s. 30, the affidavit required upon the renewal of a chattel mtge., where the mtgees. are an incorporated co., if made by the president, vice-president, manager, assistant manager, secretary, or treasurer of the co., need not state that the deponent is authorised by resolution of the directors in that behalf, nor that he is aware of the circumstances connected with the mtge. & has personal knowledge of the facts deposed to; the words "officer or agent" being confined in their application to an officer or agent who is not one of the principal officers above enumerated.—*UNIVERSAL SKIRT MANUFACTURING Co. v. GORMLEY* (1908), 17 O. L. R. 114; 11 O. W. R. 1110.—**CAN.**

c. — Amount due incorrectly stated in.]—Where a bill of sale has been duly filed, but the subsequent annual affidavit of the amount due upon it, required by Act No. 557, s. 13, states the amount incorrectly, the bill of sale becomes absolutely void.—*BLACK v. ZEVENBOOM* (1880), 6 V. L. R. 473.—**AUS.**

d. — Failure to file—Effect of.]—Though a bill of sale is made null & void by failure to file the prescribed affidavit of renewal, the grantee may recover the debt from the grantor, upon an independent covenant to pay contained in the same deed.—*TIDYMAN v. COLLINS* (1878), 4 V. L. R. 478.—**AUS.**

e. Sufficiency of renewal statement—Where supplemented by affidavit.]—The statement annexed to the affidavit filed with the copy of mtge., did not give distinctly all the information required by the Act, but the affidavit & statement together contained all

Sect. 5.—Registration: Sub-sect. 8.]

affidavits were sufficient.—*Re* **BILLS OF SALE ACT, 1886, NEEDHAM TO JOHNSON, TAYLOR TO BENTLEY (1867), 8 B. & S. 190; 15 L. T. 467; 15 W. R. 346.**

615. — Statement of grantor's true residence — Residence wrongly described in original bill.]—The affidavit on the re-registration of a bill of sale must state the residence of the grantee as it was stated in the bill of sale, even though it was there erroneously stated.

that was necessary:—*Held* sufficient.—**WALKER v. NILES (1871), 18 Gr. 210. —CAN.**

f. — — —.]—Held: on the renewal of a chattel mtge. the statement & affidavit may when they refer to each other & are meant to be read together, be so read; & that if together they contain the particulars required by the statute the renewal is sufficient.—**BARBER v. MAUGHAN (1877), 42 U. C. R. 134.—CAN.**

g. — — —.]—Where the statement & affidavit filed upon renewal of a chattel mtge., when read together, give all the information required by R. S. O. 1877 (c. 119), s. 10, the renewal is sufficient.

The statement was that "the interest of the mtgee. in the goods described in the mtge., of which the annexed is a true copy, & made by C., & dated Mar. 13, 1876, is as follows: The amount still due to me, S., on said mtge. for principal is \$200." The mtgee.'s affidavit stated that the above statement was correct & true, that the mtge. had not been assigned by him, & was not kept on foot for any fraudulent purpose:—*Held*: sufficient.

The copy filed gave the date of the mtge. as Mar. 13, 1877, instead of 1876:—*Held*: immaterial, as the mistake could have misled no one.—**SLOAN v. MAUGHAN (1878), 3 A. R. 222.—CAN.**

h. — — —.]—The objection taken to the validity of a chattel mtge. was, that the renewals were not sufficient, in that (1) they were not signed by the mtgee., & (2) were not upon their face sufficiently explicit in regard to the payments made. On the back of each statement was an affidavit, signed by the mtgee. & sworn by him, referring to the statement upon which it was indorsed:—*Held*: this might be read as part of the statement & being so read showed the statement to be that of the mtgee., which was all that R. S. O. 1897 (c. 148), s. 18, required.—**CHRISTIN v. CHRISTIN (1899), 1 O. L. R. 634.—CAN.**

k. — As to identification of mortgage.]—It is immaterial that a renewal statement does not contain the surname of the mtgee. or the additions of the mtgor. & mtgee. so long as the mtge. referred to in it can be identified.—**ROGERS LUMBER CO. v. DUNLOP (1914), 30 W. L. R. 209; 7 W. W. R. 975; 20 D. L. R. 154.—CAN.**

l. — By assignee for benefit of creditors.]—A renewal statement, in itself in proper form, alleging title through the assignment for the benefit of creditors, is sufficient.—**FLEMING v. RYAN (1893), 21 A. R. 39.—CAN.**

m. — Inclusion of improper charge.]—The statement contained an item of \$2.25, as paid for re-filing, which the mtgee. had no right to charge:—*Held*: the re-filing was not thereby avoided.—**WALKER v. NILES (1871), 18 Gr. 210.—CAN.**

n. — As to payments made & amount due.]—A renewal statement was as follows: "H. the only authorised agent of F. & C. mtgee.'s named in the chattel mtge. of which the

hereunto annexed copy of chattel mtgeo. is, I verily believe a true copy as hereby state, that I am well acquainted with all the circumstances connected with the said original chattel mtge., & that the said F. & C. claim interest in the property claimed & described in said chattel mtge. as mtgees. thereof, that the whole principal sum of £— named in said mtge. is still due to said mtgees. & unpaid together with £— for interest making in all £— the said mtgor. has made no payment on account of either principal & interest:—*Held*: a sufficient compliance with Con. Stat. U. C. (c. 48), s. 10.—**SAULTER v. CARRUTHERS (1863), 9 U. C. L. J. O. S. 158.—CAN.**

o. — — —.]—The statement of payments made did not set forth in detail the date & amount of each payment made, but only the total sum paid. It went on to state "that no payments have been made upon the said mtge.": but it clearly showed that payment of a certain sum had been made on account of the interest & no other payments:—*Held*: sufficient under R. S. O. 1897 (c. 148).—**CHRISTIN v. CHRISTIN (1899), 1 O. L. R. 634.—CAN.**

p. — — — Interest of mortgagee not sufficiently shown.]—"Statement of amount still due from the mtgor. named in the original bill of sale by way of mtge., of which the annexed is a true copy: that is to say, \$212 for principal, & the sum of \$12.50 for interest, amounting in the whole to the sum of \$224.50":—*Held*: not to sufficiently exhibit the interest of the mtgee. in the goods claimed, nor show the principal & interest due thereon.—**O'HALLORAN v. SILLIS (1862), 12 C. P. 465.—CAN.**

—*Held*: The statement on the renewal of a chattel mtge. was merely: "E. in account with M." (the mtgee.); & then, "To amount of money secured by chattel mtge., \$2,200; interest thereon for one year at the rate in said mtge. named, \$264: \$2,464." The mtgee.'s affidavit stated that she was the mtgee.; that the above statement showed her interest in the property claimed by virtue of the said mtge.; that "as appears from the said statement, there will be due & owing to me this deponent, on Feb. 6 next, from E. S. R., the mtgor., etc., the sum of \$2,464, being the \$2,200 mentioned therein, & \$264 as the interest thereon, under the terms of the said bill of sale," etc.: that no payment on account of either principal money or interest had been made to her or to any one on her behalf: "that the said statement is correct"; & that the said mtge. had been kept on foot for the purpose only of securing the payment of the money owing to the deponent by the terms thereof, & not for any fraudulent purpose:—*Held*: the statement & affidavit were insufficient, as the statement neither showed the interest of the mtgee. in the property claimed, nor a full statement of the amount due for principal & interest, nor did the affidavit allege that the statement was true, as required by C. S. U. C. (c. 45), s. 10; & that if the affidavit could be

In a bill of sale the grantee was described as of "Baldock in the county of Hereford," her residence really being at Baldock in the county of Hertford. The bill of sale was registered & was re-registered within five years. The affidavit made on the re-registration stated only the true residence of the grantee:—*Held*: B. S. Act, 1878, s. 11, had not been complied with.—*Re* **MORRIS, Ex p. WEBSTER (1882), 22 Ch. D. 136; 52 L. J. Ch. 375; 48 L. T. 295; 31 W. R. 111, C. A.**

Annotation:—**Mentd.** Tuck v. Southern Counties Deposit Bank (1889), 42 Ch. D. 471.

looked to in support of the statement, it was insufficient for that purpose.—**REYNOLDS v. WILLIAMSON (1875), 25 C. P. 49.—CAN.**

r. — — — Second renewal.]—The first renewal statement showed all the payments made during the year & the total amount due; the subsequent renewal statement began with the total amount due in the preceding statement, & did not repeat the payments there set out & credited:—*Held*: sufficient.—**ROGERS v. MARSHALL (1903), 24 C. L. T. Occ. N. 172; 7 O. L. R. 291; 3 O. W. R. 327.—CAN.**

s. — — — Interest.]—A statement made on Jan. 28, stated the amount due for interest as it would be on the 31st, the day of re-filing:—*Held*: no objection.—**FRASER v. BANK OF TORONTO (1860), 19 U. C. R. 381.—CAN.**

t. — Statement filed after assignment.]—A chattel mtge. does not cease to be valid as against creditors, etc., if otherwise regularly renewed, because a renewal statement, made & verified by the mtgee. before an assignment by him of the mtge., is not filed until after such assignment.—**DANIEL v. DANIEL (1898), 29 O. R. 493.—CAN.**

a. Time for renewal.]—Where a mtge. was re-filed forty-seven days before a year from the first filing, it was held insufficient, the statute requiring that such re-filing shall take place "within thirty days next preceding" the expiration of one year.—**BEATY v. FOWLER (1852), 10 U. C. R. 382.—CAN.**

b. — —.]—Held: where the first filing was on May 15, 1852, a re-filing on May 14, 1853, was clearly in time.—**ARMSTRONG v. AUSMAN (1854), 11 U. C. R. 498.—CAN.**

c. — — Computation of.]—A chattel mtge. was filed Aug. 12, 1886, & registered at 4.10 p.m. of that day. A renewal was registered at 11.49 a.m. Aug. 12, 1887:—*Held*: the renewal was filed within one year from the date of the filing of the original mtge. as provided by N. W. Ter. Ord. No. 5, 1881, s. 9.

In computing the time mentioned in this sect., the day of the original filing should be excluded, & the mtgee. would have had the whole of Aug. 12, 1887, for filing renewal.—**THOMSON v. QUIRK (1889), 18 S. C. R. 695.—CAN.**

d. — — —.]—In computing the year within which the renewal of a chattel mtge. must be filed under R. S. O. 1897 (c. 148), s. 18, the day on which the mtge. was filed is to be excluded.—**MCCANN MILLING CO. v. MARTIN (1907), 10 O. W. R. 681, 1053; 15 O. L. R. 193.—CAN.**

e. — Effect of delay.]—Pltf. held a chattel mtge. made by one G., which was dated May 9, 1879, & filed May 13. Defts' mtge. from the same mtgor. was dated in the Dec. following. On Apr. 12, 1880, pltf. made affidavit of the amount due up to Apr. 10, & re-filed the mtge. under R. S. O. 1877 (c. 119), s. 10. Defts' landlords of the mtgor. illegally distrained for rent, whereupon pltf. brought trover for

616. Extension of time for renewal—Discretion of court.]—In 1875 a post-nuptial settlement was executed & registered as a bill of sale. In 1880 it was re-registered, but owing to inadvertence the registration was not renewed in 1885. Upon the omission being discovered, application was made to a judge in chambers, & in Oct., 1886, leave under 1878 Act, s. 14, to renew the registration was granted. In Nov., 1886, the settlor became bkpt. By an error in the affidavit filed in accordance with s. 11 upon the renewed registration in Oct., 1886, such registration became void. Upon that being discovered in Feb., 1887, the trustees of the settlement applied *ex p.* to the same judge to allow the error to be amended & the register rectified. An order was made to that effect, the judge stating his intention to be that the parties should be put back in the position they would have been in in Oct., 1886, had no mistake been made. Upon an application by the settlor's trustee in bkpcy. to discharge or vary the order for the benefit of the creditors:—*Held*: s. 14 conferred full power upon the judge in his discretion to grant leave to renew the registration.—*Re DOBBIN'S SETTLEMENT* (1887), 56 L. J. Q. B. 295; 57 L. T. 277; 3 T. L. R. 539, D. C.

Annotation:—*Consd. Re Parsons, Ex p. Furber*, [1893] 2 Q. B. 122.

goods levied upon by them & contained in his mtgo.:—*Held*: debts. were neither creditors nor subsequent purchasers or mtgees. within the statute, & therefore could not object to the mtgo. because the affidavit verifying the statement of the amount due was not made within the thirty days next preceding the expiration of the year. *Semble*: such affidavit & statement should be made within the thirty days.—*GRIFFIN v. MCKENZIE* (1881), 46 U. C. R. 93.—**CAN.**

f. — From year to year.]—A mtgee., to retain his priority, must, under 12 Vict. c. 74, continue to re-file his mtgo. after the first re-filing at the end of the first year.—*KISSOCK v. JARVIS* (1859), 9 C. P. 156.—**CAN.**

g. S. P. BEAUMONT v. GRAMP (1880), 45 U. C. R. 355.—**CAN.**

616 i. Extension of time for renewal—By order of court—Intervening rights.]—Where an order is made, under Bills of Sale Act, to file a renewal statement subsequently to date fixed by the Act, & that renewal statement is filed, the mtgo. retains its validity under s. 25, & is only void as against those who have acquired rights during the interval between the date upon which the renewal should have been filed & the date upon which it was actually filed.

A creditor must become an execution creditor within the said period in order to acquire any rights against the mtgee.—*ROGERS LUMBER Co. v. DUNLOP* (1914), 30 W. L. R. 209; 7 W. W. R. 975; 20 D. L. R. 154.—**CAN.**

616 ii. — — — — —.]—Where a judge's order extending the time for a renewal of a mtgo. is made subject to the rights of third parties accrued because of the omission to register the renewal within the prescribed time, & no such rights have accrued at the date of the order, the order is effective as against creditors of the mtgor.—*ROYAL TRUST Co. v. CASTOR TOWN*, [1917] 3 W. W. R. 586; 37 D. L. R. 277.—**CAN.**

k. Small inaccuracies—Renewal not invalidated.]—An immaterial variation between a mtgo. & the copy filed does not invalidate the re-filing.

A mistake in the copy in the number of the lot where the chattels were:—*Held*: to be immaterial.—*WALKER v. NILES* (1871), 18 Gr. 210.—**CAN.**

l. — — — — —.]—The fact that the number of a bill of sale is erroneously stated in the affidavit filed on the renewal of registration, does not affect its validity.—*Re CATIP* (1912), 12 S. R. N. S. W. 552.—**AUS.**

618 i. Omission to renew—Loss of right to seize.]—E. mortgaged a horse to deft. in Apr., 1864, with a proviso that if he should attempt to dispose of it deft. might take possession & sell. E. did dispose of the horse to pltf. within a few weeks. The mtgo. was not re-filed, but deft. took another in Feb., 1865, for the same money with other advances. In July, having first discovered the sale, he seized under the proviso:—*Held*: having neglected to re-file the mtgo. & taken another, he had lost his right to seize.—*COURTIS v. WEBB* (1866), 25 U. C. R. 576.—**CAN.**

See, further, Part VII., Sect. 2, post.

618 ii. — — — — —.]—*Avoidance against subsequent purchasers or mortgagee.]*—K., in possession of premises under a lease for years, assigned his term by way of mtgo. to R. Deft. purchased from R. & went into possession. The assignment to R. was never re-filed. More than a year after its original filing the unexpired term was sold under an execution against K., & the purchaser brought ejectment:—*Held*: if the mtgo. had come within 12 Vict. c. 74 it would have been void, not having been kept in force by registry.—*FRAZER v. LAZIER* (1852), 9 U. C. R. 679.—**CAN.**

618 iii. — — — — —.]—Where the mtgo. was registered in Aug., 1878, & pltf. purchased the property in Mar., 1879, & the mtgo. was not re-filed:—*Held*: pltf. was not entitled, as against deft., who took the property from him in Dec., 1879.—*HODGINS v. JOHNSTON* (1880), 5 A. R. 449.—**CAN.**

618 iv. — — — — —.]—*Semble*: a purchaser from a mtgee. under the power of sale contained in a mtgo., leaving the mtgor. in possession, is protected so long as the mtgo. under which he bought has the protection given it by registration; but when the term of the mtgo. expires, the purchaser is no longer protected, unless he takes actual possession, or procures & registers a bill of sale from the mtgee.—*CARLISLE v. TAIT* (1881), 32 C. P. 43; *reversd.* 7 A. R. 10.—**CAN.**

617. — — — — —.]—*Trustee in bankruptcy having acquired vested right.]*—After the time had expired for renewing under 1878 Act, s. 11, the registration of a bill of sale, & before any application had been made under s. 14 to rectify the omission, the grantor of a bill of sale was adjudicated a bkpt., & his estate vested in his trustee in bkpcy.:—*Held*: the time for registration of the bill of sale could not be extended under s. 14, so as to defeat the vested rights of the trustee in bkpcy.—*Re PARSONS, Ex p. FURBER*, [1893] 2 Q. B. 122; 62 L. J. Q. B. 365; 68 L. T. 777; 41 W. R. 468; 9 T. L. R. 375; 37 Sol. Jo. 383; 4 R. 374, C. A.

Annotations:—*Folld. Re Abrahams*, [1902] 1 Ch. 695. *Consd. Re Spiral Globe*, [1902] 1 Ch. 396. *Reid. Re Ehrmann, Albert v. Ehrmann*, [1906] 2 Ch. 697.

618. Omission to renew—Whether bill void for all purposes.]—The effect of omitting to renew the registration of a bill of sale within five years after its execution is, since the passing of 1882 Act, to make such bill of sale wholly void, even as between grantor & grantee.—*FENTON v. BLYTHE* (1890), 25 Q. B. D. 417; 59 L. J. Q. B. 589; 63 L. T. 534; 39 W. R. 79, D. C.

See, further, Part VI., post.

619. Duty of master.]—The duties of a master of the Queen's Bench Ct. as to the affidavits filed on renewal of a bill of sale under 1866 Act, are

618 v. — — — — —.]—*Rights of grantor's creditors.]*—A chattel mtgo. which has expired by effluxion of time under R. S. O. 1877 (c. 119), s. 10, & has not been renewed, ceases to be valid as against all creditors of the mtgor. then existing; & a sale on default in good faith, made by the mtgee., with the consent of the mtgor., though good as between the parties to the mtgo., only passes to the purchaser a title subject to the rights of any creditors who may take steps to follow the goods.—*BARKER v. LEESON* (1882), 1 O. R. 114.—**CAN.**

618 vi. — — — — —.]—B., being indebted to J., pltf., gave him a mtgo., dated Feb. 5, 1858, which was filed on the 8th & not subsequently re-filed. On Feb. 12, 1858, B. executed an assignment to R. for the benefit of creditors, subject to this mtgo. On Jan. 29, 1859, B. made an absolute bill of sale to J. of the same goods, which was filed on Feb. 2, 1859. A., deft., recovered judgment against B. on Sept. 12, 1861:—*Held*: no copy of the mtgo. having been filed within thirty days before the year expired from its first filing, it ceased to be valid against the creditors of B., or any subsequent purchaser or mtgo. in good faith for value.—*BOYNTON v. BOYD* (1862), 12 C. P. 334.—**CAN.**

618 vii. — — — — —.]—*Mortgagee of land.]*—The mtgo. was not re-filed within the year, but within the year, the mtgor. having sold the mortgaged fixtures, the purchaser gave the mtgee. a mtgo. of the same in substitution of the original mtgo., containing a recital of that mtgo., & of the sale of the fixtures to him subject thereto, & that he had obtained an extension of time on condition of giving this mtgo. for the sum unpaid:—*Held*: the omission to re-file did not give the mtgee. of the land priority, for he could not be considered a "subsequent mtgee. in good faith for valuable consideration," within the statute.—*ROSE v. HOPE* (1872), 22 C. P. 482.—**CAN.**

See, further, Part VI., post.

m. — — — — —.]—*Admissibility in evidence.]*—A bill of sale, dated July 12, 1879, was duly filed on July 28, 1879, & registration renewed on July 19, 1880. On Feb. 22, 1881, the grantee assigned the chattels comprised in it to a third party who immediately took possession

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ministerial, & he has not to inquire whether the requirements of the Act have been complied with.—*Re* **BILLS OF SALE ACT, 1866, NEEDHAM TO JOHNSON, TAYLOR TO BENTLEY (1867), 8 B. & S. 190; 15 L. T. 467; 15 W. R. 346.**

SUB-SECT. 9.—RECTIFICATION OF REGISTER.

See 1878 Act, s. 14.

By extending time for renewal.]—*Sec* Nos. 616, 617, *ante*.

620. By what court—Court of Appeal.]—The Ct. of Appeal has no jurisdiction to rectify the register under 1878 Act, s. 14.—*Re* **MORRIS, Ex p. WEBSTER (1882), 48 L. T. 295, C. A.**

Annotation:—Mentd. *Tuck v. Southern Counties Deposit Bank (1889), 42 Ch. D. 471*

621. Removal of copy of bill from file—Affidavit defective.]—A bill of sale was filed, accompanied by an affidavit which was afterwards discovered to be defective, & a fresh copy of the bill of sale & another affidavit being prepared & filed, application was made to the ct. that a memorandum might be added to the registration of the second copy, showing that the two registrations were in respect of the same bill of sale. The ct. refused, but permitted the first copy to be taken off the file.—*Re* **WRIGHT (1856), 27 L. T. O. S. 192; 4 W. R. 617.**

622. What defects can be rectified—Error in affidavit—On renewal of bill.]—In 1875 a post-nuptial settlement was executed & registered as a bill of sale. In 1880 it was re-registered, but owing to inadvertence the registration was not renewed in 1885. Upon the omission being discovered, application was made to a judge in chambers, & in Oct., 1886, leave under 1878 Act, s. 14, to renew the registration was granted. In Nov., 1886, the settlor became bkpt. By an error in the affidavit filed in accordance with s. 11 upon the renewed registration in Oct., 1886, such registration became void. Upon that being discovered in Feb., 1887, the trustees of the settlement applied *ex p.* to the same judge to allow the error to be amended & the register rectified. An order was made to that effect, the judge stating his intention to be that the parties should be put back in the position they would have been in, in Oct., 1886, had no mistake been made. Upon an application by the settlor's trustee in bkpcy. to discharge or vary the order for the benefit of the creditors:—*Held*: s. 14 conferred full power upon the judge in his discretion to rectify the error.—*Re* **DOBBIN'S SETTLEMENT (1887), 56 L. J. Q. B. 295; 57 L. T. 277; 3 T. L. R. 539, D. C.**

Annotation:—Dbtd. *Re* **Parsons, Ex p. Furber, [1893] 2 Q. B. 122.** *Crew v. Cummings (1888), 21 Q. B. D. 420, overrules Re Dobbin's Settlement (A. L. SMITH, L.J.).*

of them, the mtgor. having made default. In an action after the expiration of 12 months from July 19, 1880, the bill of sale was tendered in evidence, & objected to, on the ground that the registration had not been renewed within 12 months from July 19, 1880, as required by Act No. 557, s. 13:—*Held*: such objection was untenable.—*PETTIT v. WALKER (1882), 8 V. L. R. 72.—AUS.*

PART V. SECT. 5, SUB-SECT. 9.

621 i. Removal of copy of bill from file—Affidavit defective.]—The affidavit of registration of a bill of sale, under 17 & 18 Vict. c. 55, s. 1, omitted to state the description & occupation of

the grantor, & attesting witnesses. An application to have the bill of sale & the affidavit of registration taken off the file, for the purpose of having this omission rectified, refused, the proper course being to file a new bill of sale & affidavit of registration, with an indorsement thereon referring to the first bill of sale, & to the effect that each of the bills of sale is made for the same purpose, & relate to the same transaction, but that by reason of an irregularity in the affidavit of registration of the first bill of sale, it had become necessary to file the second bill of sale & affidavit of registration.—*Re* **O'BRIEN (1860), 10 I. C. L. R. App. xxxiii.—IR.**

n. Application to rectify misde-

623. Omission of description of attesting witness.]—Where an affidavit filed, together with a bill of sale, with the registrar under 1878 Act, s. 10, omits a description of the residence & occupation of one of the attesting witnesses, a judge has no power under s. 14 to order a supplementary affidavit to be filed supplying those particulars, although such omission may be due to inadvertence.—*CREW v. CUMMINGS (1888), 21 Q. B. D. 420; 57 L. J. Q. B. 641; 59 L. T. 886; 36 W. R. 908; 4 T. L. R. 772, C. A.*

Annotations:—Fold. *Re* **Parsons, Ex p. Furber, [1893] 2 Q. B. 122.** *Consd.* *Re* **Abrahams, [1902] 1 Ch. 695.** *Reid.* *Re* **Spiral Globe, [1902] 1 Ch. 396.** *Mentd.* *Re* **Johnson, [1902] 2 Ch. 101; Re Cardiff Workmen's Cottage Co., [1906] 2 Ch. 627.**

SUB-SECT. 10.—ENTRY OF SATISFACTION.

See 1878 Act, s. 15; Part VII., Sect. 4, *post*.

SECT. 6.—STAMPS.

See 1878 Act, s. 18.

624. Whether unstamped bill admissible in evidence.]—On an issue to try the property in certain goods, which pltf. claimed under a bill of sale, a former bill of sale of the same goods, but which had been cancelled, was tendered in evidence to show that the second bill of sale was given *bona fide*, & not fraudulently. The document having been rejected at the trial, on the ground that it was not stamped:—*Held*: it was properly rejected, & was inadmissible without a stamp.—*WILLIAMS v. GERRY (1842), 10 M. & W. 296; 2 Dowl. N. S. 201; 11 L. J. Ex. 389; 152 E. R. 482.*

Annotation:—Consd. *Smart v. Nokes (1844), 6 Man. & G.*

625. On payment of duty & penalty.]—*Held*: Revenue No. 2 Act, 1861 (c. 91), s. 34, did not invalidate the registration, otherwise regular, of a bill of sale not duly stamped, but on payment of the penalty & stamp duty required, the bill of sale was available under 1854 Act, s. 1, & might be received in evidence.—*BEILAMY v. SAULL (1863), 4 B. & S. 265; 2 New Rep. 355; 32 L. J. Q. B. 366; 8 L. T. 534; 11 W. R. 800; 122 E. R. 459.*

626. Schedule not annexed to bill & unstamped—Whether bill admissible in evidence without schedule.]—On the trial of an interpleader issue, pltf. tendered in evidence a bill of sale & schedule, the former of which assigned to him "all the goods, fixtures, household furniture, plate, china, etc., in & about a messuage, tenement, & premises, where he now resides, & being No. 2, P. Road, O. K. Road, in the county of Surrey, & the chief articles whereof are particularly enumerated & described in a

*description—Interpleader claim pending.]—*An order was obtained on an *ex p.* application under Chattels Transfer Act, 1889, s. 12, to rectify a misdescription contained in the affidavit filed on the registration of a bill of sale at a time when an interpleader claim was pending to try the right to the goods. The hearing of the interpleader summons had been adjourned at the instance of the bill of sale holder. The affidavit filed in support of the application did not disclose the fact that such proceedings were pending. Upon motion to have the order set aside:—*Held*: appct. was within his legal rights in making the application.—*McDERMOTT v. JONAS, Ex p. WALKER (1891), 9 N. Z. L. R. 722.—N.Z.*

certain schedule hereunto annexed." The schedule was in no way annexed to the deed, & was inadmissible for want of a stamp:—*Held*: the bill of sale was admissible in evidence without the schedule.—*DYER v. GREEN* (1847), 1 Exch. 71; 16 L. J. Ex. 239; 154 E. R. 30.

627. Whether additional stamp required—Indorsements of description of substituted chattels.]—

A bill of sale assigned certain horses as a security, & also such other horses as might be substituted for them in the business of the assignor, provided the names & descriptions of such substituted horses were indorsed:—*Held*: the indorsements did not require an additional stamp, being only for the purpose of identification.—*BARKER v. ASTON* (1858), 1 F. & F. 192, N. P.

Part VI.—Avoidance.

SECT. 1.—DURING TIME FOR REGISTRATION.

628. Seizure of chattels by execution creditor—Before time for registration.]—Where a bill of sale was given on June 27, & a writ of *fi. fa.* was issued, under which the sheriff seized on July 5:—*Held*: a bill of sale was not invalid by reason of its not having been filed, if the effects comprised in it were seized before the expiration of the time within which it might have been so filed, & the person claiming under the bill of sale was not prevented from setting it up, & asserting that the effects were his, although at the time of seizure it had not been filed.—*MARPLES v. HARTLEY* (1861), 3 E. & E. 610; 30 L. J. Q. B. 92; 3 L. T. 774; 7 Jur. N. S. 446; 9 W. R. 334; 121 E. R. 571.

Annotations:—*Folld.* *Hollingsworth v. White* (1862), 10 W. R. 619. *Consd.* *Banbury v. White* (1863), 2 H. & C. 300. *Refd.* *Smale v. Burr* (1872), L. R. 8 C. P. 64.

629. ———.]—A. executed a bill of sale of goods to pltf. on Dec. 31. Defts. levied under a *fi. fa.* on Jan. 4, & the bill of sale was registered on the 10th:—*Held*: the bill of sale having been registered within the twenty-one days allowed by 1854 Act was good as against the execution creditor.—*HOLLINGSWORTH v. WHITE* (1862), 6 L. T. 604; 10 W. R. 619.

Annotations:—*Consd.* *Cheney v. Courtols* (1863), 13 C. B. N. S. 634; *Re Pulling, Ex p. Harris* (1872), 8 Ch. App. 48; *Smale v. Burr* (1872), L. R. 8 C. P. 64; *Chapman v. Knight* (1880), 49 L. J. Q. B. 425. *Refd.* *Ramsden v. Lupton* (1873), L. R. 9 Q. B. 17; *Lamb, Duggan & Cooper v. Bruce* (1876), 45 L. J. Q. B. 538.

630. ——— Registration defective.]—Where goods are seized under a *fi. fa.* within twenty-one days of the making of a bill of sale, 1854 Act does not apply, although the form of registering the bill of sale has been gone through, but in a defective manner.—*BANBURY v. WHITE* (1863), 2 H. & C. 300; 2 New Rep. 286; 32 L. J. Ex. 258; 8

L. T. 508; 9 Jur. N. S. 913; 11 W. R. 785; 150 E. R. 125.

Annotation:—*Distd.* *Brodrick v. Scalé* (1871), L. R. 6 C. P. 98.

631. ——— Bill never registered.]—When the goods comprised in a bill of sale are seized within the time allowed for registration under an execution issued against the grantor, the grantee is entitled to the goods as against the execution creditor, although the bill of sale is never registered.—*BRIGNALL v. COHEN* (1872), 21 W. R. 25, Ex. Ch.

632. ———.]—An absolute bill of sale was made on May 15, 1915, & on May 18 the chattels comprised therein were seized in execution by the sheriff. The bill of sale was not registered at any time. The county ct. judge found as a fact that the chattels were in the apparent possession of the grantor of the bill of sale. On appeal to the Divisional Ct. it was contended, the point had not been taken in the county ct., that the seizure of the chattels in execution prevented them being in the apparent possession of the grantor of the bill of sale, & that, under 1878 Act, s. 8, inasmuch as the execution was put in before the expiration of the seven days allowed for registration, the bill of sale, though unregistered, was not void as against the execution creditor. The Divisional Ct. decided that, notwithstanding the execution, the chattels comprised in the bill of sale were in the apparent possession of the grantor, & the bill of sale, being unregistered, was void against the execution creditor:—*Held*: the point, not having been raised in the county ct., could not be taken on appeal, but there being evidence on which the county ct. judge could find as a fact that the chattels were in the apparent possession of the grantor, his finding could not be disturbed.—*SALES AGENCY, LTD. v. ELITE*

PART VI. SECT. 1.

a. Issue of execution—Before time for registration—Delay in registration.]—

An assignment of chattels was registered before an execution came to the sheriff, although not until after it had issued:—*Held*: the assignment was not avoided by a delay of eight days in registering it.—*BALKWELL v. BEDDOME* (1858), 16 U. C. R. 203.—*CAN.*

p. Execution in sheriff's hands—Before time for registration.]—Held. a *fi. fa.* placed in the sheriff's hands between the date of a chattel mtge. & its registry would cut it out.—*FEEHAN v. BANK OF TORONTO* (1860), 10 C. P. 32.—*CAN.*

q. S. P. SHAW v. GAULT (1860), 10 C. P. 236.—*CAN.*

r. S. P. HAIGHT v. MCINNES (1862), 11 C. P. 518.—*CAN.*

s. ———.]—An assignee is entitled as against a *fi. fa.* placed in the sheriff's hands after the assignment has been executed, but before the

registration.—*FEEHAN v. BANK OF TORONTO* (1860), 19 U. C. R. 474.—*CAN.*

t. ———.]—On July 16, M. executed a mtge., which was registered on the 19th. On the same day, & before the registration a *fi. fa.* against M. was placed in the sheriff's hands:—*Held*: the *fi. fa.* was entitled to prevail.—*McMARTIN v. McDUGALL* (1853), 10 U. C. R. 399.—*CAN.*

a. ———.]—Held: before 20 Vict. c. 3, an execution coming in before the filing of an assignment was entitled to prevail, though a reasonable time for filing might not have elapsed.—*CARSCALLEN v. MOODIE* (1857), 15 U. C. R. 92.—*CAN.*

b. ———.]—Judgment debtor executed a bill of sale of his goods to pltf., & gave him possession at 9 o'clock in the morning. At half-past eleven o'clock on the morning of same day a writ of *fi. fa.* was lodged by deft., a judgment creditor, in the hands of the sheriff for execution on the goods of debtor:—*Held*: the lodging of the

writ bound the goods from the earliest possible hour of the day, & the execution creditor had priority over claimant under the bill of sale.—*THOMPSON v. DE LISSA* (1881), 2 N. S. W. L. R. 165.—*AUS.*

See, further, EXECUTION, & also, cases on pp. 108, 109, post.

628 i. Seizure of chattels by execution creditor—Before time for registration.]—A co. registered in England gave a debenture to W. The co. were also indebted to M., who issued execution against the co. W.'s debenture was not registered under Bills of Sales Act, nor under Cos. Act, 1897:—*Held*: as Bills of Sales Act, s. 3, allowed sixty days within which to register a bill of sale, W. was entitled to priority over M., the sheriff having seized the goods before the expiration of that period.—*Re KING OF WEST GOLD MINING CO., LTD., IN LIQUIDATION* (1899), 1 W. A. L. R. 70.—*AUS.*

628 ii. ———.]—The sheriff seized under a writ of *fi. fa.* a mining claim, the ownership of which was

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registration: Sect. 2.]

[1917] 2 K. B. 164; 86 L. J. K. B. 1060; 117 L. T. 6; [1917] H. B. R. 163, C. A.

Annotation:—*Reid*. Gonsky v. Durrell, [1918] 2 K. B. 71.

633. Bankruptcy of grantor—Before time for registration.—Where a bill of sale was executed in July, 1870, in accordance with an agreement made in Oct., 1868, & the grantor filed a petition for liquidation on the same day, but after the execution of the bill of sale, & the bill of sale was registered within twenty-one days:—*Held*: the title of the holder of the bill of sale prevailed over that of the trustee.—*Re* BROADBENT, *Ex p.* HOMAN (1871), L. R. 12 Eq. 598; 36 J. P. 148; *sub nom.* BLACKBURN v. HOMAN, *Re* BROADBENT, 19 W. R. 1078.

Annotations:—*Expld.* *Re* Fairbrother, *Ex p.* Harding (1873), L. R. 15 Eq. 223. *Reid.* Hollinshead v. Egan, [1913] A. C. 564. *Mentd.* *Re* Jeavons, *Ex p.* Mackay, *Ex p.* Brown (1873), 42 L. J. Bey. 68; *Jarvis v. Jarvis* (1893), 63 L. J. Ch. 10.

634. ———.]—A bill of sale registered within the time prescribed by 1878 Act, s. 8, will sufficiently protect the goods comprised therein, notwithstanding the bkpcy. of the grantor in the interval between execution & registration.—*Re* HEWER, *Ex p.* KAHEN (1882), 21 Ch. D. 871; 51 L. J. Ch. 904; 46 L. T. 856; 30 W. R. 954.

—.]—*See, further*, BANKRUPTCY & INSOLVENCY, Vol. V., pp. 783, 784.

SECT. 2.—AS AGAINST WHAT PERSONS.

See 1878 Act, s. 8.

635. Only against persons mentioned—Liquidator.—The directors of a co. registered under Cos. Act, 1862 (c. 89), being empowered by their articles to borrow on debenture bonds any sums "necessary" for the business of the co., in Dec.,

asserted by a purchaser from the execution debtor. The sale was on June 10, 1910, & a bill of sale was executed on July 27, & registered on Oct. 10, about a month after the writ was placed in the sheriff's hands:—*Held*: the *bonâ fide* sale accompanied as it was by an actual & continued change of possession, was not defeated by the seizure before the registration of the bill of sale.—*McRAE v. FROOKS, HANNA v. FROOKS* (1911), 17 W. L. R. 287.—CAN.

d. *Subsequent purchase—Before time for registration—After removal of chattels into another district.*—Where a North West Territories Ordinance provided that if mortgaged goods were removed into another district, a certified copy of the mtge. should be filed in the registry office thereof within three weeks from the time of removal, otherwise the mtge. should be null & void as against subsequent purchasers, etc.:—*Held*: the "subsequent purchaser" must be one who purchased after the expiration of the three weeks from the time of removal, & though no copy of the mtge. was filed as provided, it was valid as against a purchaser made within such period.—*HULBERT v. PETERSON* (1905), 36 S. C. R. 324; 25 C. L. T. Occ. N. 118.—CAN.

e. ———.]—The "subsequent purchaser" mentioned in R. S. M. 1902 (c. 11), s. 29, against whom a chattel mtge. will cease to be valid upon goods removed out of the division where it is registered, unless a certified copy is registered in the division to which the goods have been removed within six months after the removal, must be one who purchased after the expiration of such period.—*ROPER v. SCOTT, WALLACE v. SCOTT,*

GALBRAITH v. SCOTT (1907), 5 W. L. R. 341; 16 Man. L. R. 594.—CAN.

f. ———.]—Bill of Sale & Chattel Mortgage Act, s. 38, requiring a chattel mtge. to be registered in the office of the county ct. clerk for the judicial district, into which the chattels mortgaged have been permanently removed, within six months after such removal, only extend to purchasers who buy after the expiry of the six months.—*MCINTYRE v. PREFONTAINE* (1915), 31 W. L. R. 928; 23 D. L. R. 139; 25 Man. L. R. 572.—CAN.

PART VI. SECT. 2.

635 i. Only against persons mentioned—Liquidator.—*Qu.*: whether the liquidator of a co. under R. S. C. (c. 129), can object to the want of registration or other formal defects in a chattel mtge.—*Re* RAINY LAKE LUMBER CO., *STEWART v. UNION BANK OF LOWER CANADA* (1888), 15 A. R. 749.—CAN.

635 ii. ———.]—liquidator cannot invoke R. S. C. (c. 148).—*Re* CANADIAN SHIPBUILDING CO. (1912), 22 O. W. R. 585; 3 O. W. N. 1476.—CAN.

635 iii. ———.]—A liquidator has not the right, on behalf of the creditors of a co., to attack, merely because of statutory defects, a chattel mtge. made by the co.—*SECURITY TRUST v. STEWART*, [1918] 1 W. W. R. 709; 39 D. L. R. 801; 12 Alta. L. R. 420; *overd.* *Grand Trunk Pacific Ry. v. Dearborn*, 58 S. C. R. 315.—CAN.

635 iv. ———.]—An incorporated manufacturing & trading co. made a mtge. to pltf. as trustee for bondholders to secure payment of its bonds, of its properties real & personal. The

1865, issued twenty debentures of £100 each, all in the same form, by which they pledged "the property belonging to us for the time being during the subsistence of the debenture, with all the buildings & stock on, & connected with, our property, & all the receipts & revenues to arise therefrom," & declared that the entire debenture loan & interest should be a first charge on "our undertaking & property, & receipts & revenues aforesaid." The business of the co. was to buy & sell land, to build, buy, & sell houses, to furnish houses for hotels, & to carry on the business of hotel keepers. A winding-up order having been made, the liquidator proceeded to sell certain freehold & leasehold estate belonging to the co., but the purchaser refused to complete unless the debenture holders were satisfied:—*Held*: the non-registration of the debentures under 1854 Act did not render them void as to the furniture & chattels, against the liquidator.

The case of a liquidator is not within the sect. [1854 Act, s. 1] (PAGE WOOD, V.-C.).—*Re* MARINE MANSIONS CO. (1867), L. R. 4 Eq. 601; 37 L. J. Ch. 113; 17 L. T. 50.

Annotations:—*Appld.* *Re* Oriental Hotels Co., *Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126. *Expld.* *Re* Standard Manufacturing Co. (1891), 60 L. J. Ch. 292. *Reid.* *Re* Stockton Iron Furnace Co. (1879), 10 Ch. D. 335; *Re* Staffordshire Gas & Coke Co., [1893] 3 Ch. 523; *G. N. Ry. Co. v. Coal Co-Op. Soc.*, [1896] 1 Ch. 187. *Mentd.* *Re* New Clydach Sheet & Bar Iron Co. (1868), L. R. 6 Eq. 514; *Re* Panama, New Zealand & Australian Royal Mail Co. (1869), 39 L. J. Ch. 162; *Re* General South American Co. (1876), 2 Ch. D. 337; *Re* Florence Land & Public Works Co., *Ex p.* Moor (1878), 10 Ch. D. 530.

636. — Unsecured creditor.—In a suit for administration of the estate of testator, who had given a bill of sale, which had not been filed in accordance with 1854 Act, testator's estate being insufficient for the payment of his debts in full:—*Held*: the rules in bkpcy. did not apply

co. made an assignment for the benefit of creditors & a winding-up order was afterwards made, under which deft. was appointed liquidator. On deft. taking possession of all the assets, pltf. claimed them under the mtge.:—*Held*: deft. was entitled in right of the creditors of the co. to contest the validity of the mtge.—*NATIONAL TRUST CO. v. TRUSTS & GUARANTEE CO.* (1912), 26 O. L. R. 279.—CAN.

g. ———.]—*Simple contract creditor.*—Q. & A. being indebted to S., executed a mtge. to S. on all their stock-in-trade, securing \$2,400, S. agreeing to make further advances, as they should require in the course of their business. Pltf., a simple contract creditor of Q. & A., instituted proceedings seeking, on behalf of the creditors of Q. & A., to have the mtge. declared void:—*Held*: pltf. could not succeed.—*PARKES v. ST. GEORGE* (1884), 10 A. R. 496.—CAN.

h. ———.]—Pltf. claimed ownership of goods seized by deft., basing his title upon two absolute bills of sale by F. Defts. claimed the property as theirs by virtue of a contract between them & F.:—*Scmble*: Bills of Sale Act, s. 7, made a bill of sale void only against classes of persons therein named & defts. did not come within any of these classes.—*CLANCEY v. GRAND TRUNK PACIFIC RY. CO.* (1910), 14 W. L. R. 201.—CAN.

k. ———.]—*Effect of 55 Vict. c. 26, ss. 2, 4, extending R. S. O., 1887 (c. 125), to simple contract creditors suing on behalf of themselves & other creditors.*—*MERIDEN BRITANNIA CO. v. BRADEN* (1894), 21 A. R. 352.—CAN.

l. ———.]—*"Persons who become creditors."*—*GILLARD v. BOLLETT* (1893), 24 O. R. 147.—CAN.

under Jud. Act, 1875 (c. 77), s. 10, & the bill of sale was good against the unsecured creditors.—*Re KNOTT* (1877), 7 Ch. D. 549, n.; 26 W. R. 349, n.

Annotations:—*Consd. Re Albion Steel & Wire Co.* (1878), 7 Ch. D. 547; *Re D'Epineuil, Tadman v. D'Epineuil* (1882), 20 Ch. D. 217.

637. ———.]—Jud. Act, 1875, s. 10, is not intended to enlarge the assets of an insolvent estate, but only to vary the rights of the persons entitled to the assets, & that sect. does not apply the rules of bkpcy. so as to make an unregistered bill of sale void as against the unsecured creditors.—*Re D'EPINEUIL (COUNT) (No. 1), TADMAN v. D'EPINEUIL* (1882), 20 Ch. D. 217; 51 L. J. Ch. 491; 46 L. T. 409; 30 W. R. 423.

Annotations:—*Consd. Hasluck v. Clark*, [1899] 1 Q. B. 699. *Reid. Re Gould, Ex p. Official Receiver* (1887), 19 Q. B. D. 92.

638. ——— **Trustee for such creditors as should execute trust deed.**]—A mtge. of leasehold property, & by a separate operative part, of all & all manner of mill-gear, millwright work, plant of wheelwright's shop, fixed & movable machinery & plant then being, or which at any time thereafter during the subsistence of the security should be thereon, is, unless registered, null & void under 1854 Act, s. 1, as against a trustee to whom the mtgor has assigned all his estate & effects for the benefit of all such of his creditors as should elect to execute same, such an assignment being "an assignment for the benefit of the creditors of such person" within the sect.—*PAINE v. MATTHEWS* (1885), 53 L. T. 872, D. C.

Annotation:—*Reid. Hadley v. Beedom*, [1895] 1 Q. B. 646.

639. Against grantor—Under 1854 Act—Defect in registration.]—The defect of registration under 1854 Act does not avoid a bill of sale as between the parties.—*BARKER v. ASTON* (1858), 1 F. & F. 192, N. P.

640. ———.]—1854 Act only renders

m. ———.]—*When mortgage void ab initio.*—*CLARKSON v. MCMASTER & Co.* (1895), 25 S. C. R. 96.—**CAN.**

n. ———.]—K. having become security for repayment by H. of \$600, H. assigned to K. all his right & claim to the goods & stock-in-trade in the store of H. to an amount sufficient to reimburse K. whatever he might pay in consequence of becoming such security. The agreement was not registered:—*Held*: creditors, although not creditors by judgment & execution at the time of the assignment, could take advantage of the want of registration.—*KITCHING v. HICKS* (1884), 6 O. R. 739.—**CAN.**

o. ———.]—*Held*: creditors, not being execution creditors, could not maintain an action to set aside a chattel mtge., on the ground that the debt was incorrectly stated therein.—*HYMAN v. CUTHBERTSON* (1886), 10 O. R. 443.—**CAN.**

p. ———.]—A simple contract creditor cannot make an attack upon a chattel mtge. under R. S. M. 1902 (c. 11).—*EMPIRE SASH & DOOR CO. v. MARANDA* (1911), 21 Man. L. R. 605; 19 W. L. R. 78.—**CAN.**

q. ———.]—A simple contract creditor cannot attack a chattel mtge. under R. S. M. 1913 (c. 17).—*BROWN v. LEONOFF* (1915), 31 W. L. R. 621.—**CAN.**

r. ———.]—The failure to renew a chattel mtge. in accordance with Bills of Sale Ordinance of Alberta, s. 17, or s. 19, makes the mtge. invalid as against all creditors of the mtgor., & not merely as against execution creditors.—*GRAND TRUNK PACIFIC RY. CO. v. DEARBORN*, [1919] 1 W. W. R. 1005.—**CAN.**

s. ———.]—*Creditor when mortgage made.*—A mtge. was filed upon an insufficient affidavit:—*Held*: it was void as against debt., a creditor of mtgor. when the mtge. was given, at the first, & the ct. would not, on the suggestion of mtgee., question the regularity of debt.'s judgment entered after the date of the mtge., or an attachment issued upon it.—*HOLMES v. VANCAMP* (1853), 10 U. C. R. 510.—**CAN.**

t. ———.]—*Creditor of bargainor—Subsequent creditor.*—The "creditors of the bargainor," as against whom Bills of Sale Ordinance, s. 9, makes void sales not in compliance with the Ordinance, include not only the creditors then existing, but also the subsequent creditors of the bargainor.—*GRAY v. LINGERELL* (1914), 7 Alta. L. R. 340; 27 W. L. R. 707; 6 W. W. R. 566.—**CAN.**

a. ———.]—The fact that the consideration for a bill of sale is not truly expressed therein does not render the bill of sale void, under Bills of Sale Ordinance, s. 11, against creditors of the bargainor, the only creditors of whom the sect. speaks being creditors of a mtgor., & there is no warrant for the assumption that the words "or bargainor," were inadvertently omitted.—*SUTHERLAND v. CLARKE*, [1917] 3 W. W. R. 672; 37 D. L. R. 518.—**CAN.**

b. ———.]—*Judgment creditor—Action on behalf of all creditors.*—*BARCHARD & Co., LTD. v. NIPISING COCA COLA BOTTLE WORKS, LTD.* (1918), 42 O. L. R. 196; 13 O. W. N. 456.—**CAN.**

c. ———.]—*Mortgagee having bare personal licence to distrain mortgagor's goods.*—Deft. distrained for a year's

bills of sale void for defect of registration as against creditors, not as between the parties.—*HILLS v. SHEPHERD* (1858), 1 F. & F. 191, N. P.

641. ——— **Under 1878 Act—Bill not attested.**]—C. & B. being, under an agreement, tenants for a short period of a theatre, with power to renew the tenancy & take a lease, charged the agreement, & the lease to be executed in pursuance thereof, with payment to N. of £275 by weekly instalments of £10, & interest at the rate of 30 per cent. *per annum*, & covenanted with N. to charge the furniture brought or to be brought into the theatre with payment of the money thereby secured. The deed was not attested by a solr.:—*Held*: the deed was in fact a bill of sale, & not having been executed by a solr., in accordance with 1878 Act, s. 10, it was, so far as it was a bill of sale, wholly void, even as against the grantor.—*BAGHOTT v. NORMAN* (1880), 41 L. T. 787.

Annotation:—*Reid. Crawcour v. Salter* (1881), 45 L. T. 62.

642. ———.]—A bill of sale to which 1878 Act applies, if it be not explained to the grantor & attested by a solr. in compliance with ss. 8 & 10, is not void as between the grantor & grantee.—*DAVIS v. GOODMAN* (1880), 5 C. P. D. 128; 49 L. J. Q. B. 344; 42 L. T. 288; 28 W. R. 559, C. A.

Annotations:—*Dbtd. Hill v. Kirkwood* (1880), 42 L. T. 105.

Expld. & Distd. Conelly v. Steer (1881), 7 Q. B. D. 520. *Consd. Lyons v. Tucker* (1881), 6 Q. B. D. 660. *Expld. Seal v. Claridge* (1881), 7 Q. B. D. 516. *Consd. Casson v. Churchley* (1884), 53 L. J. Q. B. 335. *Reid. Baghott v. Norman* (1880), 41 L. T. 787; *Re Haynes, Ex p. National Mercantile Bank* (1880), 15 Ch. D. 42; *Hickson v. Darlow* (1883), 23 Ch. D. 690. *Mentd. Re Thornbury Division of Gloucestershire, Election Petn., Ackers v. Howard* (1886), 16 Q. B. D. 739.

643. ——— **Under 1882 Act—Bill executed before Act in force—Non-registration.**]—A bill of sale was executed more than seven days before the above Act, 1882, came into operation, & was not registered:—*Held*: as between the grantor &

interest on his mtge. from the owner of certain chattels under a special clause, whereby he attorned as tenant of the land to debt. at a yearly rental equivalent to the annual interest on the mtge., & providing that the legal relation of landlord & tenant was thereby constituted between the parties. He at the same time distrained for an overdue instalment of the principal under another special clause in the mtge., that in default of payment of any part of the principal he might enter, seize & distrain upon any goods upon the land & by distress warrant recover by way of rent the overdue principal & costs:—*Held*: debt. was not a "creditor of the mtgor." within Chattel Mortgage Act, 1913 (c. 17), s. 5, as against whom the chattel mtge. would be void until registration.—*McDERMOTT v. FRASER* (1915), 8 W. W. R. 196; 23 D. L. R. 430; 25 Man. L. R. 298.—**CAN.**

639 i. Against grantor—Defect in registration.]—A chattel mtge. was improperly registered:—*Held*: that did not affect the right of the mtgee. to exercise the powers reserved to him by the mtge., as against the mtgor.—*COLLINS v. EATON* (1911), 19 W. L. R. 608; 1 W. W. R. 45.—**CAN.**

e. ———.]—*Non-registration.*—A bill of sale, though void as against execution creditors, because not duly filed, remains good as between the parties to it, & the grantee under it, as against the grantor, can validly sell the goods *bond fide*, for valuable consideration, & his title will prevail against that of an execution creditor, whose judgment was not recovered at the time the bill of sale was given.—*ANDERSON v. WATSON* (1891), 17 V. L. R. 263.—**AUS.**

Sect. 2.—As against what persons.]

grantee, the bill of sale was not void.—**HICKSON v. DARLOW** (1883), 23 Ch. D. 690; 52 L. J. Ch. 453; 48 L. T. 449; 31 W. R. 417, C. A.

Annotations :—**Mentd.** *Ex p.* Cotton (1883), 49 L. T. 52; Blackburn Corpn. v. Micklethwait (1886), 54 L. T. 539; Brewer v. Square, [1892] 2 Ch. 111; *Re* Athlumney, *Ex p.* Wilson, [1898] 2 Q. B. 547.

644. Against joint grantor—Becoming bankrupt—Other grantor solvent.]—Two partners in trade executed a mtge. of their trade fixtures & loose chattels. The mtge. was not registered as a bill of sale. The partnership was dissolved & the business was thenceforth carried on by one of the two partners alone. The outgoing partner executed an assignment of his half share in the mortgaged property to the continuing partner, subject to the mtge. The continuing partner afterwards filed a liquidation petition. At the date of the filing of the petition the mortgaged property was in his sole possession. The retiring partner remained solvent :—**Held** : as regarded the trade fixtures, the mtge. was, by reason of non-registration, void as against the trustee only to the extent of the liquidating debtor's original moiety.—*Re* REED, *Ex p.* BROWN (1878), 9 Ch. D. 389; 48 L. J. Bcy. 10; 39 L. T. 338; 27 W. R. 219, C. A.

Annotation :—**Consd.** Paine v. Matthews (1885), 53 L. T. 872.

645. Against execution creditor—Under 1854 Act—Whether bill wholly avoided.]—The consequence of avoiding an unregistered bill of sale by execution is to displace the security altogether.—**RICHARDS v. JAMES** (1867), L. R. 2 Q. B. 285; 8 B. & S. 302; 36 L. J. Q. B. 116; 16 L. T. 174;

of
in England.]—A bill of sale executed in England & registered in Western Australia is valid in Western Australia by the *lex fori*, although by the law of England it may be invalid as against creditors for want of registration, though valid between the parties.—**IDA H. MINING CO., LTD. v. JONES** (1905), 7 W. A. L. R. 329.—**AUS.**

removal of
chattels into another district.]—The owner of goods, having executed a chattel mtge., which was duly recorded in the proper registration district in Saskatchewan, afterwards fraudulently removed them to Alberta, where he sold them to a *bona fide* purchaser for value without notice of the mtgee.—**Held** : such sale conferred no title to the goods as against the chattel mtge., the mtge. being good as between the parties, & Bills of Sale Ordinance being inoperative as a law of Saskatchewan, beyond the boundaries of that Province.—**JONES v. TWOHEY** (1908), 8 W. L. R. 295; 1 Alta. L. R. 267.—**CAN.**

645 i. Against execution creditor—Whether bill wholly avoided.]—Possession taken under an execution avoids an unregistered bill of sale *pro tanto*, i.e., so far only as may be necessary to satisfy the execution. It does not avoid the security *in toto*.—**SOMMERS v. EMBY** (1890), 8 N. Z. L. R. 626.—**N.Z.**

645 ii. — **Execution creditors may not have a chattel mtge. set aside in so far as the goods mortgaged are exemptions within R. S. M. 1913 (c. 66), s. 29 (9).**—**ROBIN HOOD v. MAPLE LEAF** (1916), 33 W. L. R. 776; 9 W. W. R. 1453; 26 Man. L. R. 238.

645 iii. — **—.]**—An execution debtor can do as he pleases with the statutory exemptions & his execution creditor cannot take advantage of the fact that they are insufficiently described in a bill of sale thereof by the execution debtor.—**FIELD v. HART** (1895), 22 A. R. 449.—**CAN.**

h. — In any court.]—The word "execution" in Bills of Sale Act, 1893, s. 4, is not restricted to Supreme & county cts., but is broad enough to cover execution creditors in any ct.—**LEVASSEUR v. BEAULIEU** (1893), 33 N. B. R. 569.—**CAN.**

645 i. — With notice of existence of bill—Non-registration.]—If a particular creditor is aware that there has been a sale of chattels & an actual & continued change of possession following it, he cannot be prejudiced by the fact that a written bill of sale or mtge. has not been filed in accordance with Bills of Sale Act, & the sale or mtge. may be held valid as against his claim, although the requirements of that Act are not fully complied with.—**ROBERTSON v. WRENN** (1895), 10 Man. L. R. 378.—**CAN.**

k. — Delay in contesting validity of bill.]—An execution creditor, who permits more than a year to pass after the production by his opponent of a bill of sale under which the latter claims to be the owner of the goods seized, is no longer entitled to contest the title of his opponent by declaring the invalidity of the bill of sale as made in fraud of creditors.—**ROSS v. LEBEVRE** (1909), Q. R. 36 S. C. 210.—**CAN.**

l. — Execution superseded by insolvency.]—A chattel mtge. void against an execution creditor, but good against an assignee in insolvency, prevails over an execution superseded by an attachment in insolvency.—**ONTARIO BANK v. WILCOX** (1878), 43 U. C. R. 460.—**CAN.**

m. — Bill of sale given after seizure.]—Where a bill of sale is given by judgment debtor after the seizure of the latter's goods under execution, the sale does not take priority unless the exceptions stated in r. 478 are successfully invoked.—**LITTLE v. MAGLE** (1914), 29 W. L. R. 596; 7 W. W. R. 224.—**CAN.**

n. — Grantee in actual possession.]—4th R. S. (c. 84), s. 1 :—**Held** :

15 W. R. 580; *subsequent proceedings, sub nom.* **Re RICHARDS v. JAMES, SPARK v. JAMES, Ex p. HOLLINGSWORTH**, 16 L. T. 672.

Annotations :—**Consd.** Begbie v. Fenwick (1871), 24 L. T. 58; Ramsden v. Lupton (1873), L. R. 9 Q. B. 17. **Distd.** Hunter v. Turner (1875), 32 L. T. 556. **Consd.** Meux v. Jacobs (1875), L. R. 7 H. L. 481. **Distd.** *Re* Barrand, *Ex p.* Cochran (1876), 34 L. T. 950; Payne v. Cales (1877), 38 L. T. 355. **Consd.** Chapman v. Knight (1880), 5 C. P. D. 308; Lyons v. Tucker (1881), 6 Q. B. D. 660; *Re* Artistic Colour Printing Co., *Ex p.* Fourdrinier (1882), 21 Ch. D. 510; *Re* Toomer, *Ex p.* Blaiberg (1883), 23 Ch. D. 254; *Re* O'Sullivan, *Ex p.* Ferd. Baller (1892), 61 L. J. Q. B. 228. **Refd.** *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623.

646. — — —.]—Qu. : whether under 1854 Act, s. 1, the taking in execution of goods comprised in an unregistered bill of sale defeated the bill of sale wholly, or only to the extent necessary to give effect to the execution.—**Re ARTISTIC COLOUR PRINTING CO., Ex p. FOURDRINIER** (1882), 21 Ch. D. 510; 48 L. T. 46; 31 W. R. 149, C. A.

647. — Under 1878 Act—Whether bill wholly avoided.]—The effect of 1878 Act, s. 8, in avoiding an unregistered bill of sale as against an execution creditor of the grantor is to avoid it only to the extent necessary to satisfy the execution.—**Re TOOMER, Ex p. BLAIBERG** (1883), 23 Ch. D. 254; 52 L. J. Ch. 461; 49 L. T. 16; 31 W. R. 906, C. A.

Annotations :—**Refd.** Sanguinetti v. Stuckey's Banking Co., [1895] 1 Ch. 176. **Mentd.** *Re* Johnstone, *Ex p.* Abrams (1884), 50 L. T. 184; *Re* Monolithic Building Co., Tacon v. The Co., [1915] 1 Ch. 643.

648. — With notice of existence of bill—Non-registration.]—The fact that an execution creditor was, at the time when his debt was contracted,

not to apply, where the grantee, under a bill of sale not filed, had gone into actual possession of the property prior to the seizure by the sheriff.—**MCLEAN v. BELL** (1884), 5 R. & G. 128.—**CAN.**

o. — Chattels not mentioned in schedule.]—Some goods not mentioned in the schedule were delivered by one of the mtgors. to pltf.'s agent, on May 4, 1863; the sheriff received the execution on the 27th :—**Held** : such delivery was good against the sheriff.—**MILLS v. KING** (1864), 14 C. P. 223.—**CAN.**

p. — —.]—G. & E., bakers, on May 18, 1880, agreed to give debts. a chattel mtge. on their horses, waggons, & baking utensils. On May 26, the chattel mtge. not having been executed, debts. wrote to G. & E. to have it done, & the mtge. was drawn, & was executed by the mtgors. only on June 10, & filed on the 12th, & on the 14th debts. took possession under the mtge. Pltf.'s writ of attachment issued on June 17, & the sheriff seized the goods under it on June 30 :—**Held** : the property having passed by the bill of sale, & debts. being in actual possession when pltf.'s attachment issued, they had a right to retain the goods as against pltf.—**ROBINS v. CLARK** (1880), 45 U. C. R. 362.—**CAN.**

q. — —.]—Where the execution of the deed is immediately followed by an actual transfer of the possession, non-compliance with R. S. (c. 92), s. 4, does not invalidate the transaction so as to leave the goods liable to seizure under an execution against the assignor.—**MCMULLIN v. BUCHANAN** (1893), 26 N. S. R. 146.—**CAN.**

r. — —.]—Held : even if the mtge. was defective under Chattel Mortgage Act, yet pltf.'s execution creditors, were not entitled to succeed, because the mtgee. had taken actual possession of the goods before delivery of the writ to the sheriff.—**ROSS v. DUNN** (1889), 16 A. R. 552.—**CAN.**

s. — —.]—In an interpleader issue between the grantee of

aware that his debtor had given a bill of sale of chattels, does not prevent his availing himself of the objection that it has not been registered.—*EDWARDS v. EDWARDS* (1876), 2 Ch. D. 291; 45 L. J. Ch. 391; 34 L. T. 472; 24 W. R. 713, C. A.

Annotations:—*Consd. Re Monolithic Building Co., Tacon v. The Co.*, [1915] 1 Ch. 643. *Reid. Re Walden, Ex p. Odell* (1878), 39 L. T. 333; *Salter v. Brooks* (1879), *De Colyar's County Ct. Cases*, 82; *Re Roberts, Evans v. Roberts* (1887), 36 Ch. D. 196. *Mentd. Re Watkins, Ex p. Evans* (1879), 13 Ch. D. 252; *Smart v. Flood* (1893), 49 L. T. 467; *Re Standard Manufacturing Co., Ex p. Lohne* (1891), 39 W. R. 369.

a bill of sale & an execution creditor:—*Held*: registration was unnecessary, if possession was taken by claimant before the seizure in execution, though after the expiration of the time for registration.—*SMITH v. WHITE* (1869), 5 L. L. T. 74.—*IR.*

t. —.—.]—The fact of non-registration of a bill of sale is immaterial, where, at the time of seizure by a judgment creditor of the grantor, the goods are in the grantee's possession.—*PEAKE v. HOGG* (1885), 4 N. Z. L. R. 190.—*N.Z.*

a. —.— *No intent to hinder, defeat or delay execution creditor or to give mortgagee preference.*—*McMILLAN v. BARTLETT* (1885), 2 Man. L. R. 374.—*CAN.*

b. —.— *Chattel mortgage to secure wife for bar of dower.*—A husband executed to his wife a chattel mtge. to secure her against loss, by reason of her having barred her dower in certain mtges. of land. The goods were seized by his execution creditors. The husband was living:—*Held*: the chattel mtge. was valid, notwithstanding anything in R. S. O. 1887 (c. 125), s. 6.—*MORRIS v. MARTIN* (1890), 19 O. R. 564.—*CAN.*

c. —.— *Post-nuptial settlement—Subsequent assignment for value.*—An execution debtor made a post-nuptial settlement of chattel property, with a trust for sale on his own request. The trustee of the settlement, by the direction of execution debtor & his wife, assigned the property included in the settlement to pltf. for valuable consideration. Neither the settlement nor the subsequent assignment was registered under Bills of Sale Registration Act, 1856. Debtor was at the time of seizure under the *fi. fa.* issued by the judgment creditor in apparent possession of the goods, but the trustee of the settlement was in actual possession, as agent for the assignee for valuable consideration:—*Held*: (1) were it not for the intermediate assignment the execution creditor could have seized the goods, as the goods of debtor for non-registration of the settlement; (2) the assignment for value, debtor remaining in apparent possession throughout, did not defeat the execution creditor's right.—*WALKER v. CLEVE, Mac.* 107.—*N.Z.*

d. *Against subsequent purchaser.*—A purchaser of goods, who neglects to comply with Bills of Sale Act, s. 6, cannot invoke its provisions as against a subsequent purchaser in good faith, & the latter, even though he also has not complied with the Act, obtains priority.—*WINN v. SNIDER* (1899), 26 A. R. 384.—*CAN.*

e. —.— *For valuable consideration—What is.*—A purchaser of goods from the maker of a chattel mtge., in consideration of the discharge of a pre-existing debt, is a purchaser for valuable consideration within Bills of Sale Act, s. 5.—*WILLIAMS v. LEONARD & SONS* (1896), 26 S. C. R. 406.—*CAN.*

f. —.— *With notice.*—A mtge. not sufficiently describing the goods is void as against subsequent purchasers

in good faith, & notice of such mtge. to the purchaser will not affect his right.—*MOFFAT v. COULSON* (1860), 19 U. C. R. 341.—*CAN.*

g. —.—.]—*Held*: the words "in good faith" could not be imported into C. S. V. C., c. 45, s. 9, after "mortgagees," & a purchaser for value of the goods, though with notice of the mtge., was entitled as against the mtgee.—*MORROW v. RORKE* (1876), 39 U. C. R. 500.—*CAN.*

h. —.— *Without notice.*—In an action for the recovery of a horse debt, relied on a bill of sale from J., a former owner. Pltf. had purchased the horse, without actual notice of the bill of sale, from B., who had purchased from J.:—*Held*: even if the bill of sale was fraudulent, as was attempted to be shown, that would be of no avail to pltf., who was not a creditor.—*McBRIDE v. WARD* (1886), 7 R. & G. 115; 7 C. L. T. 148.—*CAN.*

i. *Against trustee in bankruptcy or insolvency.*—Under Insolvent Act, 1875, s. 39, an assignee represents the creditors for the purpose of avoiding a mtge. for want of compliance with Chattel Mortgage Act.—*Re ANDREWS* (1877), 2 A. R. 24.—*CAN.*

j. —.—.]—The assignee of an insolvent mtgor. can, for the benefit of creditors, impeach a chattel mtge. for non-compliance with Chattel Mortgage Act.—*Re BARRITT* (1880), 5 A. R. 206.—*CAN.*

k. —.—.]—*Held*: an assignee for the benefit of creditors could not take advantage of the want of registration of an assignment.—*KITCHING v. HICKS* (1884), 6 O. R. 739.—*CAN.*

l. —.—.]—Where goods seized under an execution were claimed by a mtgee., & the assignee for the benefit of the creditors of execution debtor was ordered to be made a party to the interpleader issue:—*Held*: judgment should go in his favour, upon admissions at the trial that the chattel mtge. did not fully comply with Bills of Sale & Chattel Mortgages Act.—*PULOS v. SOPER* (1913), 24 O. W. R. 962; 4 O. W. N. 1559.—*CAN.*

m. —.— *Not being creditor.*—Pltfs. took a chattel mtge. from W., who next day assigned to deft. in trust for the benefit of his creditors. Deft. was not a creditor, & before any creditor had been informed of the assignment pltfs., who had omitted to register their mtge., demanded of deft. the goods contained in it, which was refused, whereupon an action was brought. Upon the application of deft., with the consent of M., a creditor of W., the master ordered M. to be added as deft., in order to test the validity of pltfs.' mtge.:—*Held*: deft. was not entitled to the order.—*HYMAN v. BOURNE* (1884), 5 O. R. 430.—*CAN.*

n. —.— *Or purchaser from him.*—On Dec. 3, 1875, M. & D. mortgaged chattels to pltfs. On Mar. 27, 1876, an attachment in insolvency issued against M. & D., & on Apr. 26, H. was appointed assignee. On the same day, H., in consideration of \$300,

See, also, No. 650, *post*, & cases in Part VII., Sect. 2, sub-sect. 3, A, *post*.

Against creditors generally—Bill amounting to fraudulent conveyance.—*See* BANKRUPTCY & INSOLVENCY, Vol. IV., pp. 52-71; FRAUDULENT & VOIDABLE CONVEYANCES.

Against trustee in bankruptcy—Bill amounting to act of bankruptcy.—*See* BANKRUPTCY & INSOLVENCY, Vol. IV., pp. 52-71, Vol. V., pp. 889-893.

Against money-lender grantee—Misrepresentation as to terms of loan.—*See* MONEY & MONEY-LENDING.

assigned to F. all his right & interest as assignee to & in all the personal estate, etc., of insolvents:—*Held*: the sale by the assignee could not be supported, & pltfs. had a right to replevy. *Qu.*: whether an assignee in insolvency can raise technical objections to a mtge. not impeachable under Insolvent Acts.—*BERTRAM v. PENDRY* (1877), 27 C. P. 371.—*CAN.*

o. —.— *Bill not registered—No agreement not to register.*—Bkpt. gave a bill of sale over all the assets of his business as security for guarantees given by resp. The bill of sale was not registered, but there was no agreement not to register:—*Held*: it was an arrangement not to register, & not the fact of non-registration, which raised a presumption of intent to defeat.—*Re ISRAEL, Ex p. OFFICIAL ASSIGNEE* (1895), 16 N. S. W. B. 93.—*AUS.*

p. —.— *No sufficient consideration at time of execution of bill.*—A bill of sale was executed on May 30 for a then present advance of money, but was not registered until Aug. 18, at which date the maker was alleged to have been in insolvent circumstances. He was adjudicated insolvent within six months:—*Held*: as against the trustee in the insolvency, the bill of sale was liable to be avoided.—*DIXON v. TODD* (1904), 1 C. L. R. 320.—*AUS.*

q. —.— *Bill of exchange or note taken by bank on acquiring security—Not "negotiated."*—Where a bill or note is taken by a bank on acquiring a security, but is not "negotiated" at the time of the acquisition thereof, such security, not being registered, is void under Chattel Mortgage Act against the assignee for creditors under R. S. O. 1887 (c. 124).—*HAILESTED v. BANK OF HAMILTON* (1897), 27 O. R. 435; 24 A. R. 152; 28 S. C. R. 235.—*CAN.*

r. —.— *Chattels insufficiently described.*—*Held*: as to stock-in-trade & other chattels insufficiently described under Chattels Transfer Act, 1908, s. 20, the bill of sale was by that action void as against the trustee for the benefit of creditors & the seizure invalid.—*JOHNS v. MULINDER*, [1915] 35 N. Z. L. R. 422.—*N.Z.*

—.—.]—*See, generally*, BANKRUPTCY & INSOLVENCY, Vol. IV., pp. 52-71; Vol. V., pp. 889-893.

s. *Against liquidator of company—Bill given in pursuance of prior promise.*—A bill of sale given in pursuance of a prior agreement dates back to that agreement, unless it be shown that a bill of sale was postponed with the intention of giving debtor a fictitious credit with other creditors. It is not sufficient to show that at the time the bill of sale was executed the person giving it was in insolvent circumstances.—*AUSTRALIAN CO-OPERATIVE FRUIT, ETC., Co. v. LONDON CHARTERED BANK OF AUSTRALIA* (1890), 11 N. S. W. Eq. 98.—*AUS.*

—.—.]—*See, generally*, BANKRUPTCY & INSOLVENCY, Vol. IV., pp. 52-71; Vol. V., pp. 889-893; COMPANIES.

SECT. 3.—AS REGARDS WHAT CHATTELS.

SUB-SECT. 1.—CHATTELS IN APPARENT POSSESSION OF GRANTOR.

See 1878 Act, ss. 4, 8.

A. Apparent Possession terminated by Grantee.

649. Chattels removed to grantee's premises.]—

Want of registration of a bill of sale does not nullify it, if the goods were in the actual possession of the assignee at the time of the execution.

Goods subject to an unregistered bill of sale were seized by the grantee & removed to his premises, where they were on the same day seized by the sheriff under a *fi. fa.* issued against the grantor:—*Held*: the goods were not in the possession or apparent possession of the grantor.—*MINISTER v. PRICE* (1859), 1 F. & F. 686, N. P.

650. Grantor allowed to use chattels—& carry on business.]—If a party who obtains a bill of sale takes possession under it, but suffers the late owner of the goods to interfere or execute any act of ownership, it avoids the bill of sale as against a subsequent *bonâ fide* execution.—*PAGET v. PERCHARD* (1794), 1 Esp. 205, N. P.

See, further, Sect. 2, *ante*; FRAUDULENT & VOIDABLE CONVEYANCES.

651. ———.]—A deposit of title deeds was accompanied by a memorandum in the following terms: "As a collateral security I hereby make over to you all the interest I have acquired in my sugar refinery at, etc., & in the machinery & effects therein for which purpose I place in your hands all the documents relating thereto," with full power to the mtgee. at any time without notice to sell & satisfy his claim & all expenses, etc. The memorandum was not registered under 1854 Act. The mtgor. subsequently filed a declaration of insolvency, & the mtgee. put a man in possession of the machinery, but the mtgor. continued in possession of the premises up to the time of his bkpcy.:—*Held*: the premises must be considered to have been in the actual occupation of bkpt. & the memorandum not having been filed the movable machinery & effects were in the apparent possession of bkpt. at the time of his bkpcy.—*Re POLLACK, Ex p. SCHRÖDER* (1857), 29 L. T. O. S. 185.

652. ———.]—A bill of sale assigned for value all the furniture & effects in a private dwelling-house. Soon after the bill was made, an agent of the holder of the bill took possession of the furniture & effects, & resided in the house armed

with a copy of the bill, which he was directed to show to any person claiming the furniture, or interfering with his possession. The assignor, who was tenant of the house, continued as before, to reside there, & to have the use of the furniture subject to the possession of the agent. Shortly after the agent's entry the assignor was adjudicated bkpt. The transaction being assumed to be *bonâ fide*:—*Held*: (1) nothing had been done to change, in the view of the outer world, that appearance of ownership with which the assignor was invested, & the chattels were in his apparent possession within 1854 Act, & passed to the assignee in bkpcy., the bill of sale not having been duly registered; (2) the definition "apparent possession" in the interpretation clause of that Act applied to cases where more than merely formal possession had been taken by or given to another person.—*Re VINING, Ex p. HOOMAN* (1870), L. R. 10 Eq. 63; 39 L. J. Bcy. 4; 22 L. T. 179; 18 W. R. 450.

Annotations:—*Reid. Re Blenkhorn, Ex p. Jay* (1874), 9 Ch. App. 697. *Mentd. Taylor v. Eckersley* (1877), 5 Ch. D. 740.

653. ——— Sale advertised.]—On Nov. 29, L., the holder of an unregistered bill of sale of the household furniture of H., took possession by sending in a broker's man, who remained in the house, but did not remove any of the furniture nor interfere with the use of it by H., who went on using it exactly as before. On Dec. 19 placards were posted in the neighbourhood of the house announcing a sale of the furniture on the 28th, but, with the exception of a reference to a firm of solrs. for particulars, there was nothing in the placards from which it could be inferred that the sale was not made by H. himself. On the 23rd H. committed an act of bkpcy., & was adjudged bkpt. on the following day:—*Held*: the goods belonged to the trustee in bkpcy., as being in the apparent possession of bkpt., for the possession taken by the broker's man was merely "formal possession," within 1854 Act, & the placards could not take the furniture out of bkpt.'s apparent possession, as they did not show that the sale was to be made under a bill of sale.—*Re HENDERSON, Ex p. LEWIS* (1871), 6 Ch. App. 626; 24 L. T. 785; 19 W. R. 835, L. J.

Annotations:—*Distd. Furber v. Finlayson* (1876), 34 L. T. 323; *Re Henley, Ex p. Fletcher* (1877), 5 Ch. D. 809. *Consd. Robinson v. Tucker* (1883), Cab. & El. 173. *Reid. Re Blenkhorn, Ex p. Jay* (1874), 9 Ch. App. 697; *Emanuel v. Bridger* (1874), L. R. 9 Q. B. 286.

PART VI. SECT. 3, SUB-SECT. 1.

—A.

b. Formal seizure—No further proceedings taken.]—Formal seizure under a chattel mtge., without further proceeding being taken, does not cure the failure to renew a chattel mtge. as against a creditor, who becomes an execution creditor subsequent to such seizure.—*GRAND TRUNK PACIFIC RY. CO. v. DEARBORN*, [1919] 1 W. W. R. 1005.—CAN.

c. ——— Under warrant to bailiff—No new delivery or transfer by mortgage.]—A mtgeo. delivered to his bailiff a warrant directing the seizure of the goods, which the bailiff seized, but left them in the possession of the mtgor.'s son, who resided with his father on the premises, & his son-in-law, who resided on the adjoining premises, taking from them an instrument under seal, whereby they acknowledged that they had received the goods under & by virtue of the warrant from him, & undertook to deliver them to him on demand:—*Held*: not a sufficient taking of possession.—*HEATON v. FLOOD* (1897), 29 O. R. 87.—CAN.

d. ———.]—*JOHNSON & BOON, LTD. v. McNEIL*, [1917] 3 W. W. R. 249.—CAN.

e. ———.]—Where goods were seized by a bailiff, who then left the premises & did not return:—*Held*: there was no actual or continued change of possession.—*AVERRILL v. CASWELL & Co.* (1915), 31 W. J. 953; 23 D. L. R. 112; 8 Sask. L. R. 269.—CAN.

f. ——— No actual change of possession.]—S., on Mar. 25, 1868, executed a mtge. to pltf., payable the following Oct., with a proviso that on default pltf., instead of selling the goods, might take possession as absolute owner. On default being made pltf. went through a form of taking possession, without any change in the possession, or any assignment of the mtgor.'s interest taken or registered, & executed a lease of the goods to mtgor. After default, & before the taking of possession by pltf., an execution against the goods was placed in the sheriff's hands, but no seizure was made until Nov., 1869, after the expiration of the mtge., which had not

been renewed:—*Held*: the transaction between the parties was void.—*CHAMBERLAIN v. GREEN* (1870), 20 C. P. 304.—CAN.

g. ———.]—The taking possession by a chattel mtgeo. of the mortgaged goods, with the consent of the mtgor.:—*Held*: to cure, as against a subsequent seizure by another creditor, any alleged defect in the mtge., although there was no immediate actual or visible change in possession of the mortgaged goods.—*ROYAL TRUST CO. v. CASTOR TOWN*, [1917] 3 W. W. R. 586; 37 D. L. R. 277.—CAN.

h. Chattels *bonâ fide* taken possession of within twenty-one days.]—Where the goods comprised in a bill of sale were within twenty-one days after its execution *bonâ fide* taken possession of by the bargainee:—*Held*: Bills of Sale Act did not apply, & it was immaterial that the bill was subject to a defeasance not contained in it.—*McCLARY MANUFACTURING CO. v. HOWLAND SONS & CO. & GREENWOOD HARDWARE CO.* (1908), 9 B. C. R. 479.—CAN.

654. — Removal by grantee

A mtgee. under an unregistered bill of sale, sent two men on Feb. 10 to take possession of the goods. They remained in the house, but allowed debtors to use the goods as usual till Feb. 14. On Feb. 11 debtors executed another bill of sale, which comprised substantially all their property, to another creditor, to secure an antecedent debt. Early in the morning of Feb. 14 the first mtgee. sent vans to the house, & the men in possession commenced to pack the furniture & load the vans. At half-past twelve on the same day debtors filed a petition for liquidation. The furniture & live stock at the house were carried away by the first mtgee. before the evening:—*Held*: the furniture & live stock were in the apparent possession of debtors until the morning of Feb. 14, but ceased to be so when the men in possession began to pack the goods & put them in the vans.—*Re* **BLANKHORN**, *Ex p. JAY* (1874), 9 Ch. App. 697; 43 L. J. Bcy. 122; 31 L. T. 260; 38 J. P. 821; 22 W. R. 907,

Folld. Re Loes, Ex p. Collins (1874), 10 Ch. App. 369, n. *Distd. Furber v. Finlayson* (1876), 34 L. T. 323. *Refd. Ancona v. Rogers* (1876), 1 Ex. D. 285; *Sales Agency v. Elite Theatres*, [1917] 2 K. B. 164. *Mentd. Taylor v. Eckersley* (1877), 5 Ch. D. 740; *Re Moojen, Ex p. Bouchard* (1879), 28 W. R. 129.

655. — Residing on premises as servant of grantee.—Goods assigned by an unregistered bill of sale were left upon premises in the sole occupation of the grantor, under an arrangement between the parties that he should carry on a trade there as servant of the grantee at a weekly salary & have the use of the goods. An execution creditor of the grantor having seized the goods:—*Held*: they were in the apparent possession of the grantor & could not be claimed by the grantee under the invalid bill of sale.—**PICKARD v. MARRIAGE** (1876), 1 Ex. D. 364; 45 L. J. Q. B. 594; 35 L. T. 343; 24 W. R. 886.

Annotations:—*Distd. Gibbons v. Hickson* (1885), 55 L. J. Q. B. 119. *Mentd. Blaiberg v. Parke* (1882), 10 Q. B. D. 90.

Key retained by grantor.—J. having executed a bill of sale, a man was put in

657 i. Business conducted by grantee.—The grantee under an unregistered bill of sale took possession of the goods covered thereby, consisting of a bakery stock, & employed a person to take charge, & instructed him to let no one else in the place. Pltf. gave no written notice of change of ownership, but informed some of the creditors that he was in possession. Pltf. carried on baking, & delivered the product in his own name, but debtor's name was not removed from the door of the premises:—*Held*: the goods were not in the apparent possession of the debtor.—**BRACKMAN v. McLAUCHLIN** (1894), 3 B. C. R. 265.—**CAN.**

657 ii. — Hotel licence obtained by grantee in own name.—The lessees of hotel premises sold the business to pltf.:—*Held*: the handing over of the keys of a building, giving the combination of the safe & the former proprietors going out of possession, the securing by pltf. of a license in his own name, & the conduct of the business by him thereafter, were all acts of a notorious character such as to constitute an immediate delivery & continued change of possession.—**MUNRO v. FERGUSON** (1907), 6 W. L. R. 755.—**CAN.**

657 iii. — Grantor employed as grantee's clerk.—The purchaser of the stock of a trader, where the change of ownership is open & notorious, may employ the former owner as a clerk in carrying on the business, & notwithstanding such hiring there may still be an actual & continued change of

possession.—**KINLOCH v. SCRIBNER** (1886), 14 S. C. R. 77; *sub nom. SCRIBNER v. McLAREN* (1883), 2 O. R. 265; *sub nom. SCRIBNER v. KINLOCH* (1885), 12 A. R. 367.—**CAN.**

657 iv. — Grantor's clerk employed as grantee's agent.—Name not altered. Pltfs., assignees for the benefit of creditors, proved a delivery of the goods, but they had employed the assignor's clerk as their agent to keep & sell the goods in the shop, & he had in some instances, without their knowledge, permitted the proceeds to be applied in payment of some small claims against the assignor, & once had paid money into the bank to the credit of the assignor, that he might draw a cheque for it immediately, to pay a privileged claim, but pltfs. knew nothing of the deposit in the bank, or of the drawing the cheque. Their agent took no steps to give public intimation of the change of possession, either directly or by removing the assignor's name as the party carrying on the business, though he made weekly returns of sales to the assignees, & that had been done at the solicitation of the assignor, who represented that he hoped to make arrangements again to resume the business. The fact of any change having been made was generally unknown in the neighbourhood:—*Held*: it was properly left to the jury to say whether there was an actual & continued change of possession, & they were warranted in finding that there was.—**FOSTER v. SMITH** (1856), U. C. R. 243.—**CAN.**

possession of the goods comprised in it by the grantee. The house in which the goods were belonged to J., & he had a key of it; he did not sleep in it, but he went in & out as he pleased:—*Held*: the goods were in the possession or apparent possession of J. within 1878 Act, ss. 4, 8.—**SEAL v. CLARIDGE** (1881), 7 Q. B. D. 516; 50 L. J. Q. B. 316; 44 L. T. 501; 29 W. R. 598, C. A.

Annotations:—*Mentd. Penwarden v. Roberts, Wilson v. Roberts, Heath v. Roberts* (1882), 9 Q. B. D. 137; *Re Parrott, Ex p. Cullen*, [1891] 2 Q. B. 151; *Peace v. Brookes*, [1895] 2 Q. B. 451.

657. Business conducted by grantee.—Pltfs. joined with A., an insolvent trader, as his sureties in giving promissory notes for payment of his composition, on condition that they were secured, & A. executed a bill of sale to them of all his personal chattels as such agreed security, & pltfs. immediately put an agent of their own in possession to carry on the business for them. A. left the place on the execution of the bill of sale, but his daughter remained in the house, & his name continued over the shop door. All was done publicly, & without any secrecy. The goods having been seized in execution at the suit of debt., a creditor of A.:—*Held*: the transaction operated as a complete change of possession & ownership.—**DAVIES v. JONES** (1862), 7 L. T. 130; 10 W. R. 779.

Annotation:—*Refd. Re Blenkhorn, Ex p. Jay* (1874), 31 L. T. 260.

658. Business conducted by grantor—Key taken by grantee—Change of possession common knowledge.—Applts., holders of an unregistered bill of sale of stock-in-trade from debtor, at about two o'clock p.m. on Saturday, May 14, put a man into possession, who remained in possession until a receiver of the ct. entered at about six o'clock p.m. on Tuesday, the 17th, on which day debtor had filed a liquidation petition. Applts. deposed that the deputy of the man in possession locked up the premises every night, & took away the keys, omitting by inadvertence, on Saturday night only, to lock the door of a passage leading from the house of debtor's son to the shop, that

657 v. — — — — —.—C. who had been the assignor's clerk & book-keeper, was employed by pltfs., assignees for the benefit of creditors, as their agent to dispose of the stock, & collect the debts due, etc. C. took possession, opened new books in the name of the assignees, & sold & collected the assets under their instructions, but continued in the same place, the name of the assignor remaining above the door as usual:—*Held*: a sufficient change of possession.—**HARRIS & WOODSIDE v. COMMERCIAL BANK OF CANADA** (1858), 16 U. C. R. 437.—**CAN.**

k. Agent sent by grantee to carry on business—Inventory of chattels handed to agent—Grantor remaining in possession.—Under assignments by partners to trustees for the benefit of creditors an agent of the trustees was sent out to obtain possession of the property assigned & to carry on the business. One of the partners farmed land & he also assigned to the trustees his personal estate. His son made an inventory and handed it to the agent, but the father remained in possession until an execution was levied:—*Held*: there was not an actual & continued change of possession.—**HEWARD v. MITCHELL** (1853), 10 U. C. R. 535.—**CAN.**

658 i. Business conducted by grantor.—An assignor remained in his store after the assignment, having the same clerk, & his sign remained over the door, nor were any goods removed. There was no evidence of change of

n. 3.

chattels: Sub-sect. 1,

of two servers in the shop other than debtor & his son, one was discharged on Monday, & on Tuesday assisted an auctioneer who had been sent by applts. for the purpose, in making an inventory, & that the fact of possession having been taken on behalf of applts. was well known in the town, & generally talked about on Sunday & Monday. On the other hand, it was deposed that the bailiff's man never or seldom appeared in the shop, but remained in a warehouse on the premises, out of sight of the customers, that the business appeared to go on as usual & no notification was made to the public:—*Held*: on the facts there never was any apparent possession by debtor after the seizure on the 14th, & the mtgees. were entitled to the produce of the stock sold.—*Re BASHAM, Ex p. MORTLOCK*, [1881] W. N. 161.

659. — Name altered & customers informed.]

—H. assigned, by an unregistered bill of sale, on Mar. 4, 1885, the goodwill & stock-in-trade of a business carried on by him, but continued to manage the business on behalf of the grantee, residing in the house where the business was carried on, & using the furniture. At the date of the assignment a circular was sent to all the customers notifying the change of ownership, & an advertisement signed by H., as manager, was inserted upon three different occasions in a local newspaper, stating that the business would thenceforward be carried on by "H. & Co." The goods comprised in the bill of sale having been taken in execution in May, 1885, to satisfy a judgment debt due from H.:—*Held*: the goods were not in the apparent possession of the grantor, & debt. was not entitled to them as against the grantee.—*GIBBONS v. HICKSON* (1885), 55 L. J. Q. B. 119; 53 L. T. 910; 34 W. R. 140, D. C.

660. Sale advertised as under bill of sale—Business stopped—Grantor allowed to remain.]—Pltf. advanced to Y., a baker by trade, £155 on the security of a bill of sale of Y.'s goods, & took possession of them by putting a man into possession of them in Y.'s house on May 15. The doors were kept locked, & the trade & business stopped, the key being kept by pltf.'s men in possession.

possession that could be apparent to others than the parties concerned, & the bill of sale was not filed:—*Held*: not sufficient change of possession.—*McLEOD v. HAMILTON* (1857), 15 U. C. R. 111.—CAN.

658 ii. —.]—Pltfs. agreed to buy a farm from K., who continued to live on the farm & to exercise the same control over it, so far as the public could see, as before the sale:—Held: there was no actual & continued change of possession.—*MUM v. BALCOLVSKI* (1908), 1 Sask. L. R. 415; 9 W. L. R. 25.—CAN.

659 i. — Name not altered & customers not informed—Bailiff in shop.]—Deft., holder of an unregistered bill of sale over the stock-in-trade of H., sent a bailiff to H.'s shop to take possession. The bailiff took possession and remained all day in the shop, but the business was carried on as usual by the shopman, & nothing was said to the customers, & H.'s name was allowed to remain up outside. In the afternoon H. filed a petition in bkpcy. & his estate was sequestrated next day. On the day of sequestration bills were posted on the shop windows announcing a sale of the goods under the bill of sale. The official assignee of H. brought an action to recover the proceeds of the sale:—Held: the jury were right in finding that nothing had occurred to take the apparent

possession out of H.—*STEPHEN v. ISRAEL* (1889), 10 N. S. W. L. R. 135.—AUS.

661 i. Sale advertised as under bill of sale.]—Where an assignment was made by the director of a joint stock co. of all the property of the co. to trustees for the benefit of creditors, & the property was formally handed over by the directors to the trustees, who took possession & advertised & sold the property under the deed of assignment:—Held: there was an actual & continued change of possession.—*HOVEY v. WHITING* (1887), 14 S. C. R. 515.—CAN.

m. — Chattels bought by grantee & left on grantor's premises.]—A father mortgaged chattels to his son, who advertised them for sale under the mtge., & bought them all in himself, but did not remove them from the place on which both he & his father were living at the time:—Held: there had been no actual change of possession.—*GOODYEAR v. GOODYEAR* (1902), 1 O. W. R. 405.—CAN.

662 i. Premises locked up—Chattels not removed.]—Where goods in a shop or other unoccupied building under lock & key are sold by the owner, & the key delivered to the purchaser, who goes to the place & examines & checks over the goods, & then locks up the place again, this constitutes an actual & continued change of possession

On May 17 notices announcing a sale by auction of the goods were posted up outside the house, & in places about the neighbourhood, & the catalogue stated that the sale would take place under a bill of sale on May 24. Y., who was an infirm old man, was allowed, though against the wish of pltf.'s man in possession, to remain on in the house, on the plea that he could not get lodgings elsewhere. Between the 17th & the 24th of May debt.'s execution was put in, the bailiff procuring admission by knocking at the door, & when it was opened forcing his way in. The verdict, at the trial of an interpleader issue to determine the right to the goods, having been entered for debt.:—*Held*: (1) the necessary inference from the facts was, that more was done than the taking of merely formal possession, & actual & real possession & control were in fact taken & kept by pltf.; (2) public notice thereof was given by the catalogues announcing the sale, & the verdict must be entered for pltf.—*SMITH v. WALL* (1868), 18 L. T. 182.

Annotations:—*Consd. Re Henderson, Ex p. Lewis* (1871), 6 Ch. App. 626. *Refd. Vicarino v. Hollingsworth* (1869), 17 W. R. 613; *Re Allibon, Noyes, Ex p. McLean* (1871), 24 L. T. 144; *Re Blenkhorn, Ex p. Jay* (1874), 31 L. T. 260.

661. —.]—When the grantee of a bill of sale takes possession of the goods comprised in it, & advertises them for sale as the goods of the grantor sold under a bill of sale, the goods, though still in the house of the grantor, are no longer in his apparent possession, & the bill of sale, although not duly registered, is valid against an execution levied on the goods of the grantor.—*EMANUEL v. BRIDGER* (1874), L. R. 9 Q. B. 286; 43 L. J. Q. B. 96; 30 L. T. 194; 22 W. R. 404.

Annotations:—*Mentd. Lowe v. Blakemore* (1875), L. R. 10 Q. B. 485; *Stevens v. Phelps* (1875), 10 Ch. App. 417; *Re London Cotton Mills Co., Re Brander* (1876), 25 W. R. 109; *Barnfather v. Barron, Barron, Page & Draper* (1877), 37 L. T. 231; *Re Watt, Ex p. Joselyne* (1878), 8 Ch. D. 327; *Chatterton v. Watney* (1881), 16 Ch. D. 378; *Geisse v. Taylor & Hartland* (1905), 93 L. T. 534.

662. Premises locked up—Chattels not removed.]—Goods belonging to bkpt., taken possession of by a creditor under an unregistered bill of sale, in order to pass to the assignee under the bill of sale, must be actually removed, so far as they are capable of removal, before the bkpcy.

& the purchaser need not either personally or by some one for him remain in possession or remove the goods.—*McMARTIN v. MOORE* (1877), 27 C. P. 397.—CAN.

n. — Grantor procuring key & obtaining access by back entrance.]—W. made an assignment of goods at S. to his brother, who lived sixty or seventy miles away. His brother went to S., locked up the building where the goods were, and returned home, leaving the key of the premises with the postmaster at S. W. got possession of the key, & had constant access to the shop by a back entrance, though the street door was kept fastened:—Held: no sufficient change of possession.—*WILSON v. KERR* (1858), 17 U. C. R. 168.—CAN.

o. Timber in shipbuilder's yard—Possession taken by grantee's foreman.]—M., a shipbuilder, carried on his business in a yard leased from A. Pltf. sent two vessels there to be repaired, & it was agreed that pltf. should furnish the materials, & he purchased from M. some oak timber then in the yard. Pltf.'s foreman took possession of it, & a portion had been worked up by pltf.'s & M.'s men, when A. distrained it for rent:—Held: there had been a sufficient change of possession of the timber.—*GILDERALEVE v. AULT* (1858), 16 U. C. R. 401.—CAN.

p. Logs—Marking & symbolic de-

Where goods were taken possession of before adjudication, but after the act of bkpcy., of which the creditor had notice, & not removed from the premises, but simply locked up & the key taken away by the creditor:—*Held*: the assignees under the bkpcy. were entitled.—*Re JARVIS, Ex p. KITCHENER* (1858), 32 L. T. O. S. 136.

663. Timber on private & public wharves—Key of private wharf handed to grantor.]—E., by an agreement in writing, sold timber lying partly on his private wharf, & partly on a public wharf, to G. for £300, E. agreeing to pay all rent & other charges upon the timber for six months, within which time G. was to remove it. G. took possession of the key of the private wharf & sold some of the timber lying there, but he did nothing with reference to the timber on the public wharf, the key of which remained in the hands of the wharfinger, except taking persons to look at it with a view to its sale:—*Held*: there was no possession or apparent possession of the timber either at the public or private wharf within 1854 Act, so as to render them liable to a seizure under an execution against E.—*GOUGH v. EVERARD* (1863), 2 H. & C. 1; 2 New Rep. 169; 32 L. J. Ex. 210; 8 L. T. 363; 11 W. R. 702; 159 E. R. 1.

Annotations:—*Folld. Smith v. Wall* (1868), 18 L. T. 182. *Consd. Re Vining, Ex p. Homan* (1870), L. R. 10 Eq. 63. *Distd. Re Allibon, Noyes, Ex p. McLean* (1871), 24 L. T. 144. *Apld. Re Henderson, Ex p. Lewis* (1871), 6 Ch. App. 626. *Consd. Robinson v. Tucker* (1883), Cab. & El. 173; *Gibbons v. Hickson* (1885), 55 L. J. Q. B. 119. *Refd. Re Blenkhorn, Ex p. Jay* (1874), 9 Ch. App. 700, n.; *Hilton v. Tucker* (1888), 57 L. J. Ch. 973; *Sales Agency v. Elite Theatres*, [1917] 2 K. B. 164. *Mentd. Branton v. Griffiths* (1876), 1 C. P. D. 349.

664. Furniture in grantor's house—Not used by grantor after date of sale.]—E., by a written agreement, sold to G. for £50 some furniture lying in a house, the property of E., & part of which house E. had previously used as an office & occasionally slept in, but of which apartments E. had the use. By the agreement G. out of the £50 was to pay the wages due to E.'s servant, who remained in the house, & the rates & taxes. E. did not use the house after the agreement:—*Held*: there was no possession or apparent possession of the furniture, by E. within 1854 Act, so as to render them liable to a seizure under an execution against

livery.]—H. agreed to get out logs for plffs. A large number were got out during the winter by H., & while on the ice he marked 1,040 logs with plffs.' mark. When the ice broke up, all were floated down together & became mixed. Plffs. accepted & paid £200 on account, & afterwards a delivery was made by H. to them of 1,040 logs, by delivering some in the name of that number out of the whole, which were still together:—*Held*: Chattel Mortgage Act would not have applied, even if the jury had not found, as they did, that there was an actual & continued change of possession.—*MIDDLEBROOK v. THOMPSON* (1860), 19 U. C. R. 307.—CAN.

q. — Hauled out & placed at place agreed to by parties.]—Deft. entered into a verbal contract with R., who was then engaged in cutting cordwood on a certain limit, by which the latter was to deliver about 85 cords of wood on the station grounds at M., at a point indicated by deft., in payment of a debt. During the following month R. hauled out & piled about 85 cords of the wood in the place indicated & notified deft. thereof. He also hauled out & piled in different parts of the same grounds about 1,500 cords besides. Plff. afterwards obtained from R. a chattel mtgc. covering the wood delivered for deft. & a large quantity of other wood piled at the same station.

Subsequently deft. went to M., accepted the 85 cords, & had it shipped away:—*Held*: the facts did not warrant the conclusion that there had been the actual change of possession necessary to satisfy R. S. M., c. 10.—*BERNHART v. McCURCHEON* (1899), 12 Man. L. R. 394.—CAN.

r. — Not set apart—Agreement by grantee to bear loss by fire.]—B. agreed to deliver to deft., at C., 195 cords of wood to be taken out of two piles of wood containing 200 cords lying at another railway station, & received the consideration therefor. Before anything was done towards delivery of the wood or setting apart the 195 cords from the rest of the wood, B. assigned to plff., for the benefit of his creditors:—*Held*: (1) R. S. M. 1902 (c. 11), s. 3, had not been complied with; (2) deft.'s agreement to bear the loss, if the wood should be burned, was not sufficient to vest the title in him in the face of the other facts.—*HAVERSON v. SMITH* (1906), 16 Man. L. R. 204; 4 W. L. R. 249.—CAN.

—.]—*See, also*, cases in Sect. 3, sub-sect. 2, A, *post*.

s. Store of goods—Key handed to grantee—Symbolic delivery.]—C. executed a bill of sale of a share of goods to plffs., who received the key after a symbolic delivery of the goods by portions in the name of the whole:—

E.—GOUGH v. EVERARD (1863), 2 H. & C. 1; 2 New Rep. 169; 32 L. J. Ex. 210; 8 L. T. 363; 11 W. R. 702; 159 E. R. 1.

Annotations:—*Folld. Smith v. Wall* (1868), 18 L. T. 182. *Consd. Re Vining, Ex p. Homan* (1870), L. R. 10 Eq. 63. *Apld. Re Henderson, Ex p. Lewis* (1871), 6 Ch. App. 626. *Consd. Robinson v. Tucker* (1883), Cab. & El. 173; *Gibbons v. Hickson* (1885), 55 L. J. Q. B. 119. *Refd. Re Allibon, Noyes, Ex p. McLean* (1871), 24 L. T. 144; *Re Blenkhorn, Ex p. Jay* (1874), 9 Ch. App. 700, n.; *Sales Agency v. Elite Theatres*, [1917] 2 K. B. 164. *Mentd. Branton v. Griffiths* (1876), 1 C. P. D. 349; *Hilton v. Tucker* (1888), 57 L. J. Ch. 973.

665. Chattels in rooms tenanted by grantor—Key handed to grantee.]—Goods comprised in an unregistered bill of sale were deposited in rooms rented by the grantor, & the keys of the premises demanded & given up to the grantee in consequence of non-compliance by the grantor with the conditions of the bill of sale. The grantor never returned to the premises, but the grantee entered, marked the goods, & kept the keys:—*Held*: (1) the premises were not occupied by the grantor, & the goods were not in his apparent possession within 1854 Act, ss. 1, 7; (2) the occupation spoken of in s. 7 meant a *de facto* occupation.—*ROBINSON v. BRIGGS* (1870), L. R. 6 Exch. 1; 40 L. J. Ex. 17; 23 L. T. 395.

666. Possession demanded but not obtained—Chattels with bailee.]—Under the terms of an unregistered bill of sale of goods, given to secure a debt, the grantor was to be allowed to remain in possession of the goods until default in payment of the debt after demand. Default having been made, the grantee demanded the goods from the owner of a house in which the grantor had placed them, & threatened to take them by force. The grantor remained in possession of the goods until she filed a petition for liquidation:—*Held*: (1) the fact that the grantee was entitled to & demanded possession did not take the goods out of the grantor's possession within 1854 Act, & the trustee in liquidation was entitled to the goods as against the grantee; (2) if the grantor had bailed the goods to a bailee to hold on account of the grantor, the goods would still have been in the possession of the grantor within the Act, & would not have been taken out of the grantor's possession by the fact that the grantee was entitled

Held: the change of possession was sufficient.—*TAYLOR v. COMMERCIAL BANK* (1854), 4 C. P. 447.—CAN.

t. Sheep on grantor's land—Marking & removal from other sheep of grantor.]—Plff., a butcher, bought from R. a number of sheep, & marked the sheep with red paint as his property, & they were then placed apart from the rest of R.'s sheep in a separate field on the latter's farm, where they were to remain until required by plff. It was the custom among butchers to leave with farmers stock purchased from them until convenient to remove it:—*Held*: the mere marking of the sheep, or the removal of them from one field of the seller to another, did not constitute a sufficient delivery or change of possession under C. S. U. C., c. 45, s. 4.—*DOYLE v. LASHIER* (1866), 16 C. P. 263.—CAN.

v. Horses in grantor's stables—Grantee in actual possession by servant.]—On Oct. 2, 1894, a verbal sale of horses was made to A., & part of the purchase money was then paid. For the convenience of A., & at his request, deft. continued in actual possession of the horses until Nov. 12 following, when he called upon A. & told him that he was going away, but had left everything all right, & that a boy who had been in his employment could take care of everything, & thereafter A., by his servants, remained in actual possession of the horses:—*Held*: there

Sect. 3.—As regards what chattels: Sub-sect. 1, A.]

to & demanded possession.—**ANCONA v. ROGERS** (1876), 1 Ex. D. 285; 46 L. J. Q. B. 121; 35 L. T. 115; 24 W. R. 1000, C. A.

Annotations:—Consd. *Lincoln Waggon & Engine Co. v. Munford* (1879), 41 L. T. 655. *Reid. Re Henley, Ex p. Fletcher* (1877), 5 Ch. D. 809. *Mentd. Ramsay v. Margrett*, [1894] 2 Q. B. 18.

667. Grantee's man unable to obtain access to chattels—But remaining on premises.]—The holder of a bill of sale, which was not registered, sent a man to take possession of the goods & prevent the grantor retaining them. The man entered the premises in which the goods were, but could not get into the room in which they were, but kept watch outside the door of such room, the grantor being absent. The jury having found that the man intended *bonâ fide* to take possession:—**Held:** there was evidence to justify such finding, & a verdict found for the holder of the bill of sale against an execution creditor, whose execution was put in after such taking of possession, was rightly found.—**FURBER v. FINLAYSON** (1876), 34 L. T. 323; 24 W. R. 370.

Annotation:—D_{bt}d. *Re Henley, Ex p. Fletcher* (1877), 5 Ch. D. 809.

668. Wrongful possession.]—Actual possession taken by the grantee of an unregistered bill of sale, even though taken wrongfully, may exclude the operation of 1854 Act. But, though when possession is taken rightfully the possession will be extended by construction of law beyond the actual physical possession, this will not be done in the case of a wrongdoer. His possession will not be constructively extended beyond the articles of which he has obtained actual physical possession.—

was a delivery by the vendor on Nov. 12, & the sale was good, notwithstanding. R. S. M., c. 10, s. 2.—**TRUST & LOAN CO. v. WRIGHT** (1895), 11 Man. L. R. 314.—**CAN.**

a. Stack of hay on grantor's premises—Allowed to remain there on grantor vacating premises.]—H., owing money to G. on a note, the note was given up in exchange for a stack of hay & \$5 in cash. The stack was on H.'s premises, where it remained. H. shortly afterwards vacated the premises & G. alleged that he obtained permission for the stack to remain where it was:—**Held:** the sale was not accompanied by an immediate delivery followed by an actual & continued change of possession, & was void under Bills of Sale & Chattel Mortgage Act.—**CONN v. HAWES** (1912), 21 W. L. R. 622; 4 D. L. R. 4.—**CAN.**

b. Chattels left in grantor's shop—After reasonable time for removal.]—Pltf., on May 31, 1861, purchased & paid for a carriage from F., a carriage maker, for \$175, but did not remove it from the shop. Shortly after, pltf.'s wife saw another carriage in the course of building which she preferred, & it was agreed that pltf. should have it, if he chose, upon payment of an additional sum, the one first purchased to be his if he did not take the other:—**Held:** pltf., having left the carriage in the vendor's hands more than a reasonable time for the removal thereof, the sale came within C. S. U. C., c. 45, & there being no delivery, followed by an actual & continued change of possession, nor any bill of sale filed, in accordance with that Act, the property remained in F.'s hands liable to seizure.—**CARRUTHERS v. REYNOLDS** (1862), 12 C. P. 596.—**CAN.**

c. Attempt to take possession.]—Defts. seized goods in the possession of L. under an execution against him, & pltf. claimed the goods as assignees under an unregistered bill of sale given

by L. to F. There was no change of possession. Afterwards L. agreed with pltf. to hold the goods as tenant at will at a rental, & subsequently they made an ineffectual attempt to take possession:—**Held:** that attempt to take possession of the goods was not sufficient to satisfy R. S. O. 1877 (c. 119).—**MCKELLAR v. MCGIBBON** (1885), 12 A. R. 221.—**CAN.**

d. —.]—Seizure of a chattel while in the lawful possession of a judgment debtor as apparent owner is valid as against a mtgee. under a defective chattel mtge., who had not actual possession, it being immaterial that the mtgee. diligently attempted to obtain possession.—**RITCHIE CONTRACTING CO. v. BROWN** (1915), 30 W. L. R. 723; 8 W. W. R. 84; 21 D. L. R. 86.—**CAN.**

e. Possession after assignment for benefit of creditors.]—On Dec. 28, 1891, N. made a bill of sale to pltf., which was filed on Dec. 29. On Jan. 1, 1892, N. made a deed of assignment for the benefit of creditors to C., covering the same property, & parting with all his interest in it. On Jan. 9, N. delivered possession of the property to pltf. The bill of sale was intended to be a security under 5th R. S., c. 92, ss. 4, 5, being made both to secure a debt due, & to secure the grantees against their indorsements for the accommodation of the grantor:—**Held:** there was no delivery to the mtgees. under the mtge. which transferred to them the possession of the goods.—**REID v. CREIGHTON** (1895), 27 N. S. R. 90; 24 S. C. R. 69.—**CAN.**

668 i. Wrongful possession.]—Held: (1) the rights of a mtgee. of chattels are not taken away by his failure to register the instrument unless the goods remain in the possession or apparent possession of the mtgor.; (2) As in the present case the chattels had been effectually though illegally taken out of the mtgor.'s possession and into the possession of deft., the

Re HENLEY, Ex p. FLETCHER (1877), 5 Ch. D. 809; 46 L. J. Bcy. 93; 36 L. T. 758; 25 W. R. 573, C. A.

669. Possession taken after act of bankruptcy.]

—The grantee, under an unregistered bill of sale, took possession of the property comprised in it before the filing of a liquidation petition by the grantor. The day before possession was taken, the grantor had committed an act of bkpcy. of which the grantee had no notice:—**Held:** the "time of such bkpcy.," in 1854 Act, s. 1, meant the time of the act of bkpcy., & the title of the grantee was defeated by virtue of the relation back of the title of the trustee in the liquidation to the earlier act of bkpcy.—*Re TURNER, Ex p. ATTWATER* (1876), 5 Ch. D. 27; 46 L. J. Bcy. 41; 35 L. T. 682; 25 W. R. 206, C. A.; *subsequent proceedings* (1877), 5 Ch. D. 32.

Annotation:—F_{olld.} *Re Cross, Ex p. Payne* (1879), 11 Ch. D. 539.

670. Third party already in possession—Sale stopped & third party ejected.]—Pltf., the holder of an unregistered bill of sale, prior to an act of bkpcy. committed by the grantor of the bill obtained an order of the ct. restraining a sale of the goods already advertised & appointing him receiver. On the day fixed for the sale pltf. entered the premises where the goods were, but found a man in possession, whom he ordered to retire, but pltf. allowed him to remain pending instructions from his employer. Pltf. took possession of the goods & stopped the sale. The act of bkpcy. took place at about two o'clock p.m. & the man was not withdrawn till three o'clock p.m.:—**Held:** sufficient possession had been taken by

seizure was valid as to the chattels sufficiently described in it the bill of sale.—**JOHNS v. MULINDER**, [1915] N. Z. L. R. 422.—**N.Z.**

f. Chattels with bailee—Verbal statement by solicitor that he was acting for grantee—Bill blank as to name of grantee.]—A concrete mixer, owned by A. & Co. was stored with T., who had complete possession of it & held it for the owners. R., a solr., having a claim against A. & Co. for costs, on Nov. 20, 1914, procured them to execute a bill of sale of the mixer, leaving the name of the bargainee blank. In Dec., 1914, R. told T. he was the owner or was acting for the owner. Subsequently, the name of L. was inserted in the bill of sale. The bill of sale was never fully completed or registered.—**Held:** there was no immediate delivery to R. or L. followed by an actual continued change of possession.—**MISSISQUOI LAUTZ CORPN. v. NORTH** (1915), 32 W. L. R. 591; 9 W. W. R. 317.—**CAN.**

g. — Verbal instructions by grantor to hold chattels for grantee—Authority to grantee to sell.]—A. agreed to make for R. an iron fence for which R. furnished him with the iron, & paid a certain sum on account of the work. Being unable to pay the balance, G. advanced the money, taking R.'s note, & the fence, which was then in A.'s yard, was delivered by R. to him to hold for G. until payment of the note, but there was no written agreement. When the note fell due R. authorised G. to sell the fence, but it remained until it was seized under an execution against R.:—**Held:** the execution could not prevail against G.'s claim.—**GURNEY v. JAMES** (1860), 19 U. C. R. 156.—**CAN.**

h. — Substitution of chattels—Statement of chattels in bailee's hands demanded by grantee.]—S. & Co. used to transmit linens to B. & Co. to be bleached. On Nov. 23, 1874, B. & Co. holding a quantity of such goods

pltf. to take the goods out of the apparent possession of the grantor.—**BURROUGHS v. WILLIAMS** (1878), 13 L. J. N. C. 127.

671. Possession taken for purpose of cataloguing.]—Goods were assigned by an absolute bill of sale to a firm of auctioneers. The grantor arranged to leave the premises on which the goods were & to allow the grantees to sell them by auction on the premises. On the agreed day the auctioneers sent a man to take possession of the goods & to lot & catalogue them for sale:—*Held*: (1) the bill of sale required registration, as 1878 Act, s. 8, was not repealed as to absolute bills of sale; (2) the goods were not in the apparent possession of the grantor.—**ROBINSON v. TUCKER** (1883), Cab. & El. 173.

672. Assignment by husband to wife—Chattels at matrimonial domicile.]—A wife, who was living in the same house with her husband, agreed to buy from him the furniture & plate in the house, & she paid him a fair price for the goods, & he gave her a receipt & an acknowledgment that the goods were the absolute property of his wife:—*Semble*: if the receipt had been a bill of sale the goods would not have been in the apparent possession of the husband, because, the fact that the goods remained in the house being consistent with the possession of either husband or wife, the possession must be attributed to the person, viz., the wife, who had the legal title to them.—**RAMSAY v. MARGRETT**, [1894] 2 Q. B. 18; 63 L. J. Q. B. 513; 70 L. T. 788; 10 T. L. R. 355; 1 Mans. 184; 9 R. 407, C. A.

Annotations:—**Consd.** *Re Satterthwaite, Ex p. Trustee* (1895), 2 Mans. 52; *Withers v. Berry* (1895), 39 Sol. Jo. 559. **Mentd.** *Clapham v. Ives* (1904), 91 L. T. 69; *Re Reis, Ex p. Clough*, [1904] 1 K. B. 451; *Re Magnus, Ex p. Salaman* (1910), 80 L. J. K. B. 71; *Rogers, Eungblut v. Martin* (1910), 103 L. T. 527.

Sec. also, Part III., Sect. 2, ante.

673. ——— & dealt with by wife as her

subject to a lien to a bank for advances made to S. & Co. as against those goods, a deed was executed to the bank by the several members of the two firms, by which S. & Co. transferred all the goods then with B. & Co. to secure all money for the time being to be due to the bank by S. & Co., & B. & Co. covenanted that they held those goods & would hold any other goods which might be substituted by S. & Co. therefor from time to time with the concurrence of the bank, for the bank, & that they would at all times retain goods which should in the gross be equal in value to those which they should part with in substitution, & that the bank might enter & take the goods for the time being, subject to their lien. The deed, which gave the bank power to sell the goods in default of payment of their advances, was not registered. The bank continued to make advances in the ordinary course of trade, the goods were withdrawn by S. & Co., & other goods sent by them to B. & Co. in substitution for them. S. & Co. became bkpts., but before they committed any act of bkpcy. the bank required from B. & Co. a statement of the goods then in their possession, which was delivered by B. & Co. with the consent of S. & Co., & B. & Co. again undertook to hold the goods subject to the bank's lien:—*Held*: even though no authority was given by the bank for the substitution, the transaction which took place previously to the bkpcy. of S. & Co., constituted *novus actus* binding the goods then in the possession of B. & Co. in favour of the bank to secure their advances, & took the goods out of the possession or apparent possession of S. & Co. so as to prevent the operation of Bills of Sale Act.—**MERCHANT BANKING CO. OF LONDON v. SPOTTEN**

(1877), 11 L. R. Eq. 586; 11 L. L. T. 153.—**IR.**

672 i. Assignment by husband to wife—Chattels in matrimonial domicile.]—In Aug., 1899, N., the husband of pltf. bought plants from the deft. N., intending to trade in the plants, placed them on land, of which he was lessee. N. in Oct. assigned the lease, furniture & plants to pltf. Pltf. having claimed under the assignment:—*Held*: the goods did not remain in the possession or apparent possession of N., & the assignment did not require registration as a bill of sale.—**NICHOLSON v. NEWMAN** (1901), 3 W. A. L. R. 28.—**AUS.**

672 ii. ———.]—An ante-nuptial settlement provided that the husband would forthwith after the celebration of the marriage grant & convey to his wife all the personal & real property which he owned, & that he would further transfer to her within one year other furniture to be selected by her to the value of \$1,500 in all. Nothing was done to carry out the covenants in the marriage settlement for nearly two years, when the husband executed a bill of sale of the furniture:—*Held*: as the furniture had been, since the marriage, in the house occupied by the wife & her husband, the possession must be presumed to have been his & not hers, & there was no change of possession at the marriage.—**BROWN v. PEACE** (1897), 11 Man. L. R. 409.—**CAN.**

672 iii. ———.]—A sale of chattels, consisting of household furniture in their residence, between a married woman & her husband, living & continuing to live together, without a duly registered bill of sale, is void as against creditors, for in such a case there cannot be said to be an actual & continued change of possession open &

own.]—Chattels settled by husband on wife by post-nuptial settlement, & being in a house which is the matrimonial domicile at the date of the husband's bkpcy., are not in the apparent possession of the husband within 1854 Act, though the settlement is not registered under that Act, if the possession is consistent with the trusts of the settlement.—*Re SATTERTHWAITE, Ex p. TRUSTEE* (1895), 2 Mans. 52; 15 R. 242.

Annotations:—**Refd.** *Withers v. Berry* (1895), 39 Sol. Jo. 559. **Mentd.** *Re Reis, Ex p. Clough*, [1904] 1 K. B. 451.

674. ——— Subsequent deed of separation—& lease by wife to husband.]—In 1889 A. conveyed to his wife the house in which they lived & shortly afterwards executed a deed of gift to his wife of the furniture in the house. The deed was registered under 1878 Act, s. 10, but was not re-registered under s. 11. Under a separation deed made in 1892 the wife leased the house & furniture to A. In 1894 part of the furniture was taken in execution to satisfy a judgment debt of A.'s. The wife claimed the furniture so taken in execution:—*Held*: the wife was entitled as she acquired the entire interest in the furniture under the deed of gift, & after the lease A. held as lessee, & the furniture was not in his apparent possession when the execution was levied.—**WITHERS v. BERRY** (1895), 39 Sol. Jo. 559, D. C.

675. Grantor & grantee living in same house.]—In 1893, deft., by an absolute bill of sale, assigned the furniture in the house in which he resided, & of which he was the tenant, to a person who also resided in the same house:—*Held*: it would require cogent evidence to rebut the inference of actual possession by the grantee from the fact that he was living all along in the house in which the goods were, though the grantor lived there also.—**ANTONIADI v. SMITH**, [1901] 2 K. B. 589; 70 L. J. K. B. 869; 85 L. T. 200; 49 W. R. 693; 17

reasonably sufficient to afford public notice thereof as required by Bills of Sale Act.—**HOGABOOM v. GRAYDON** (1891), 26 O. R. 298.—**CAN.**

672 iv. ———.]—Where deft. made a voluntary assignment of all the furniture in his residence to his wife:—*Held*: the assignment was void as a bill of sale by virtue of 1879 Act, s. 8, the chattels comprised in the bill of sale having remained in the possession or apparent possession of the person making such bill of sale.—**SANDERS v. CROSSLEY**, [1919] 2 I. R. 525.—**IR.**

675 i. Grantor & grantee living in same house.]—It was alleged that pltf., who was living with his mother, gave some horses to her for his board, but no price was fixed for them, & they were kept at the house & used by pltf. as before:—*Held*: there was no sufficient change of possession.—**SNARR v. SMITH** (1880), 15 U. C. R. 156.—**CAN.**

675 ii. ——— Grantee clerk of grantor.]—The grantee of a bill of sale of goods, some of which were contained in the building mentioned in the bill of sale, & others in R. Street, was a clerk in the grantor's employment & managed the R. Street store. The grantor lived over the store mentioned in the bill of sale & the grantee lived with them. After the sale the grantor continued to reside in the same place, & for about a fortnight thereafter he assisted in the store & instructed the man hired by the grantee how to run the business. The grantee continued in the R. Street store, but the grantor paid the rent & purchased goods for the business which were charged to him:—*Held*: there was no actual & continued change of possession.—**SVAIGHER v. ROTARU** (1906), 3 W. L. R. 486.—**CAN.**

Sect. 3.—As regards what chattels: Sub-sect. 1, A. & B.]
T. L. R. 643; 45 Sol. Jo. 638; 8 Mans. 335, C. A.

Annotations:—Distd. Hopkins v. Gudgeon, [1906] 1 K. B. 690. **Mentd.** Rogers, Eungblut v. Martin (1910), 103 L. T. 527.

Whether chattels in reputed ownership of bankrupt grantor.]—See BANKRUPTCY & INSOLVENCY, Vol. V., pp. 750–801.

B. Other Cases.

676. Apparent possession question of fact.]—The question of apparent ownership under 1854 Act, s. 7, is a matter of fact for the jury & not one for the judge to decide, & it is no misdirection to leave to them the question of the *bona fides* of the assignment.—**DAVIES v. JONES** (1862), 7 L. T. 130; 10 W. R. 779.

Annotation:—Refd. Re Blenkhorn, *Ex p.* Jay (1874), 31 L. T. 260.

677. Chattels seized by sheriff.]—Goods formally seized by the sheriff under an execution remain

in the apparent possession of debtor within 1854 Act.—**Re COLE, Ex p. MUTTON** (1872), L. R. 14 Eq. 178; 41 L. J. Bcy. 57; 26 L. T. 916; 20 W. R. 882.

Annotations:—Refd. Re James, *Ex p.* Harris (1874), L. R. 19 Eq. 253. **Mentd.** Re Ayshford, *Ex p.* Lovering (1887), 35 W. R. 652; Davis v. Petrie (1905), 93 L. T. 511; Re Craig, *Ex p.* Hinchcliffe, [1916] 2 K. B. 497.

678. — In his visible possession.]—If the goods comprised in an unregistered bill of sale are, at the time of the filing of a bkpcy. petition against the grantor, in the actual visible possession of the sheriff under an execution, issued either by the grantee or by a third party, they are not, even though the grantee has himself taken no possession, in the apparent possession of the grantor, & 1878 Act does not apply.—**Re BRENNER, Ex p. SAFFERY** (1881), 16 Ch. D. 668; 44 L. T. 324; 29 W. R. 749, C. A.

Annotations:—Folld. Re Eales, *Ex p.* Steel (1905), 54 W. R. 202. **Consd.** Sales Agency v. Elite Theatres, [1917] 2 K. B. 164.

679. —.]—E. being indebted to a friend,

PART VI. SECT. 3, SUB-SECT. 1. —B.

k. Definitions—"Apparent possession."]—There is no definition of the term "apparent possession" in Chattels Transfer Act, 1889, but the definition contained in English 1854 Act & Chattels Securities Act, 1880, is a reasonable one.—**SLATTERY (OFFICIAL ASSIGNEE) v. SLATTERY** (1895), 16 N. Z. L. R. 332.—N.Z.

l. — "Actual & continued change of possession."]—"Actual & continued change of possession," which by 55 Vict. c. 26, s. 3, is to be "open & reasonably sufficient to afford public notice thereof," has reference only to the "actual & continued change of possession" mentioned in R. S. O. 1887 (c. 125), ss. 1, 5, & does not refer to possession taken by a mtgee. after default.—**GILLARD v. BOLLERT** (1893), 24 O. R. 147.—CAN.

m. Necessity for actual & continued change of possession.]—K., in possession of premises under a lease for years, assigned his term by way of mtge. to R. K. continued in possession for some time after the assignment, until R. entered:—**Held**: if the mtge. had come within 12 Vict. c. 74 it would have been void, not having been accompanied by immediate & continued possession.—**FRAZER v. LAZIER** (1852), 9 U. C. R. 679.—CAN.

n. —.]—Where household furniture was assigned, but there was no change of possession:—**Held**: notwithstanding registration of the assignment, such furniture did not pass.—**HARRIS & WOODSIDE v. COMMERCIAL BANK OF CANADA** (1858), 16 U. C. R. 437.—CAN.

o. —.]—MAY v. ROUTLEGE (1864), 14 C. P. 534.—CAN.

p. —.]—Where there was no actual & continued change of possession of the goods & chattels mentioned in the bill of sale from debtor to claimant:—**Held**: the bill of sale was invalid.—**MUELLER v. CAMERON** (1905), 2 W. L. R. 524.—CAN.

q. —.]—The ct. dismissed a claim on an alleged sale not complying with Bills of Sale Act, & as to which there had not been actual & continued change of possession.—**DOMINION BANK v. SALMON** (1912), 23 O. W. R. 608; 4 O. W. N. 460.—CAN.

r. —.]—P., in consideration of advances made & to be made agreed to get out & deliver to pltf. 5,000 cords of pulpwood, the wood to be marked with pltf.'s mark, the letter "Q," & to be pltf.'s property immediately it was cut, & to be delivered to pltf. at a

specified place:—**Held**: the contract was in accordance with C. S. 1903 (c. 142).—**QUEBEC FOREST PRODUCTS CO. v. SHANNON** (1919), 46 N. B. R. 294.—CAN.

s. — Mortgage by company.]—Where a mtge. within R. S. O. 1897 (c. 148), ss. 2, 23, was made by a co. & there was no immediate delivery or actual & continued change of possession:—**Held**: it was null & void under s. 5 of the Act.—**NATIONAL TRUST CO. v. TRUSTS & GUARANTEE CO.** (1912), 26 O. L. R. 279.—CAN.

t. — After-acquired chattels.]—Pltf. claimed title under bills of sale containing provisions that made the conveyances applicable to after-acquired property, to property seized in execution. The goods had been ordered by the grantor, after the date of the bills of sale, & nothing had been done by pltf. by way of asserting a right of possession:—**Held**: in the absence of any *novus actus interveniens*, pltf. had not the legal title, & he could not rely on an equitable title.—**O'KELL v. BELL** (1883), 4 R. & G. 419.—CAN.

a. — Timber.]—To make valid against creditors of the vendor a sale of timber to be cut down by him, there must be an actual delivery to the purchaser, after the timber is cut down, followed by an actual & continued change of possession, as in the case of other chattels.—**McMILLAN v. MCSHERRY** (1868), 15 Gr. 133.—CAN.

b. — Bill absolute in form.—In fact given by way of security.]—If the transaction between the bargainor & the bargainee in a bill of sale filed in apparent compliance with R. S. M. c. 10, s. 2, is really a transfer to the latter by way of security only for the repayment of money, & not an absolute sale of the goods & chattels comprised therein, the bill of sale, in the absence of immediate delivery & actual & continued change of possession, will be held void under that sect.—**BODDY v. ASHDOWN** (1897), 11 Man. L. R. 555.—CAN.

c. — — —.]—Although a bill of sale absolute in form is invalid where the transaction is really one of mtge., for not setting forth the true consideration, where there is actual delivery & change of possession, the transaction is not affected.—**MATHESON v. POLLOCK** (1893), 3 B. C. R. 74.—CAN.

d. — Valid consideration.—Absence of fraud.]—Where there was a valid consideration & no fraud:—**Held**: the question of apparent possession or visible change of possession

or merely formal possession did not arise, N. S. Act, in that particular, differing substantially from English & Ontario Acts.—**EASTERN CANADA SAVINGS & LOAN CO. v. CURRY** (1896), 28 N. S. R. 323.—CAN.

e. — Whether grantor remaining in possession evidence of fraud.—Registration of bill.]—When an absolute bill of sale is given, the fact of the grantor continuing in possession, though evidence of fraud, does not necessarily make the transfer void, & it is for the jury to say whether, from all the circumstances, the transaction is *bona fide*, or merely colourable to defeat an execution creditor.

When the bill of sale is registered, one of the circumstances always relied on to show fraud, viz., the secrecy of the transaction, is wanting.—**SHIRREFF v. MCKEEN** (1883), 23 N. B. R. 184.—CAN.

f. — —.]—The due registration of a bill of sale prevents the inference of fraud being drawn from the retention of possession of the goods by the bargainor.—**BELANGER v. MENARD** (1896), 27 O. R. 209.—CAN.

g. — —.]—By a mtge. the mtgor. was to continue in possession, selling the goods, & accounting to the mtgee. for the proceeds on demand:—**Held**: not to afford *per se* any evidence of fraud.—**ROSS v. CONGER** (1857), 14 U. C. R. 525.—CAN.

h. — —.]—A bill of sale to pltf. purported on its face to be an absolute transfer, with a right to immediate possession, but it was referred to in the affidavit as a bill of sale, & there was an understanding, not reduced to writing, that the grantor should get the property back on payment of the amount secured. After the filing of the bill of sale, the property was allowed to remain in the possession of the grantor:—**Held**: the fact of the property remaining in the possession of the grantor was not a fraud in itself, but a matter for the consideration of the judge, & he having found that the amount named as the consideration was due from the grantor to the grantee, & that the transaction was not tainted with fraud, & the amount of property transferred not being excessive, there was no reason for disturbing his finding.—**FRASER v. MURRAY** (1901), 31 N. S. R. 186.—CAN.

676 i. Apparent possession question of fact.]—It is not a question of law, but for the decision of a jury, in all the circumstances, whether there has been a sufficient immediate & continued change of possession.—**WALDIE v. GRANGE** (1859), 8 C. P. 431.—CAN.

transferred her furniture in satisfaction of the loan, by documents which constituted an absolute bill of sale. Subsequently the sheriff seized the goods in execution, & was actually in possession when E. filed her own petition. The trustee in bkpcy. claimed the furniture:—*Held*: the bill of sale could not be avoided, because at the date when E. filed her petition the goods were not in her apparent possession, but in the possession of the sheriff.—*Re EALES, Ex p. STEEL* (1905), 54 W. R. 202; 50 Sol. Jo. 60, D. C.

Annotation:—*Consd. Sales Agency v. Elite Theatres*, [1917] 2 K. B. 164.

680. —.—.]—An absolute bill of sale was made on May 15, 1915, & on May 18 the chattels comprised therein were seized in execution by the sheriff. The bill of sale was not registered at any time. The county ct. judge found as a fact that the chattels were in the apparent possession of the grantor of the bill of sale. On appeal to the Div. Ct. it was contended that the seizure of the chattels in execution prevented them being in the apparent possession of the grantor of the bill of sale, but the Div. Ct. decided that, notwithstanding the execution, the chattels comprised in the bill of sale were in the apparent possession of the grantor, & the bill of sale, being unregistered, was void against the execution creditor:—*Held*: there being evidence on which the county ct. judge could find as a fact that the chattels were in the apparent possession of the grantor, his finding could not be disturbed.—*SALES AGENCY, LTD. v. ELITE THEATRES*, [1917] 2 K. B. 164; 86 L. J. K. B. 1060; 117 L. T. 8; [1917] H. B. R. 163, C. A.

Annotation:—*Mentd. Gonsky v. Durrell*, [1918] 2 K. B. 71.

681. Chattels in hands of police—Taken from grantor on arrest.—A., being in custody upon a criminal charge, executed a bill of sale of certain jewels, of which the police inspector had taken possession. The bill of sale was never registered. A. having been subsequently adjudicated bkpt., the trustee under an order of the ct. obtained

possession of the jewels from the police inspector:—*Held*: the bill of sale was void for want of registration as against the claim of the trustee, who was entitled to the jewels as being in the apparent possession of the grantor at the date of the adjudication.—*Re WOOD, Ex p. NEWSHAM* (1879), 40 L. T. 104.

682. Chattels handed to auctioneer—For sale.—P., a trader, being in want of capital sold to plffs. certain agricultural machinery, including a steam engine & thrashing machine, with their appurtenances, for £700, & signed a sale or receipt note for same. Plffs. thereupon, by an agreement in writing, let the machinery on hire to P. for a term of three years at or for £882, payable by quarterly instalments of £73 10s., & the agreement provided that in case of default being made by P. in payment of the £882 or the quarterly instalments or any part thereof, or if P. during the term became bkpt., or assigned, or parted with possession of the machinery or any part thereof, without the consent of plffs., it should be lawful for them to resume & take absolute possession of the machinery. Neither the sale note nor the agreement was registered under 1854 Act, & P. paid two instalments of £73 10s. due under the agreement & no more. P., without the consent or knowledge of plffs., & after he had made default in payment of the instalments, parted with the possession of the steam engine & thrashing machine, with their appurtenances, & delivered same to deft., who had no notice of the above agreement, for the purpose of having them sold by auction, & deft. advanced £100 to P. on them, & also incurred expenses in attempting to sell them. P. then committed an act of bkpcy. by absconding, & plffs. demanded possession of the steam engine & thrashing machine, with their appurtenances, from deft., who claimed a lien upon them in respect of his commission & charges as auctioneer in such attempted sale, & also in respect of the advance of £100 which had not been repaid to him by P.

k. —.— *What jury must consider.*—In considering whether a sufficient change of possession has taken place, regard must be had to the nature & purposes of the assignment, & the circumstances of the case. When an assignment is made by a merchant for the benefit of his creditors, it is not to be expected that the assignee should remove the goods or take exclusive possession, as in the case of an ordinary sale, & the assignor may continue upon the premises & assist in disposing of the goods, without vitiating the assignment in law, but it is a fact for the jury as evidence to show that the transfer was colourable.—*MAULSON v. COMMERCIAL BANK* (1859), 17 U. C. R. 30.—CAN.

— *What amounts to change of possession.*—See Sect. 3, sub-sect. 1, A., ante.

l. —.— *Whether finding of jury inconsistent.*—P. under an unregistered bill of sale put a bailiff in possession of A.'s goods, & shortly afterwards A. became a bkpt. The goods were claimed by the Official Assignee, & the issue was tried by a jury, one question put to them being whether the goods at the commencement of the bkpcy. were in the apparent possession of A., which they answered: "Apparent, but in the actual possession of P." It was contended that that was an inconsistent finding:—*Held*: the finding of the jury was not inconsistent, & it was impossible to say that the jury were wrong.—*Re ANDERSON* (1890), 11 N. S. W. L. R. 51.—AUS.

m. *Chattels in hands of bailee.*—Where the grantor of an unregistered

bill of sale becomes bkpt., & a chattel comprised in the bill of sale is, at the date of the act of bkpcy. to which the bkpcy. relates back, in the actual possession neither of the grantor nor of the grantee, but of some third person, then, if such third person be the simple bailee of the grantor, such as a bailee for safe custody, such possession is constructively the possession of the grantor, & the chattel will be deemed to be in the apparent possession of the grantor within Chattels Transfer Act, 1889, s. 25, but otherwise if the bailee be a pledgee of the grantor, & the fact that the grantor had no right, as against the grantee of the bill of sale, to make such a pledge will for this purpose make no difference.—*SOUTH PACIFIC LOAN & INVESTMENT CO. v. WRIGHT'S OFFICIAL ASSIGNEE* (1898), 17 N. Z. L. R. 492.—N.Z.

n. *Mortgaged stock in possession of mortgagor.*—*Semble*: Instruments & Securities Act enacting that the possession of the mortgaged stock by the mtgor. shall be to all intents & purposes in law the possession of the mtgee., notwithstanding the subsequent insolvency of the mtgor. is restricted to the case of the insolvency of the mtgor.—*CAVE v. BEVERIDGE* (1877), 3 V. L. R. 302.—AUS.

682 i. Chattels handed to auctioneer—For sale.—B., a dry goods dealer, consigned his stock-in-trade to S. & Co., auctioneers, for sale, the proceeds to be applied in payment of \$800 advanced to B. by S. & Co., & of \$250 advanced by M. & Co. After the goods had reached the warehouse of S. & Co. B. gave other orders on the

proceeds, which they accepted conditionally:—*Held*: the consignment to S. & Co. was as complete & continuous a change of possession as in the circumstances it was possible to effect, & no necessity existed under Chattel Mortgage Act for registering the orders.—*MCMASTER v. GARLAND* (1883), 31 C. P. 320; 8 A. R. 1.—CAN.

o. *Effect of grantee taking actual possession—Bankruptcy of grantor.*—Where the goods are not in the apparent possession of bkpt. the bkpcy. of mtgor. does not avoid an unregistered bill of sale.—*POWELL v. HARCOURT* (1884), 2 N. Z. L. R. C. A. 303.—N.Z.

p. —.— *Of part only of chattels.*—*Held*: although the deed, for want of registration, could have no effect with respect to the furniture, of which there had been no sufficient change of possession, yet it was not thereby avoided as to those goods which went into & remained in possession of the assignees.—*TAYLOR v. WHITTEMORE* (1853), 10 U. C. R. 440.—CAN.

q. —.—.]—*Qu.*: whether, when as to part only of the goods assigned there has been no change of possession, the assignment, unless filed, is void altogether.—*OLMSTEAD v. SMITH* (1858), 15 U. C. R. 421.—CAN.

r. —.—.]—An assignee should succeed as to any part of the goods of which there has been a change of possession, though as to the rest the assignment may be void for want of registration.—*FEEHAN v. BANK OF TORONTO* (1860), 10 C. P. 32.—CAN.

— *As against execution creditor.*—See cases in Sect. 2, ante.

Sect. 3.—As regards what chattels: Sub-sect. 1, B.; sub-sect. 2, A.]

In an action to recover the steam engine & machinery, with their appurtenances or their value & damages for their detention:—*Held*: plffs. were entitled to judgment, on the ground that the steam engine & machinery, whether the agreement amounted to a bill of sale or not, were not in the possession or apparent possession of P. at the time of his bkpcy., within 1854 Act, s. 1.—*LINCOLN WAGGON & ENGINE CO. v. MUMFORD* (1879), 41 L. T. 655.

683. Chattels let by grantor—Grantee receiving part of rent.]—The mtgor. of a house & furniture let same to a tenant for six months with the consent of the mtgee. to whom, by arrangement between the parties, a certain portion of the rent was paid. The mtge. deed was not registered as a bill of sale. The mtgor. having become bkpt., the mtgee., at the termination of the six months' tenancy, took possession of the furniture & goods in the house, & claimed to retain them as against the trustee in the liquidation:—*Held*: inasmuch as the furniture & goods comprised in the mtge. deed were not used & enjoyed by bkpt. so as to be in his apparent possession within 1854 Act, the mtgee. was entitled to retain them.—*Re WESTRAY, Ex p. MORRISON* (1880), 42 L. T. 158; 28 W. R. 524.

684. Bill given by grantee—Chattels in possession of original grantor.]—The grantee of a bill of sale assigned the goods, which were in the original grantor's possession, by an absolute bill of sale:—*Held*: the goods were not in the apparent possession of the grantee of the first bill of sale.—*HALL v. SMITH* (1887), 3 T. L. R. 805, C. A.

685. Chattels removed to house of grantor's son—Where grantor lived.]—A voluntary post-nuptial settlement of furniture made by bkpt. for the benefit of his wife, himself, & the children of the marriage was registered as a bill of sale under 1854 Act, but was not registered in accordance with 1866 Act, s. 4. Bkpt. resided in a house taken by his son, to which the furniture comprised in the bill of sale had been removed. After the

passing of 1878 Act, the deed was twice registered:—*Held*: the furniture was in the actual or apparent possession of bkpt. at the date of the filing of the petition, & as the bill of sale could not be effectually registered under 1878 Act, it was void as against the trustee in bkpcy. as regarded the chattels comprised in it.—*Re EMERY, Ex p. CHIEF OFFICIAL RECEIVER* (1888), 21 Q. B. D. 405; 37 W. R. 21; 4 T. L. R. 701, C. A.
Annotation:—*Mentd. Re Parsons & Furber* (1893), 62 L. J. Q. B. 365.

SUB-SECT. 2.—CHATTELS OF WHICH GRANTOR IS NOT TRUE OWNER.

A. After-acquired Chattels.

See 1882 Act, ss. 5, 6.

Whether bill avoided by inclusion of after-acquired chattels.]—See Part V., Sect. 2, sub-sect. 4, ante.

686. Whether included in bill.]—An assignment, by way of mtge., from a lessee to his lessor of furniture & stock-in-trade in, about, upon, & belonging to an inn, with power, upon non-payment, to enter into, possess, hold, & enjoy the inn for the residue of the assignor's term therein, & "to take, possess, hold, & enjoy all the goods, chattels, effects, & premises," passes nothing but what was in, upon, or about the inn at the time of the assignment. *Semble*: it would be otherwise if power had been given to enter upon default, & take the goods, chattels, & effects then in, upon, or about the inn (*TINDALL, C.J.*).—*TAPFIELD v. HILLMAN* (1843), 6 Man. & G. 245; 6 Scott, N. R. 967; 12 L. J. C. P. 311; 7 Jur. 771; 134 E. R. 883.

687. —.]—A., by bill of sale, in 1843, in consideration of £518, absolutely assigned to B. all & every the goods & furniture, etc., which then were, or which at any time during the continuance of the security, should be in, about, or belonging to the dwelling-house of A. at N. Then followed a proviso: "in case A. shall cause to be paid to B. the £518 on Jan. 1, 1845, or at such earlier time as B. shall appoint by notice in writing to A., ten

PART VI. SECT. 3, SUB-SECT. 2.

686 i. Whether included in bill.]—At law, a bill of sale cannot pass the property in goods which are not in existence, or which do not belong to the grantor at the time the deed is given, though in equity such a contract would operate to transfer to the vendee the beneficial interest in the property as soon as it was required by the grantor, & the grantee might enforce specific performance of the contract.—*LLOYD v. EUROPEAN & NORTH AMERICAN RY. CO.* (1879), 2 P. & B. 194.—*CAN.*

686 ii. —.]—Although the rule at law is, that an instrument, intended either to assign or charge chattels of which the assignor has not the possession, is imperfect without some subsequent act of the assignor, the same is not the case in equity, neither does it prevail in insolvency proceedings.

Circumstances in which:—*Held*: mtgee. entitled to after-acquired property, as against the assignee in insolvency.—*Re THIRKELL, PERRIN v. WOOD* (1874), 21 Gr. 492.—*CAN.*

686 iii. —.]—A bill of sale recited that pltf. had furnished W. with a stock of goods to commence business with, on which W. still owed pltf. \$14,987, that W. desired pltf. to continue to supply him with goods from time to time, & that W. as well to secure payment of that sum, as also of all further sums which he might owe pltf. for future supplies of goods

had agreed to execute an assignment to pltf. by way of mtge. of his present stock-in-trade, goods, etc., & also all such goods & merchandise as he might afterwards purchase or receive into his stock in the store described. The bill of sale then conveyed to pltf. all W.'s stock-in-trade, etc., with authority upon default in payment, after demand, to enter W.'s store & seize, etc.:—*Held*: the deed showed an intention to convey the after-acquired property to pltf. & not merely to give him a licence to enter & seize it in default of payment by W., & on such default, the equitable right to such goods vested in pltf., & a ct. of equity would enforce performance of the agreement.—*VASSIE v. VASSIE* (1882), 22 N. B. R. 76.—*CAN.*

686 iv. —.]—A chattel mtge. conveyed to pltf. the stock-in-trade of mtgor., which purported to be enumerated in a schedule & was described as being on certain named premises. The schedule after setting out the goods proceeded: "& all goods which at any time may be owned by mtgor. & kept in the store for sale & whether now in stock or hereafter to be purchased & placed in stock":—*Held*: after-acquired stock brought into the business in the ordinary course thereof, became subject to the chattel mtge. as against execution creditors of the mtgor., notwithstanding their writs were in the hands of the sheriff at the time when such stock was brought into the

business, the equitable right of the mtgee. under such agreement attaching immediately on the goods reaching the premises.—*COYNE v. LEE* (1887), 14 A. R. 503.—*CAN.*

686 v. —.]—F., the husband of pltf., in 1895 gave to C. a chattel mtge. upon a livery stable stock described as eight horses & harnesses now in livery stable owned by F., six waggons in storehouse, four pungs, coach harness, buffaloes, & robes now in stable, & upon property which might be substituted for or added to such stock. In Mar., 1886, F. gave pltf. a chattel mtge., in which the property conveyed was described in almost the same words as in the mtge. to C., but the schedule, after enumerating specifically a number of articles, concluded as follows: "Also all other goods now or hereafter during the continuance of these presents used in connection with the livery stable, & all property hereafter acquired therein." In July, 1886, C. assigned his mtge. to deft. but the assignment was silent as to the after-acquired property:—*Held*: (1) the mtge. to pltf. was sufficient to cover after-acquired property; (2) the mtge. to C. & the assignment thereof to deft. were insufficient to cover after-acquired property.—*FRASER v. MACPHERSON* (1899), 34 N. B. R. 417.—*CAN.*

686 vi. —.]—A bill of sale by an unmarried woman assigned all present & after-acquired property that might

days before the time in such notice appointed for payment, & shall, in the meantime, pay to B. interest thereon half-yearly, then these presents, etc., shall be absolutely void." A. remained in possession for a year, & then, in Jan., 1884, gave formal possession to B. of all the goods then on his premises. No notice in writing was given to A. requiring payment of the principal & interest:—*Held*: this was a present conveyance, by which the property of all goods on the premises, at the time of its execution, passed to B., but goods brought upon the premises by A. after the execution of the bill of sale did not pass under it.—*GALE v. BURNELL* (1845), 7 Q. B. 850; 14 L. J. Q. B. 340; 10 Jur. 198; 115 E. R. 708.

Annotations:—*Appld. Re Nash & Chappell* (1852), 18 L. T. O. S. 335. *Consd. Baker v. Gray* (1856), 17 C. B. 462.

688. —.]—When on the face of an assignment of personalty it is plain that it was intended to operate as a continuing security, & to apply to property afterwards acquired, & substituted for that which was originally assigned, it will, if the words are capable of such a construction, be so applied; & where in such a case the deed was found capable of such a construction, although rather in the indirect form of a power of attorney than in the way of direct conveyance, it was construed to extend to stock & growing crops on a farm not occupied by the assignor at the time of the execution of the deed.—*CARR v. ALLATT (EXORS. OF TWEEDALE), ALLATT (EXORS. OF TWEEDALE) v. CARR* (1858), 27 L. J. Ex. 385; 6 W. R. 578.

Annotations:—*Consd. Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345. *Reid. Chidell v. Galsworthy* (1859), 6 C. B. N. S. 471. *Mentd. Brown v. Bateman* (1867), L. R. 2 C. P. 272.

689. —.]—Although after-acquired chattels may be assigned in equity, & a contract to assign may in equity operate as an actual assignment, yet in order that a mere contract may amount to an actual assignment, it must purport to confer an interest in the future chattels immediately by its own force, & without the necessity of any further act on the part of the assignee upon the future

chattels coming into existence, & an assignment of existing chattels, coupled with words which amount to a mere licence to seize after-acquired property, will not be construed as an equitable assignment of the latter.

The lessee of a brickfield executed to G. a bill of sale of the bricks, plant, etc., then in & upon the premises, to secure £3,000 with interest, to be repaid on a specified day, with a proviso that the lessee should have the use & enjoyment until default, or the expiration of one day after notice in writing by G. requiring possession should be given, & the bill contained a power of entry & sale, & the lessee gave & granted to G., his exors., administrators & assigns, or his or their agents or servants, licence at all times during the continuance of the security to enter on the premises, & there remain, & seize & hold possession of the property then on the premises, as if same formed part of the chattels thereby assigned. The lessee subsequently executed other bills of sale to R. in a similar form. G., who assisted the lessee in the management of his business, deposited his bill of sale & the papers relating to the brickfield with his private bankers by way of equitable mtge. Subsequently the lessee fell into difficulties & R. took possession, & shortly afterwards, G. having become bkpt., the assignee in bkpcy. of G. also took possession by the messenger & refused to withdraw. The bankers had omitted to give notice to the lessee, who swore that he was not, until G.'s bkpcy., aware of the deposit having been made:—*Held*: the bill of sale to G. operated as an assignment only of the property then on the brickfield, with a licence to seize future property.

A receiver having been appointed & put into possession by the Ct. of Ch., & the exercise of the licences to seize having been thus prevented: *Semble*: the rights of the mtgees. in reference to after-acquired property must be determined by reference to what they might have done under their powers to seize at the time when the ct. interfered.—*REEVE v. WHITMORE, MARTIN v. WHITMORE* (1863), 4 De G. J. & Sm. 1; 3 New Rep.

be brought upon the premises & contained a license to seize & sell such property:—*Held*: as the bill of sale not only contained a license to seize after-acquired property, but absolutely assigned it, the mtgee. had an equitable interest in such property as soon as it was brought upon the premises, which was not destroyed by the subsequent marriage of the grantor.—*WEBB v. NATIONAL BANK OF NEW ZEALAND*, 3 J. R. N. S. 114.—*N.Z.*

686 vii. —.]—Where the stock-in-trade of a business was mortgaged as security for a loan, & a list of the specific articles of which it consisted was attached to the mtge. deed:—*Held*: the mtge. did not include stock acquired after the date of the mtge. to replace that which had been sold.—*ANDERSON v. BANK OF UPPER INDIA, LTD.* (1915), 1 L. R. 37 All. 390.—*IND.*

686 viii. —.]—In consideration of past & future advances, on account current, by a bank to S. & Co., linen manufacturers, the latter by deed assigned absolutely to the former, subject to a proviso for defeasance on repayment, liens which the mtgors. had placed in the possession of B. & Co. for the purpose of being bleached, the latter parties by the same deed covenanting & declaring that they would hold the goods, or other goods to be substituted therefor, from time to time, with the concurrence of the bank, for the bank, & that if the bank should at any time sanction their parting with goods, they would retain & hold goods of a certain value, & that

they would keep an account of such goods, substituted or otherwise, & that it should at all times be lawful for the bank to enter on their premises & take the goods subject to the deed, it being provided that on default of payment by S. & Co. the bank should have power to sell the goods, & S. & Co. covenanting with the bank to do whatever might be expedient or necessary for the purpose of perfecting the title of the bank to the goods:—*Held*: the deed created a valid mtge. of the future-acquired goods.—*MERCHANT BANKING CO. OF LONDON v. SPOTTEN* (1877), 11 L. R. Eq. 586; 11 L. T. 153.—*IR.*

686 ix. —.]—The B. & O. Railway Co., by indenture dated Mar. 7, 1854, hypothecated, mortgaged, & pledged unto the municipalities of Lanark & Renfrew, Elizabethtown, & Brockville, to secure loans obtained from them, the lands, roads, depots, wharves, stations, terminal & otherwise, tolls, revenues, & all other property of the co. now or during the existence of the mtge. to be acquired. 20 Vict. c. 144, s. 5, recited these loans & declared the mtges. valid; that the intended railway & all stations, buildings, carriages, engines, & other property belonging to the municipalities according to the terms of the mtges.; & that Chattel Mortgage Act should not apply to them. A quantity of iron was purchased for the railway, the vendors stipulating "these rails to be laid down upon the B. & O. Railway Co. of

Canada," to which the vendees, by their agent, assented. The iron was shipped to the vendees, who indorsed the bills of lading to the municipality of Lanark & Renfrew, who paid the shipping charges & freight out of moneys which formed part of the advances secured by the mtge. of Mar. 7, 1854, & the municipality having the iron in their possession at Brockville ready to be placed on the railway, it was seized under an execution against the railway co.:—*Held*: (1) as the mtges. covered chattel as well as real property, the words "other property" in them were not restricted to real property, for the Act placed a legislative & different construction on the mtge.; (2) under the indorsement of the bill of lading to the municipality, who obtained possession of the iron by such indorsement, together with the stipulation of the vendors, & the assent thereto of the vendees, plffs. acquired the possession & the property in the said iron, & it became a part of the property mortgaged.—*LANARK & RENFREW CORPN. v. CAMERON* (1859), 9 C. P. 109.—*CAN.*

686 x. — *Duty of grantee to identify.* —]—Where a bill of sale is given with respect to goods to be acquired in future, the grantee is bound to identify such goods, otherwise the bill of sale will not attach to them.—*WINTER v. GAULT BROTHERS LTD.* (1913), 18 B. C. R. 487; 49 S. O. R. 541; 25 W. L. R. 219; 13 D. L. R. 281.—*CAN.*

Sect. 3.—As regards what chattels: Sub-sect. 2, A

15; 33 L. J. Ch. 63; 9 L. T. 311; 9 Jur. N. S. 1214; 12 W. R. 113; 46 E. R. 814, L. C.

Annotations:—*Appld.* Brown v. Bateman (1867), 1 L. R. 2 C. P. 272. *Consd.* Cole v. Kernot, Thompson v. Cohen (1872), 41 L. J. Q. B. 221. *Distd.* Leatham v. Amor (1878), 47 L. J. Q. B. 581; Reeves v. Barlow (1884), 12 Q. B. D. 436. *Consd.* *Re* Lind, Industrials Finance Syndicate v. Lind, [1915] 2 Ch. 345. *Refd.* *Re* Waugh, *Ex p.* Dickin (1876), 4 Ch. D. 527, n.; Church v. Sage (1892), 5 R. 140.

690. —.]—Pltf., a contractor for carrying the mails from A., in Essex, to B., in Suffolk, & back, owing £30 to deft., executed in Oct., 1871, a bill of sale as a security for the debt, whereby he granted to deft. "all & every the household furniture, plate, linen, china, books, live & dead stock, horses, & other cattle, carts & carriages, corn & hay, & all other the goods, chattels, personal estate & effects, whatsoever & wheresoever, of him pltf., & which now or at any time hereafter, may be in, about, or upon the dwelling-house & premises of pltf., at A. aforesaid, or elsewhere, with a proviso making void the indenture on payment by pltf. of the principal & interest on a day therein mentioned. It was provided that in default in payment of the principal & interest at the time therein mentioned, deft. should, & might, enter upon the messuage & premises of pltf., where any of his goods, chattels, & personal estate were deposited, & take possession of same, & for that purpose, if necessary, to break open any doors or other obstructions, & sell & dispose of the goods & effects, & receive the money arising from the sale thereof, & apply same in manner in the said bill of sale mentioned. On May 18, 1875, pltf. drove the mail cart from A. to B., as usual, & put up his horse & cart at the inn stables there, where also was standing at the time a second horse belonging to him, two horses being necessary for working the mail. He then went away on business, & during his absence deft. came to the stables &

seized & carried away pltf.'s two horses, & afterwards sold them, & applied the proceeds in payment of £13 9s. 4d., balance of pltf.'s debt of £30, which then remained due under the bill of sale. In an action of trespass by pltf. against deft. for so seizing his horses:—*Held*: there must be a verdict for pltf. for £30, the value as found by the jury, of the horses seized, as there was not in the bill of sale any assignment of future property nor any assignment of property "elsewhere" than on pltf.'s premises.—*GREENBIRT v. SMEE* (1876), 35 L. T. 168.

691. — **Ratification by grantor.**—]—A deed of bargain & sale cannot pass the property in goods which do not belong to the grantor at the time of the execution of the deed, unless there be some new act done by the grantor, after he acquires the property, indicating his intention that such subsequently acquired property should so pass.—*LUNN v. THORNTON* (1845), 1 C. B. 379; 14 L. J. C. P. 161; 4 L. T. O. S. 417; 9 Jur. 350; 135 E. R. 587.

Annotations:—*Foll.* Gale v. Burnell (1845), 10 Jur. 198. *Consd.* Hope v. Hayley (1856), 5 E. & B. 830. *Expld.* Chidell v. Galsworthy (1859), 6 C. B. N. S. 471. The decision in *Lunn v. Thornton* is founded on the maxim *Nemo dat qui non habet* (WILLES, J.). *Expld. & Distd.* Edmonds v. Best (1862), 7 L. T. 279. In *Lunn v. Thornton* the grant was general; here it was specific, & he is estopped from saying, it was not mine when I gave it to you (BRAMWELL, B.). *Consd.* Holroyd v. Marshal (1862), 10 H. L. Cas. 191. *Refd.* Price v. Groom (1848), 2 Exch. 542; Congreve v. Evetts (1854), 10 Exch. 298; *Re* Harcourt, Danby v. Tucker (1883), 31 W. R. 578; Joseph v. Lyons (1884), 51 L. J. Q. B. 1. *Mentd.* Flory v. Denny (1852), 7 Exch. 581; Carr v. Allatt, Allatt v. Carr (1858), 27 L. J. Ex. 385; Martin v. Reid (1862), 11 C. B. N. S. 730; Cochrane v. Moore (1890), 25 Q. B. D. 57.

692. — **Possession taken by grantee.**—]—Where a bill of sale not only made over existing stock, but gave the grantee power to enter, take possession of, & sell after-acquired property, & the grantee did enter & take possession of after-acquired

692 i. — **Possession taken by grantee.**—]—By indenture of Apr. 17, 1860, D. assigned the live stock on a station & his interest in the station to A., B. & C. in mtge. to secure a loan & repayment on Aug. 11, 1860. He covenanted that on default it should be lawful for the mtgees. "at any time or times to seize & take possession of" all the live stock for the time being found in the station & "absolutely to sell & dispose of" what should be so taken possession of "whether hereinbefore assigned or hereby authorised to be seized." He also covenanted for further assurance of the live stock "so expressed to be hereby respectively assigned," & the chattels "hereby authorised to be seized & sold," & he agreed that any added or substituted live stock thereafter depasturing or used upon the station during the continuance of the security should be "deemed to be included in this security & to be hereby assigned." Default was made, & subsequently in Oct., 1860, the mtgor. bought 350 head of cattle & put them on the station. On May 18, 1861, the mtgees. entered on the station & took possession of all the live stock, including the 350 cattle added after default. No assignment of the 350 cattle was ever made to the mtgees. or required by them:—*Held*: the seizure completely divested the title of the mtgor. & rendered that of the mtgees. valid as against all the world.—*GOODMAN v. POWER* (1861), 1 W. & W. 96.—**AUS.**

692 ii. —.]—M., the lessee of a hotel, gave a bill of sale over his furniture in the hotel, & all after-acquired furniture, goods, & chattels which might be brought upon the premises, to S. Subsequently a co., to enable M. to sell beer on the "quick

lunch" system put up fittings in the hotel, & took from M. a bill of sale over them, which bill of sale was not registered. M. disposed of his lease to B., & S., exercising his power under his registered bill of sale, & with the approval of M., assigned all the furniture, etc., to B. The co. sued B., who claimed that the fittings passed to S. under the after-acquired property clause of the bill of sale:—*Held*: S. had never acquired any title to the fittings.—*BANNAN v. SWAN BREWERY CO.* (1909), 11 W. A. L. R. 15.—**AUS.**

692 iii. —.]—R. in writing agreed to sell his business & stock-in-trade to his sons, & it was provided that all the existing stock was to remain his property until it was paid for, that all after-acquired property brought in by way of substitution for existing stock was to become his property by way of security for the purchase-money, & that on default he should have the right to re-enter & take possession. Afterwards, default having been made, he took possession & began selling off by auction:—*Held*: in an action by the assignee & creditors of the sons to restrain the sale, the legal operation of the instrument of sale was to confer upon the vendor an equitable title in the stock to be afterwards acquired, & to give him the right to take possession for default in payment.—*BANKS v. ROBINSON* (1888), 15 O. R. 618.—**CAN.**

692 iv. —.]—Pltf., in 1898, agreed to supply M. & S., dry goods dealers, with goods under an agreement in writing that such goods should remain pltf.'s property, & that, should pltf. at any time consider that the business of M. & S. was not being conducted in a proper way or to pltf.'s

satisfaction, pltf. should be "at liberty to take possession of our stock, book debts, & other assets, & dispose of same, & after payment in full of any amount then owing to you by us, whether due or to become due, the balance of the proceeds shall be handed to us." Goods were supplied from time to time under the agreement. In 1905, the business not being conducted to pltf.'s satisfaction, & M. & S. being insolvent, pltf. entered the store by force & took possession of all the stock & effects on the premises, & of the books of account:—*Held*: as to goods supplied by pltf., the property therein did not pass to M. & S.—*GAULT BROTHERS CO. v. MORRELL* (1907), 3 N. B. Eq. Rep. 453; 2 E. L. R. 501.—**CAN.**

692 v. —.]—If an assignment of chattels contains a power or licence to seize after-acquired property, & the authority is duly pursued, the seizure by the assignee perfects his title to the after-acquired chattels.—*BATHGATE v. BANK OF OTAGO*, Mac. 914.—**N.Z.**

692 vi. —.]—*DRIVER v. PITT*, p. 123, *post.*—**N.Z.**

692 vii. —.]—A bill of sale executed by a trader contained an assignment of property mentioned & specified in the schedule, but not of after-acquired property. It also contained a power to enter on default & take possession of "all & singular the property & things hereby assigned or intended so to be, or which shall then be in the possession of or belonging to mtgor., & whether in possession or not, & to sell & dispose of them, etc." The mtgee. having seized goods which had been brought upon the premises after the date of the deed:—*Held*:

property:—*Held*: that possession was good against a judgment creditor, & goods so taken possession of passed to the grantee of the bill of sale.—*CHIDELL v. GALSWORTHY* (1859), 6 C. B. N. S. 471; 33 L. T. O. S. 94; 141 E. R. 541.

See, also, Nos. 700, 701, post.

693. — **No possession taken by grantee before act of bankruptcy.]**—In 1852 traders mortgaged to pltf. their machinery, stock-in-trade, etc., present & future. In Jan., 1855, they made an invalid assignment of all their effects to trustees for the benefit of creditors. Pltf. having afterwards sold without notice of an act of bkpcy. all the property of bkpts., including that specified in his mtge. deed as well as after-acquired property:—*Held*: he was entitled to that property only which was specified in his own mtge. deed.—**CARR v. ACRAMAN** (1856), 11 Exch. 566; 25 L. J. Ex. 90; 156 E. R. 956.

694. — Whether description sufficiently specific.]—The tenant for years of a farm, being indebted to his landlord, assigned to him, by deed, all his household goods, live stock, hay, & corn, as well as in stock as then growing upon the farm, utensils & implements of husbandry, & also all his tenant-right & interest yet to come & unexpired in & to the farm & premises, to hold the

(1) the intention of the deed was to assign only such property as was mentioned in the deed & schedule; (2) power was given to seize all property in the possession of the mtgor. at the time of the seizure; (3) the power to seize having been executed by the seizure, the mtgee. thereby obtained a title to the goods not mentioned in the schedule, although they did not pass by the deed. — MATSON v. CRAIG, 3 J. R. N. S. 33. —N.Z.

694 i. — *Whether description sufficiently specific.*—*Held*: the terms of the agreement were not sufficiently comprehensive to cover the substituted, renewed, or added stock-in-trade.—**KITCHING v. HICKS** (1884), 6 O. R. 739.—**CAN.**

694 ii. ———.]—*Held*: the mtge. could not pass after-acquired goods, for after-acquired goods might be affected in equity, only when the mtge. showed an intention to do so.—**MASON v. MACDONALD** (1875), 25 C. P. 435.—**CAN.**

694 iii. ———.]—A description in a chattel mtgo. of after-acquired goods as "all other ready-made clothing, tweeds, trimmings, gents' furnishings, furniture & fixtures & personal property, which shall at any time during the currency of this mtgo. be brought in or upon the premises or in or upon any other premises in which mtgor. may be carrying on business," is sufficient, & binds goods of the kinds mentioned in premises to which mtgor. moves after making the mtgo.—*Housfall v. Boisseau* (1894), 21 A. R. 663.—CAN.

694 iv. ——— *Chattels at place of business & private residence.*—G., a chemist carrying on business at R. Street, gave a bill of sale to plffs., to secure repayment of £500 & further advances to be made by them in money or goods in connection with his business. The bill of sale comprised all & singular the stocks of chemicals, drugs, etc., & all other the stock-in-trade of G., in the trade or business of a chemist & druggist, or any other business which then was or which might thereafter be carried on by G., household furniture, effects & things then in, about, or belonging to the shop & premises of G. at R. Street, & all book debts, etc., & all other property whatsoever of G., wheresoever situated, which might at any time during the continuance of the security, be acquired by him, & whother

goods, cattle, chattels, tenant-right, effects, & things to the landlord, in trust to sell, & thereout to pay the debt, & to pay over the surplus to the tenant, & the tenant thereby granted to the landlord license & authority at any time to enter upon the farm, & take, carry away, & sell the goods, etc., thereby assigned :—*Held* : under that assignment the tenant's interest in crops grown in future years of the term passed to the landlord.—*PETCH v. TUTIN* (1846), 15 M. & W. 110 ; 15 L. J. Ex. 280 ; 153 E. R. 782.

Annotations.—**Consd.** Allatt v. Carr & Scholfield (1858), 6 W. R. 578. **Mentd.** Flory v. Denny (1852), 7 Exch. 581; Congreve v. Evetts (1854), 10 Exch. 298.

695. ———.]—T. was the owner of certain machinery in a mill ; it was purchased by H., but not removed, & T. continued in possession. T. executed a deed, which was duly registered, by which it was declared that the machinery was the property of H., that T. desired to repurchase it for £5,000, but had not the money to pay for it, wherefore it was conveyed to B. in trust when T. should pay the money to transfer it to him, & if he did not pay the money to hold it absolutely for H. The deed contained a covenant by T. to insure the machinery, & another covenant that all the machinery which, during the continuance of

same were used in addition to, substitution for, or in connection with the premises thereby assigned, or expressed & intended so to be, or otherwise. It was expressly agreed by the bill of sale that the security should extend to & comprise, not only the mortgaged property therein before particularly set out, but also all further businesses, leases, goodwills, etc., & all other property whatsoever which G. might thereafter acquire or become possessed of, or entitled to during the subsistence of the security, whether same might be used either in addition to, or in substitution for, or in connection with the mortgaged property therein before set out or otherwise. G. at the time of his death he was carrying on business at the shop T., but he resided in another house, the property of his wife. Before his death he had been accustomed to import chemicals from England, & to store them at his private residence, taking them thence & using them at the shop as required. Certain of the chemicals acquired after the date of the bill of sale were stored at the private house at the time of G.'s death, & there was also in or about his private residence certain household furniture & effects acquired by G. before his death :—*Held* : the bill of sale included the chemicals stored at G.'s residence, & also such of the furniture as he had acquired after the execution of the bill of sale.—*Re* GOODRICH, ELLIOTT BROTHERS, LTD. v. CAMPBELL (1896), 6 Q. L. J. 294.—AUS.

694 v. ——— Chattels at two places
of business.—Persons carrying on business as manufacturers of hoops & staves at their factory at B., & also as general storekeepers at L., in the same county, made a chattel mtge. conveying their goods & chattels to deft., as set forth in two schedules annexed thereto. Schedule A. covered the machinery & other goods & chattels in the factory, &, after describing them, extended to all other goods & chattels thereafter purchased or manufactured or brought on the premises, whether for the business of stave manufacturing or not, or into or upon any other premises thereafter to be occupied by the mtgors., or either of them, it being understood that all logs, staves & bolts manufactured & timber brought on the mtgors.' premises or not, after the execution of the mtge., should be covered thereby. Schedule B. covered the goods & chattels in the general

store, & extended to goods & chattels thereafter brought into the store premises:—*Held*: the provision in schedule B, as to after-acquired goods referred only to goods brought into the store in which the business was then being carried on, & not to goods brought into the store at B., to which that business had been subsequently removed, & the provision as to after-acquired goods in schedule A. did not apply to the after-acquired goods brought into the store at B., for the reference thereto was only to goods of the character referred to in that schedule.—*MILLIGAN v. SUTHERLAND* (1896), 27 O. R. 235.—**CAN.**

694 vi. — — — *Mortgage of live stock.*—In Instruments Act, 1890 (No. 1103), ss. 169, 170, the words "other chattels" include all things which are reasonably necessary for the working of a station of the description mentioned in the mtge., & furniture in the house of the person managing the station is included in the term "other chattels" in s. 170.

Where the judgment debtor has assigned all after-acquired property brought on the premises, such assignment becomes complete in equity upon the property coming into existence, & the equitable mtee. thereof can restrain the sheriff from selling such property at the instance of an execution creditor, who has seized without notice of such assignment.—ANDERSON v. CARTER (1894), 20 V. L. R. 246.—AUS.

694 vii. — *Future crops on land specified in schedule.*]—J. assigned to S. & L. by bill of sale "the crops, horses, cattle, & chattels mentioned" in a schedule annexed; also "all new or other horses, crops, cattle, or chattels" to be thereafter "owned, planted, grown, purchased, or used by J. for the purpose of the business of contractor & farmer, or for any other purpose, & which should from time to time be added to or substituted for the crops, cattle, horses, & chattels, set forth in" the schedule. The schedule specified crops growing and to be grown on certain described lands:—*Held*: the bill of sale did not comprise crops which were afterwards grown by J. on other lands farmed by him, but not specified in the schedule, & which had not been stored or stacked on the specified lands.—*ASHCROFT v. TROY*, 1 J. R. 55.—N.Z.

the deed should be placed in the mill in addition to, or substitution for, the original machinery, should be subject to the same trusts. T. sold some of the original machinery, purchased new machinery, & sent to H. accounts of such sales & purchases, but nothing was done by or on behalf of H. to take possession of the newly purchased machinery. On Apr. 2, 1860, H. served T. with notice of a demand for payment of the £5,000. An execution against T. was afterwards put in by a creditor:—*Held*: though there had been no *novus actus interveniens*, the title of H. was preferable to that of the execution creditor, as to the new as well as the old machinery.—*HOLROYD v. MARSHALL* (1862), 10 H. L. Cas. 191; 33 L. J. Ch. 193; 7 L. T. 172; 9 Jur. N. S. 213; 11 W. R. 171; 11 F. R. 999, H. L.

Annotations:—*Distd.* *Re Barker, Ex p. Gorely* (1864), 5 New Rep. 22. *Consd.* *Dean v. Byrnes* (1864), 3 Moo. P. C. C. N. S. 92; *Belding v. Read* (1865), 3 H. & C. 955. *Distd.* *Thompson v. Cohen* (1872), L. R. 7 Q. B. 527. *Consd.* *Fothergill v. Rowland* (1873), 43 L. J. Ch. 252. *Follid.* *Anon.*, [1875] W. N. 203. *Consd.* *Greenbirt v. Smeo* (1876), 35 L. T. 168. *Follid.* *Leatham v. Amor* (1878), 47 L. J. Q. B. 581. *Consd.* *Re Bamford, Ex p. Games* (1879), 12 Ch. D. 314; *Lazarus v. Andrade* (1880), 5 C. P. D. 318; *Clements v. Matthews* (1883), 11 Q. B. D. 808; *Joseph v. Lyons* (1884), 15 Q. B. D. 280. *Distd.* *Reeves v. Barlow* (1884), 12 Q. B. D. 436. *Distd.* *Harding v. Harding* (1886), 17 Q. B. D. 442. *Consd.* *Ross v. Army & Navy Hotel Co.* (1886), 34 Ch. D. 43; *Re Clarke, Coombe v. Carter* (1887), 36 Ch. D. 348; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; *Morris v. Delobel-Flipo*, [1892] 2 Ch. 352. *Distd.* *Administrator General of Jamaica v. Lascelles, De Mercado*, [1894] A. C. 135. *Consd.* *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345. *Refd.* *Reeve v. Whitmore, Martin v. Whitmore* (1863), 4 De G. J. & Sm. 1; *Langton v. Waring* (1865), 18 C. B. N. S. 315; *Brown v. Bateman* (1867), L. R. 2 C. P. 272. *Trotter v. Watson* (1868), 19 L. T. 785; *Tebb v. Hodge* (1869), 38 L. J. C. P. 217; *Cole v. Kernot, Thompson v. Cohen* (1872), 41 L. J. Q. B. 221; *Baghott v. Norman* (1880), 41 L. T. 787; *Collyer v. Isaacs* (1881), 19 Ch. D. 342; *Re D'Epineuil, Tadman v. D'Epineuil* (1882), 20 Ch. D. 758; *Re Jones, Ex p. Nichols* (1883), 22 Ch. D. 782; *Walker v. Bradford Old Bank* (1884), 12 Q. B. D. 511; *Hilton v. Tucker* (1888), 57 L. J. Ch. 973; *Re Turcan* (1888), 58 L. J. Ch. 101; *Re Pyle Works* (1890), 44 Ch. D. 534; *Church v. Sage* (1892), 67 L. T. 800; *Re Dallas*, [1904] 2 Ch. 385. *Mentd.* *Re Marine Mansions Co.* (1867), L. R. 4 Eq. 601; *Re Cook, Ex p. Izard* (1874), 30 L. T. 7; *Thomas v. Kelly* (1888), 13 App. Cas. 506; *Re Standard Manufacturing Co.* (1891), 60 L. J. Ch. 292; *Re Reis, Ex p. Clough* (1904), 91 L. T. 592; *Ward, Lock v. Long*, [1906] 2 Ch. 550.

696. ———.]—K., a trader, by a bill of sale, assigned to debt. "all his household furniture, plate, linen, china, glass, all his stock, cattle, horses, farming implements, crops, book-debts, & all other his personal estate & effects whatsoever then being or hereafter to be upon or about his dwelling-house, farm & premises":—*Held*: the property acquired by K. after the execution of the bill of sale did not pass to debt.—*BELDING v. READ* (1865), 3 H. & C. 955; 6 New Rep. 301; L. J. Ex. 212; 13 L. T. 66; 11 Jur. N. S. 547; 13 W. R. 867; 159 E. R. 812.

Annotations:—*Consd.* *Leatham v. Amor* (1878), 47 L. J. Q. B. 581. *Expld. & Distd.* *Lazarus v. Andrade* (1880), D. 318. *Consd.* *Re D'Epineuil, Tadman v.* (1882), 20 Ch. D. 758. *Distd.* *Clements v. Matthews* (1883), 11 Q. B. D. 808. *Apld.* *Joseph v. Lyons* (1884), 15 L. J. Q. B. 1. *Dbtd.* *Reeves v. Barlow* (1884), 12 Q. B. D.

700 i ———.]—A horse taken by grantee.—A horse in the possession of pltf. as chattel &c. thereof, & he entrusted it to mtgor. to exchange for other horses, which were seized, when in mtgor.'s possession, by the sheriff under an execution against mtgor.:—*Held*: the horses for which the original horse was exchanged were in the same position as the horse included in the chattel mtge. & the sheriff must withdraw.—*BELL v. LAFFERTY* (1894), 3 Terr. L. R. 263.—CAN.

700 ii. ———.]—In May, 1880, D. being indebted to M., gave a chattel mtge. on all his stock-in-trade, chattels & effects then being in his store on G. Street, & agreed to convey to M. all stock which during the continuance of the indebtedness he might purchase for the purpose of substituting in place of stock then owned by him in connection with his business. The goods were never so conveyed. By the terms of the mtge. the debt was to be paid by instalments at specified times, & if any instalments should be unpaid for

436; *Re Clarke, Coombe v. Carter* (1887), 36 Ch. D. 348; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523. The view taken by the judges in *Belding v. Read* proceeded on a misapprehension of some observations of LORD WESTBURY in *Holroyd v. Marshall* (LORD HERSCHELL). *Refd.* *Greenbirt v. Smeo* (1876), 35 L. T. 168.

697. ———.]—M. assigned to pltf. all the machinery, plant, etc., upon certain leasehold premises, comprising a sugar refinery, warehouse & other offices, as well as the machinery, plant etc., "which shall hereafter be upon the premises for securing a sum of money & interest. The assignment was duly registered. The interest & under the above-mentioned security being, arrears pltf. obtained judgment of recovery of premises, but prior to the writ of possession being delivered to the sheriff, the latter had seized considerable amount of machinery & fixtures, & in connection with the sugar refinery, but acquired subsequently to the deed, under a writ of *fi.* issued by debts. upon a judgment obtained against M., who was then in possession of the premises of the property seized:—*Held*: as the assigner to pltf., though of after-acquired property, was absolute, & not a mere agreement to assign, & as the goods were sufficiently specific to make the assignment operative in equity, pltf. was entitled to retain the property seized as against debts.—*LEATHAM v. AMOR* (1878), 47 L. J. Q. B. 581; 38 L. T. 785; 26 W. R. 739, D. C.

Annotations:—*Consd.* *Lazarus v. Andrade* (1880), 5 C. P. D. 318. *Apld.* *Joseph v. Lyons* (1884), 15 L. J. Q. B. 1. *Refd.* *Clements v. Matthews* (1883), 11 Q. B. D. 808.

698. ———.]—By bill of sale the grantor assigned to the grantee the stock-in-trade then in certain specified premises, & also the stock-in-trade which should or might at any time during the continuance of the security be brought into the premises, either in addition to or in substitution for stock-in-trade therein at the date of the bill of sale:—*Held*: the assignment was sufficient to pass the property in stock-in-trade afterwards brought into the premises in addition to or in substitution for that previously there.—*LAZARUS v. ANDRADE* (1880), 5 C. P. D. 318; 49 L. J. Q. B. 847; 43 L. T. 30; 44 J. P. 697; 29 W. R. 15.

Annotations:—*Follid.* *Clements v. Mathews* (1882), 47 L. T. 251. *Consd.* *Joseph v. Lyons* (1884), 15 Q. B. D. 280.

699. ———.]—A person by a written instrument charged "all his present & future personalty" to secure to pltf. any sums he might become indebted to him, & afterwards incurred debts to pltf.:—*Held*: the instrument operated to charge all the personal property belonging to debtor at the date of the instrument, but did not operate to charge after-acquired property.—*Re D'EPINEUIL (COUNT) (No. 2), TADMAN v. D'EPINEUIL* (1882), 20 Ch. D. 758; 47 L. T. 157; 30 W. R. 702.

Annotations:—*Dbtd.* *Tailby v. Official Receiver* (1888), 13 App. Cas. 523. *Refd.* *Re Clarke, Coombe v. Carter* (1887), 36 Ch. D. 348; *Re Kelcey, Tyson v. Kelcey*, [1899] 2 Ch. 530.

700. ———.]—**Substituted chattels—Possession taken by grantee.**—S. by indenture assigned to pltf. his crops of grain upon his farm as a security for money lent. By the indenture it was declared & agreed

fifteen days after becoming due, the whole was to become immediately payable, & M. could take possession of & sell the mortgaged goods. On Dec. 13, 1881, D. assigned to F. in trust for the benefit of creditors, & F. took possession of the goods in the store on G. Street, & refused to deliver them to M.:—*Held*: the legal title to the property vested in F. must prevail.—*MCALLISTER v. FORSYTH* (1885), 12 S. C. R. 1.—CAN.

700 iii. ———.]—M. conveyed horses & colts to pltf. by bill of sale as security for an alleged debt. Pltf. ex-

that it should be lawful for pltf. at any time to seize & take possession of the crops & other effects thereby bargained & sold, & all such crops & other effects which should or might from time to time be substituted in lieu of the crops thereby assigned, or which should from time to time be found on or about the farm, & to sell & dispose of them, & out of the proceeds pay all costs & retain all money due to pltf. On Feb. 21, 1849, £1,297 18s. 7d. being then due to him, pltf. seized some crops of grain then growing on the farm, which had been sown by S. subsequently to the execution of the indenture. In Trinity term, 1848, deft. recovered a judgment against S., & on Feb. 22, 1849, a writ of *fi. fa.* indorsed to levy £310 19s. 3d., was issued on such judgment & delivered to the sheriff for execution, who on the same day seized the crops. On Mar. 8, 1849, S. petitioned the Insolvent Ct. under Execution Act, 1844 (c. 96). The official assignee in the first instance claimed the crops, & a bill was filed by him in the Ct. of Ch. to restrain pltf. from selling them, which bill was dismissed upon terms agreed on between pltf. & the assignee, & the latter then abandoned all claim to the crops. The sheriff afterwards sold the crops for £294, which came to the hands of deft., & pltf. sued deft. for same:—*Held*: supposing debtor had not petitioned the Insolvent Ct., pltf. had a right to recover, for though the power to seize future crops, if unexecuted, would have been of no avail against deft.'s execution, since it gave no legal or equitable title to any specific crops, yet when the power was executed to the extent of pltf.'s taking possession of the then growing crops he was in the same situation as if debtor himself had delivered them to him, & his title would prevail against that of deft.—*CONGREVE v. EVETTS* (1854), 10 Exch. 298; 2 L. J. Ex. 273; 24 L. T. O. S. 62; 18 Jur. 655; 2 C. L. R. 1253; 156 E. R. 457.

Annotations:—*Folld.* Hope v. Hayley (1856), 5 E. & B. 830. *Consd.* Allatt v. Carr & Scholfield (1858), 6 W. R. 578. *Apld.* Chidell v. Galsworthy (1859), 6 C. B. N. S. 471. *Consd.* Holroyd v. Marshall (1862), 10 H. L. Cas. 191. *Refd.* Morris v. Delobel-Elipo, [1892] 2 Ch. 352.

701. ———.]—R., by deed assigned to deft. all the dye wares & consumable stores on

his premises, upon trust to permit R. to remain in possession & carry on his trade until a specified event, & on that happening, to stand possessed of the premises upon trust to enter & take possession of all the premises, including all substituted consumable stores, pursuant to the declaration thereafter contained & to sell same. There was also a clause that, when any of the dye wares, etc., thereby assigned & specified in the schedule should be consumed & others substituted for them in the ordinary way of business, the substituted dye wares, etc., should belong to deft., upon the trusts before declared, & should be considered as included in the assignment, in like manner as if they were then the property of R., & were included in the schedule so that the security might at all times be of an adequate value. R. continued in possession until the specified event, & during that time, substituted dye wares, etc., for others consumed in the way of business. After the event happened, deft. took possession of all the dye wares, etc., then on the premises, including those which had been substituted by R., & several months after sold the same dye wares, etc. R. had become bkpt. after the seizure, & before the sale, & his assignees sued in trover for the substituted dye wares:—*Held*: the property in the substituted dye wares vested in deft. when he took possession under the deed, either by a transfer of them made valid by a new act subsequently done by the grantor, or by virtue of the express authority to take possession of them completed by possession being actually taken.—*HOPE v. HAYLEY* (1856), 5 E. & B. 830; 25 L. J. Q. B. 155; 26 L. T. O. S. 199; 2 Jur. N. S. 486; 4 W. R. 238; 119 E. R. 690.

Annotations:—*Apld.* Chidell v. Galsworthy (1859), 6 C. B. N. S. 471. *Consd.* Holroyd v. Marshall (1862), 10 H. L. Cas. 191. *Refd.* Carr v. Allatt, Allatt v. Carr (1858), 27 L. J. Ex. 385; Morris v. Delobel-Elipo, [1892] 2 Ch. 352. *Mentd.* Krehl v. Great Central Gas Consumers' Co. (1870), L. R. 5 Exch. 289.

See, also, No. 692, *ante*.

702. ———.]—*In hands of carrier for delivery to grantor.*—An assignment of goods "on the premises," with power to seize substituted effects:—*Held*: to include goods ordered & delivered to

changed one of the colts for a horse, which was afterwards, at pltf.'s request, exchanged for another horse which was delivered to pltf., but pltf. requested M. to keep him. He did so, & fed the horse with the hay transferred to pltf. by the bill of sale:—*Held*: the horse could not be levied on, as it had never been the property of .. but was the property of pltf. *ANDREWS v. BONNETT* (1881), 2 R. & J. 313.—*CAN.*

700 iv. ———.]—Pltf. owning a stock of goods & some furniture & shop fixtures, sold out to S., taking a mtge. in security, which was duly filed. S. continued to carry on business, bringing in other goods, till he absconded, when the sheriff under an attachment seized all the property in the store:—*Held*: the sheriff was liable for trespass.—*BOYS v. SMITH* (1859), 8 C. P. 248.—*CAN.*

a. ———.]—*Additions to incomplete chattel.*—Where a chattel in an incomplete state was assigned by bill of sale:—*Held*: things added to it afterwards that were essential to its completion passed with it, & were not chattels acquired within 1883 Act, s. 6.—*TAYLOR v. PYNE* (1889), 7 N. Z. L. R. 555.—*N.Z.*

b. ———.]—*Chattels brought on premises by grantor's assignee.*—A chattel mtge. included all goods used by the mtgor. "which shall hereafter be brought in the premises":—*Held*: the mtge. did not include goods afterwards brought on the premises by the

assignee of the mtgor., but only those so brought by mtgor.—*GREAT WEST LIQUOR CO. v. COLQUHOUN* (1914), 17 D. L. R. 568.—*CAN.*

c. ———.]—*Live stock.*—The object & result of Stock Mortgage Act (No. 313), s. 6, is to introduce into every stock mtge. duly registered, unless the contrary is expressed therein, a most stringent form of the clauses commonly inserted in such mtges. respecting stock afterwards brought upon any station occupied by the mtgor. & named in the mtge. It is indifferent whether the stations, on which the stock expressed to be assigned are stated to be depastured or intended to be depastured, are mortgaged or not, or whether the stock afterwards brought thereon during the continuance of the security are of the same kind as those expressly assigned. All are to be covered by the mtge., unless the mtgor. at the time of entering into the security distinctly stipulates for some other terms. *Semble*: the effect of the enactment in s. 6 that a registered mtge. of stock shall be deemed to include after-acquired stock, is no greater than that of an assignment of after-acquired stock contained in the mtge. itself, which creates only an equitable interest, which would give a complete title to the mtgee. as against the mtgor., or any one purchasing from him with notice of the mtgee.'s interest, but not as against an innocent purchaser.—*GROOM v. PATERSON* (1886), 12 V. L. R. 230.—*AUS.*

d. ———.]—*Mtge. of a number of branded sheep & herds of cattle on a run in the Colony of New South Wales, with the issue, increase, & produce thereof.*—*Held*: limited to the issue & increase of such specific sheep, and not to include any sheep afterwards brought upon the run, though in substitution of those specified in the original mtge.—*WEBSTER v. POWER* (1868), L. R. 2 P. C. 69; 5 Moo. P. C. C. N. S. 92; 37 L. J. P. C. 9.—*AUS.*

f. ———.]—P., having obtained an advance of £500 from G., executed a bill of sale by way of mtge. in his favour over all his farming stock & implements then being on his farm at W. The bill of sale contained provisions making all after-acquired live stock, whatever & wheresoever, of P. liable to the mtge. P. remained in possession of the farm, & from time to time made sales of stock with the permission of G., & purchased other stock in lieu of that sold. P. obtained sheep from pltf. for his farm, and they advanced him money to buy cattle. They pressed P. for payment of a debt due by him, & it was agreed that they should take his bill of exchange for the amount due, upon the condition that he should hold the sheep which he had obtained from them, & certain cattle which he had bought with their assistance, on their behalf until the bill had been retired, & it was also agreed that the cattle & sheep should be placed in pltf.'s hands for sale as a security

Sect. 3.—As regards what chattels: Sub-sect. 2, A. & B.] a carrier the day before, but not delivered to the assignor until the day after the execution of the bill of sale.—**SLADDEN v. SERGEANT** (1858), 1 F. & F. 322, N. P.

703. — Substitution by agreement.]—Although the general rule of law is that a bill of sale does not apply to future-acquired property, this does not apply to the case where some of the things are removed & others put in their place, if agreed to by the person entitled under the bill.—**COOPER v. TATHAM** (1866), 15 L. T. 218.

704. — Cab-horses.]—Horses used as cab-horses are not plant within 1882 Act, s. 6 (2), as they are not "used in, attached to, or brought upon the premises" of the grantor in the sense intended by that sub-sect.—**LONDON & EASTERN COUNTIES LOAN & DISCOUNT CO. v. CREASEY**, [1897] 1 Q. B. 768; 66 L. J. Q. B. 503; 76 L. T. 612; 45 W. R. 497; 13 T. L. R. 376, C. A.

—.]—*See, also*, Nos. 688, 690, 695, 698, *ante*.

— **Growing crops.]—***See* Nos. 688, 694, 696, 700, *ante*.

705. — Future book debts—Assignment of premises with goodwill & goods—Grantor to carry on business.]—H. was in business as a tobacconist, & B. lent him £2,500 on security of an unregistered bill of sale, by the provisions of which a share in the profits was to be paid to B. in lieu of interest, & the leasehold premises on which the business was carried on were mortgaged to B. to secure his loan, together with the goodwill " & all the goods, wares, merchandise, stock-in-trade, fixtures, furniture, articles, effects, & things belonging to " H., in

for the due payment of the bill. G. having subsequently seized all the live stock upon P.'s farm:—*Held*: (1) cattle & sheep brought upon P.'s farm were sufficiently specific to pass under the assignment of after-acquired live stock; (2) G. having obtained possession of the after-acquired property under the mtge., plffs. were not entitled to insist upon a fulfilment of the agreement made with them by P.—**DRIVER v. PITT, Mac.** 872.—N.Z.

g. — Covenant to brand.]—In order that a chattel security may affect after-acquired stock there must be a covenant to brand or mark the stock with a specified or indicated brand, & a provision in an instrument that subsequently acquired stock is to be subject to the instrument will not give a right to the stock against the official assignee of a bkpt. mtgor., at any rate, if the stock was in the possession of bkpt. at the time of the act of bkpt. The abbreviated covenant in "will brand" will be read as a covenant to brand after-acquired sheep with the brand mentioned in the schedule as the brand of the specified sheep.—*Re CHRISTIE* (1901), 19 N. Z. L. R. 615.—N.Z.

Instrument by way of security under 1889 Act, over certain stock charged all the real & personal estate, both present & future, of mtgor. with the payment of all money secured thereby, & also contained a covenant providing that mtgor. "will brand with the brand of mtgor. or a brand to be named by mtgees., & when and where directed by mtgees.":—*Held*: the effect of the covenant to brand was to impose on mtgor. the obligation of branding all stock, including after-acquired stock, with his own brand, or, if required to do so by mtgees., with a brand to be named by them, & so to make after-acquired stock subject to the security.—*Re BILBY BARKER* (1910), 30 N. Z. L. R. 45.—N.Z.

l. — Timber.]—Plffs. held a mtge. from C. of timber, "together with whatever quantity of squared timber the party of the first part may manufacture during the remainder of the season." The timber made after the mtge. was marked as it was got out, with plffs.' mark, but remained in C.'s possession, & was seized by an execution creditor:—*Held*: plffs. could not recover it under their mtge.—**CUMMINGS v. MORGAN** (1855), 12 U. C. R. 565.—CAN.

m. — .]—Plff. & W. made an agreement, by which plff. was to make advances to W. to enable him to draw out & to make & get to market a quantity of timber. It was agreed that the timber then made, & all thereafter made, should be delivered to plff. as security, & in proof of such delivery should be marked as specified, & that it should be rafted to market under W.'s directions. The timber was seized by debt. as sheriff under an execution against W.:—*Held*: that W. could not be looked upon merely as agent of plff., & the timber regarded as plff.'s from the first, for that would be inconsistent with the deed:—*Held*: the deed operated to pass only the timber made & capable of delivery at the time of its execution, & such as, being made afterwards, was delivered to plff. & marked for him.—**SHORT v. RUTAN** (1854), 12 U. C. R. 79.—CAN.

—.]—*See, also*, cases in Sect. 3, sub-sect. 1, A, *ante*.

705 i. — Future book debts.]—A bill of sale contained an assignment of all the stock-in-trade, plant, chattels, etc., of the grantor, a general merchant, & also "all other the chattels & effects, matters & things which at any time during the continuance of this security" should be brought upon the grantor's premises or be used in connection with his business, & all the contracts, book & business debts of the grantor in connection with the business:—*Held*:

respect of the business, & it was declared "that all fixtures, furniture, goods, wares, merchandise, articles, & things" which should during the continuance of the security, "be brought upon the premises" or "be in any other place or places in the actual or constructive possession of H." should be included in the security. The deed also provided that the property should remain in the possession of H. until B. should take possession, for its insurance, & for the keeping of proper books of account, in which entries were to be made "of all the money, goods, wares, merchandise, debts, & other effects belonging or owing to" H. in respect of the business. H. sold some of the goods on credit, but did not receive the price. B. took possession of the premises under the powers contained in the deed, & gave notice to the persons who had bought goods on credit to pay the price to him. Shortly afterwards H. presented a liquidation petition. The trustee in liquidation & B. both claimed the book debts:—*Held*: as the book debts were not "things," & could not be in a "place" or "in the actual or constructive possession" of H., they were not within the words of the assignment & did not pass to B.—**BROWN v. FRYER** (1882), 46 L. T. 636, C. A.

706. — .]—A bill of sale assigned all the book debts due & owing, or which might during the continuance of the security become due & owing to the mtgor.:—*Held*: the assignment of future book debts, though not limited to book debts in any particular business, was sufficiently defined & passed the equitable interest in book debts incurred after the assignment, whether in the business carried on by the mtgor. at the time of the assignment or in any other business.—

book debts created subsequent to the bill of sale were included, & also the books in which the debts were entered.—**LONDON CHARTERED BANK OF AUSTRALIA v. FISCHER** (1890), 11 N. S. W. Eq. 193.—AUS.

705 ii. — Assignment of all property present & future of company.]—A bill of sale was granted over "all & singular the property of the co., whatsoever & wheresoever, both present & future":—*Held*: it operated to pass the book debts of the co. existing at the date of the bill of sale, but book debts coming into existence after that date did not so pass.—*Re GLOBE NEWSPAPER CO.* (1888), 9 N. S. W. Eq. 29.—AUS.

705 iii. — .]—A trading co. gave a mtge. on all its assets, real & personal, & all its property, real & personal, that should thereafter be acquired or owned by it:—*Held*: future book debts were covered by the mtge., & the trading co. had power to mtge. them.—*Re PERTH FLAX & CORDAGE CO.* (1908), 13 O. W. R. 1140.—CAN.

705 iv. — .]—A mtge. taken to secure the co.'s bonds covered "all & singular its undertakings then made or in course of construction or thereafter" to be constructed, together with all properties real or personal, tolls, incomes, or sources of money, rights, privileges & franchises owned, held or enjoyed by it then or at any time prior to the full payments of the bonds thereby secured":—*Held*: the language of the mtge. was sufficiently broad to cover present & future book debts.—**NATIONAL TRUST CO. v. TRUSTS & GUARANTEE CO.** (1912), 21 O. W. R. 933; 3 O. W. N. 1093; 26 O. L. R. 279; 5 D. L. R. 459.—CAN.

705 v. — Issue of debentures & covering bill of sale.]—A co. issued debentures, & at the same time a bill of sale over all the assets of the

TAILBY v. OFFICIAL RECEIVER (1888), 13 App. Cas. 523; 58 L. J. Q. B. 75; 60 L. T. 162; 37 W. R. 513; 4 T. L. R. 726, H. L.; *revsq.* S. C. *sub nom.* **OFFICIAL RECEIVER v. TAILBY** (1886), 18 Q. B. D. 25, C. A.

Annotations:—**Consd.** *Re* *Coombe v. Carter* (1887), 36 Ch. D. 348; *Re Turcan* (1888), 40 Ch. D. 5; *Re Yorkshire Woolcombers Assn.*, *Houldsworth v. Yorkshire Woolcombers Assn.*, [1903] 2 Ch. 284. **Expld. & Distd.** *Re Dallas*, [1904] 2 Ch. 385. **Consd.** *Imperial Paper Mills of Canada v. Quebec Bank* (1913), 83 L. J. P. C. 67; *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345; *National Provincial Bank of England v. United Electric Theatres*, [1916] 1 Ch. 132. **Refd.** *Re Ellenborough, Towry Law v. Burne*, [1903] 1 Ch. 697; *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573; *Ward, Lock v. Long*, [1906] 2 Ch. 550; *Re Cope, Marshall v. Cope* (1914), 110 L. T. 905; *Horwood v. Millar's Timber & Trading Co.*, [1917] 1 K. B. 305. **Mentd.** *Re Pyle Works* (1890), 44 Ch. D. 534; *Western Wagon & Property Co. v. West*, [1892] 1 Ch. 271; *Re Kelcey, Tyson v. Kelcey*, [1899] 2 Ch. 530; *Nelson v. Faber*, [1903] 2 K. B. 367; *Re Reis, Ex p. Clough*, [1904] 2 K. B. 769; *Glegg v. Bromley*, [1912] 3 K. B. 474; *British Union & National Insce. v. Rawson*, [1916] 2 Ch. 476; *London County & Westminster Bank v. Tompkins* (1918), 87 L. J. K. B. 662.

Sec, generally, CHOSSES IN ACTION.

B. Other Cases.

See 1882 Act, s. 5.

707. Whether grantor true owner—Bill of sale of chattels of third party—With consent of such party.—A party in apparent possession of household furniture gave a bill of sale for value, & complied with the formalities required by 1854 Act, another person, whose property the goods really were, representing to the grantee that they were the property of the grantor:—*Held*: the owner of the goods was estopped from alleging that the goods were not the property of the party giving the bill of sale.—**RICHARDS v. JOHNSTON** (1859), 4 H. & N. 660; 28 L. J. Ex. 322; 33 L. T. O. S. 206; 5 Jur. N. S. 520; 157 E. R. 1000.

Annotation:—**Refd.** *Richards v. Jenkins* (1887), 18 Q. B. D. 451.

708. — — — — —.]—A., who was living in the same house with B., was the owner of certain goods therein, which goods A. for a fraudulent purpose permitted B. to raise & receive money upon by way of bill of sale in his own name to C.,

co. was given to a trustee for the debenture holders as collateral security. The debentures contained the following clause: "The co. hereby charges its undertaking & all its property whatsoever & wheresoever both present & future, including uncalled capital for the time being":—*Held*: under the terms of the bill of sale & debentures the debenture holders were entitled to all the assets of the co., present as well as future, including book debts.—**Re MACKENZIE GRANT & Co.** (1899), 1 W. A. L. R. 116.—**AUS.**

PART VI. SECT. 3, SUB-SECT. 2.

—B.

r. Whether grantor true owner—Brother.—A chattel mtge. was made by W. H. at a time when he knew that J. H., his brother, who carried on business as J. H. & Co., was insolvent. There was no evidence that the grantee knew the goods were the goods of J. H.:—*Held*: the mtge. could not be set aside at the instance of the assignee of J. H. & Co., & the grantee was entitled to the goods.—**LEE v. NISBET** (1906), 7 O. W. R. 149.—**CAN.**

s. — Consignee — Sale rescinded.—On July 14, 1886, pltf. forwarded hides to L., at P., to whom he had been in the habit of making sales. The hides were not ordered by L., but were shipped on the presumption that he would receive them as on previous occasions, subject to inspection & approval. On Aug. 5, some days after the arrival of the hides at

P., one of the servants of L., finding them at the landing, & without any special instructions to that effect, conveyed them to the tannery. L. being in financial difficulties at the time, ordered the hides to be placed in a warehouse belonging to D., to be held for the benefit of the consignor. At the same time he telegraphed pltf. as follows: "In trouble; have stored hides; appoint some one to take charge of them." Pltf. proceeded to P. & saw L., who told him that he might make himself easy about the hides, that he had placed them in D.'s store for him, & that he would get them. On Aug. 12, L. executed a bill of sale to defts., covering all the hides, etc., "owned by L., or stored by him in any building, warehouse or store-room of D., or in his keeping":—*Held*: the contract of sale between L. & pltf. was rescinded by the action of L. in handing the goods over to D., with directions to hold them for the consignor, who acquiesced & adopted the act of L., & there was no title to the goods in L., when the bill of sale was made to defts.—**PICTOU BANK v. HARVEY** (1887), 14 S. C. R. 617; 7 C. L. T. 107.—**CAN.**

t. — Two grantors—Separate property.—Two brothers, one of whom owned a horse & the other of whom owned a horse & dray, & who were not in partnership, executed a bill of sale over the two horses & the dray to secure a loan. The instrument, which was on a printed form intended to be signed by one person, stated that the

who believed the goods to be the goods of B. The goods being afterwards seized upon a *fi. fa.* against A.:—*Held*: the sale to C. of the goods was valid, B. being in effect the agent of A. in the transaction.—**Low v. MCGILL** (1864), 4 New Rep. 145; 10 L. T. 495; 12 W. R. 826.

709. — Cestui que trust.—Goods were vested in a trustee with power to sell them upon the direction of his *cestui que trust*. The *cestui que trust*, with the authority of the trustee, executed & registered a bill of sale assigning the goods:—*Held*: the bill of sale was void as against execution creditors.—**CHAPMAN v. KNIGHT** (1880), 5 C. P. D. 308; 49 L. J. Q. B. 425; 42 L. T. 538; 44 J. P. 491; 28 W. R. 919.

Annotations:—**Distd.** *Walrond v. Goldmann* (1885), 16 Q. B. D. 121. **Refd.** *Swire v. Cookson* (1883), 48 L. T. 877. **Mentd.** *Bright v. Rogers*, [1917] 1 K. B. 917.

710. — Married woman—Separate estate.—Upon a judgment against a husband & wife jointly, certain household furniture was taken in execution at the house where they resided. On an interpleader issue to try the title to such furniture as between the execution creditors & claimants, it appeared that before the marriage the husband had executed a deed declaring that the goods, which then belonged to the wife, should after the marriage continue to belong to her for her sole & separate use. The wife assigned the goods to claimants by a bill of sale made prior to the execution & duly registered under 1878 & 1882 Acts, to which the husband was no party:—*Held*: the bill of sale executed by the wife was valid under the above Acts, & claimants were entitled to the goods as against the execution creditors.—**WALROND v. GOLDMANN** (1885), 16 Q. B. D. 121; 55 L. J. Q. B. 323; 53 L. T. 963; 34 W. R. 272; *sub nom.* **MILLS v. GOLDMAN**, 2 T. L. R. 132, D. C.

711. — Mortgagor of land & chattels—Assignment of equity of redemption in chattels.—A mtgor. of a house with the trade fixtures subsequently granted to claimant a bill of sale of the chattels, including the trade fixtures, upon the premises. The trade fixtures & other chattels

two brothers were thereafter called "the grantors," but in many places, & in the covenant to repay, it referred to the grantor in the singular number:—*Held*: such an instrument would pass the individual ownership of each of the grantors in the chattels mtgd., & 1908 Act, s. 21, would not render it invalid.—**ANDREWS v. FAN TU** (1909), 28 N. Z. L. R. 1042.—**N.Z.**

w. — Company.—Trading cos. agreed in writing to mtge., besides certain specified property, "all their assets, real & personal, of every description." The cos. were intended by the parties to, & actually did, continue to carry on their respective business, & in the ordinary course of business disposed of some of their assets, & appropriated the proceeds to their own purposes:—*Held*: the security was void, even as against the grantor, as to chattels of which the cos. were not the true owners at the time of the execution of the instrument.—**BANK OF NEW ZEALAND v. GUTHRIE (WALTER) & Co., LTD.** (1897), 16 N. Z. L. R. 484.—**N.Z.**

x. — Bill of sale of chattels of third party—With consent of such party.—Deft. accepted a bill of sale & received delivery of a horse, cart & harness from M. to secure advances made on the faith of representations by both pltf. & M. that the property was that of M., & that pltf. had no claim to it:—*Held*: deft. had a right to retain the property until he was paid.—**CARR v. CAREY** (1872), 9 N. S. R. 70.—**CAN.**

Sect. 3.—As regards what chattels: Sub-sect. 2, B.; sub-sect. 3. Sect. 4.]

were taken in execution under a judgment against the mtgor. In an interpleader issue between claimant & the execution creditor:—*Held*: claimant having become possessed of the equity of redemption in the goods under the bill of sale was entitled to them as against the execution creditor.—*USHER v. MARTIN* (1889), 24 Q. B. D. 272; 59 L. J. Q. B. 11; 61 L. T. 778, D. C.

Annotation:—*Mentd.* *Jennings v. Mather*, [1901] 1 K. B. 108.

712. — Grantor of prior absolute bill.]—In Sept., 1885, a husband assigned his furniture to his wife absolutely. The deed was not registered. In Apr., 1888, he executed a bill of sale of the same furniture as security for a loan. That bill was registered. In July, 1888, the husband died:—*Held*: at the time of the execution of the second bill of sale the grantor was not the true owner of the chattels therein comprised.—*TUCK v. SOUTHERN COUNTIES DEPOSIT BANK* (1889), 42 Ch. D. 471; 58 L. J. Ch. 699; 61 L. T. 348; 37 W. R. 769; 5 T. L. R. 719, C. A.

Annotations:—*Distd.* *Thomas v. Searles*, [1891] 2 Q. B. 408.

Mentd. *Thomas v. Roberts*, [1898] 1 Q. B. 657.

713. — Grantor of prior bill of sale by way of security.]—The grantor of chattels by a bill of sale by way of security is still the true owner of the chattels within 1882 Act, s. 5, & may execute a subsequent valid bill of sale of the same chattels.—*THOMAS v. SEARLES*, [1891] 2 Q. B. 408; 60 L. J. Q. B. 722; 65 L. T. 39; 39 W. R. 692; 7 T. L. R. 606, C. A.

Annotations:—*Mentd.* *Edwards v. Marcus* (1894), 70 L. T. 182; *Parsons v. Equitable Investment Co.*, [1916] 2 Ch. 527.

Rights of grantee on wrongful disposal of chattels by grantor, *see, generally*, Part VII., Sect. 2, sub-sect. 4, A, *post*.

714. — Partner.]—The words “true owner” in 1882 Act, s. 5, are used in their natural & not in an artificial sense, & a man does not cease to be the true owner of personal chattels within that sect. merely because they may be subject to some lien or equitable right.

In 1885 bkpts. commenced to carry on business in partnership, & in 1888 a bill of sale was executed by the elder partner, with the consent of the younger, of partnership property, as security for an advance for partnership purposes. The bill of sale was set aside by the county ct. judge on the ground that the grantor was not the true owner of either the whole of a moiety of the goods specified in the schedule, within the above sect.; & an order was made directing the bill of sale holder to repay the value of the goods to the trustee in bkpcy.:—*Held*: the county ct. judge was wrong in ordering the bill of sale holder to pay back the whole of the money, as the grantor was, to the extent of his share in the partnership goods assigned by the bill of sale, true owner within the sect., & the bill of sale holder was entitled to retain one half of the money realised.—*Re TAMPLIN & SON, Ex p. BARNETT* (1890), 59 L. J. Q. B. 194; 62 L. T. 264; 38 W. R. 351; 6 T. L. R. 206; 7 Morr. 70, D. C.

Annotation:—*Refd.* *Lewis v. Thomas* (1918), 88 L. J. K. B. 275.

PART VI. SECT. 3, SUB-SECT. 3.

719 i. Departure from statutory form—Validity of bill as to—Property other than “personal chattels.”]—When a bill of sale includes a mtge. of chattels real, the deviation from the statutory form invalidates the instrument so far only as regards the chattels personal comprised in it, & does not avoid it so far as it is a mtge. of chattels real.—*Re*

O'DWYER (1886), 1 L. R. Ir. 19.—*IR.*

719 ii. — — — — —.] Directors mortgaged to A. money advanced, land & other property of the co. The security consisted of a mtge. of lands in a separate *testatum*, & a bill of sale of chattels also in a separate *testatum*, which was void, as not complying with 1883 Act:—*Held*: the mtgo. of the

715. Husband—Chattels settled on himself & wife.]—A. made a settlement upon marriage of all the furniture then at his residence, together with all that should be acquired during coverture, upon himself & his wife during their joint lives, & after their death to the survivor absolutely, with a proviso that, if A. became bkpt., his wife might declare other trusts. A. executed a bill of sale over certain furniture included in the settlement. On a motion by the trustee in bkpcy. of A. to set aside the bill of sale, on the ground that bkpt. was not the true owner within 1882 Act:—*Held*: A. was, to the extent of his interest under the settlement, the true owner of the goods.—*Re FIELD, Ex p. PRATT* (1890), 63 L. T. 289; 7 Morr. 132; *sub nom. Re FIELD, Ex p. PRATT*, 6 T. L. R. 286.

Annotation:—*Refd.* *Lewis v. Thomas*, [1919] 1 K. B. 319.

716. — Legal owner—Third party beneficially entitled.]—The true owner of personal cha. described in a bill of sale at the time of its execution within 1882 Act, s. 5, is the person who is the legal owner thereof at the time of the execution of the bill of sale, irrespective of whether he is also the equitable owner or only trustee for another.—*Re SARI, Ex p. WILLIAMS*, [1892] 2 Q. B. 591; 67 L. T. 597; 9 Morr. 263.

Annotation:—*Refd.* *Lewis v. Thomas*, [1919] 1 K. B. 319.

717. Hirer with option to purchase—No obligation to purchase.]—A hirer of personal chattels under a hiring agreement, which gives him an option to purchase them upon payment of all the agreed instalments of rent, but imposes upon him no obligation to do so, is not the true owner of the chattels within 1882 Act, s. 5.—*LEWIS v. THOMAS*, [1919] 1 K. B. 319; 88 L. J. K. B. 275; 118 L. T. 689; [1918–19] B. & C. R. 65, D. C.

SUB-SECT. 3.—PERSONAL CHATTELS COMPRISED IN BILL OF SALE.

See 1882 Act, ss. 8, 9.

718. Departure from statutory form—Validity of bill as to—Collateral covenants.]—If a bill of sale be not in accordance with the statutory form, it is, under 1889 Act, s. 9, void not only in respect of the assignment of personal chattels, but in respect of the covenant to repay principal & interest contained therein.—*DAVIES v. REE* (1886), 17 Q. B. D. 408; 55 L. J. Q. B. 363; 5 L. T. 813; 34 W. R. 573; 2 T. L. R. 633, C. A.

Annotations:—*Appld.* *Griffin v. Union Deposit Bank* (1887), 3 T. L. R. 608. *Expld.* *Re Burdett, Ex p. Byrne* (1888), 20 Q. B. D. 310. *Consd.* *Re London & Lancashire Paper Mills Co.* (1888), 58 L. T. 798. *Distd.* *Monetary Advance Co. v. Cater* (1888), 20 Q. B. D. 785. *Consd.* *Heseltine v. Simmons*, [1892] 2 Q. B. 547. *Refd.* *Re Yates, Batchelor v. Yates* (1888), 59 L. T. 47; *Smith v. Whiteman*, [1909] 2 K. B. 437. *Mentd.* *Hedges v. Preston* (1899), 80 L. T. 847.

719. — — — — — Property other than “personal chattels.”]—Where personal chattels & other property are mortgaged by a deed which is not made in accordance with the statutory form, & is by 1882 Act, s. 9, void as regards the “personal chattels,” such deed is valid as to the other property comprised in it, if it is possible to sever the security upon the personal chattels from that upon the other property.

lands was valid.—*Re BANSHA WOOLLEN MILLS Co., Ltd.* (1888), 21 L. R. Ir. 181.—*IR.*

719 iii. — — — — —.] A bill of sale of personal chattels in & of the lease & goodwill of an hotel, though void as a bill of sale of personal chattels, because made subject to a condition or defeasance not stated in the body of it, or written on the same paper, may

A deed assigned to the grantee as security for a debt "the several chattels & things specifically described" in a schedule to the deed. The schedule comprised "personal chattels" & also a gas engine, which did not come within the definition of "personal chattels" contained in 1878 Act, s. 4. The deed was not made in accordance with the statutory form:—*Held*: the deed was void as to the "personal chattels," but it remained valid as to the gas engine.—*Re BURDETT, Ex p. BYRNE* (1888), 20 Q. B. D. 310; 57 L. J. Q. B. 263; 58 L. T. 708; 36 W. R. 345; 4 T. L. R. 260; 5 Morr. 32, C. A.

Annotations:—*Consd.* London & Lancashire Paper Mills Co. (1888), 58 L. T. 798. *Distd.* Cochrane v. Entwistle (1890), 25 Q. B. D. 116. *Consd.* Mumford v. Collier (1890), 25 Q. B. D. 279. *Apld.* *Re* Isaacson, *Ex p. Mason*, [1895] 1 Q. B. 333. *Refd.* Monetary Advance Co. v. Cater (1888), 57 L. J. Q. B. 463; *Re* Yates, Batchelor v. Yates (1888), 38 Ch. D. 112; Climpson v. Coles (1889), 23 Q. B. D. 465; Stevens v. Marston (1890), 60 L. J. Q. B. 192; Small v. National Provincial Bank of England, [1894] 1 Ch. 686; Swanley Coal Co. v. Denton (1906), 95 L. T. 659. *Mentd.* Davis v. Petrie (1905), 93 L. T. 511.

720. ——— Attornment clause in mortgage—Creating relation of landlord & tenant.]—Held: 1878 Act, s. 6, & 1882 Act, s. 9, did not render void the ordinary attornment clause found in mtges. of real property so as to destroy the relation of landlord & tenant created by it between the mtgee. & mtgor.—*MUMFORD v. COLLIER* (1890), 25 Q. B. D. 279; 59 L. J. Q. B. 552; 38 W. R. 716, D. C.

Annotation:—*Mentd.* Scobie v. Collins, [1895] 1 Q. B. 375.

721. Untrue statement of consideration—Validity of bill as to—Collateral covenants.]—A bill of sale, given by way of security for payment of money by the grantor, did not appear on its face to deviate in any particular from the statutory, but the consideration for which it was given was not in fact truly stated:—Held: the bill of sale, though void under 1882 Act, s. 8, in respect of the personal chattels comprised in it, was not void altogether under s. 9 of the Act, so as to prevent the grantor being sued upon a covenant to pay contained in the bill of sale.—*HESLITINE v. SIMMONS*, [1892] 2 Q. B. 517; 62 L. J. Q. B. 5; 67 L. T. 611; 57 J. P. 53; 41 W. R. 67; 8 T. L. R. 768; 36 Sol. Jo. 695; 4 R. 52, C. A.

Annotations:—*Consd.* Saunders v. White, [1902] 1 K. B. 472. *Mentd.* Edwards v. Marcus, [1894] 1 Q. B. 537.

still be good as a deed relating to the lease, license, & goodwill.—*ANTHONES v. ANDERSON* (1888), 14 V. L. R. 127.—**AUS.**

a. Non-registration—Validity of bill as to—Property other than "personal chattels."]—D. & Co. executed a bill of sale on Sept. 17, whereby they conveyed to a bank all their goods & stock-in-trade, & all book accounts due & owing to them, as security for payment of \$40,000:—*Held*: Bills of Sale Act only applied to personal chattels, & not to debts or choses in action, & the non-registration of the bill would not affect the transfer of the debts.—*Re DE VEBER, Ex p. BANK OF NEW BRUNSWICK* (1882), 21 N. B. R. 401.—**CAN.**

b. ———.]—A mtge. taken by pltf., as trustee for bondholders, to secure the co.'s bonds covered "all & singular its undertaking then made or in course of construction or thereafter" to be constructed, together with all properties real or personal, tolls, incomes or sources of money, rights, privileges & franchises owned, held or enjoyed by it then or at any time prior to the full payments of the bonds thereby secured." A later clause provided that the mtge. was not to be registered

as a bill of sale or chattel mtge., & it was not so registered: *Held*: pltf. could not recover in respect of the personal property & chattels of the co. as the mtge. was not registered, but could recover in respect of any book debts owing at the date of the assignment.—*NATIONAL TRUST CO. v. TRUSTS & GUARANTEE CO.* (1912), 21 O. W. R. 933; 3 O. W. N. 1093; 26 O. L. R. 279; 5 D. L. R. 459.—**CAN.**

c. Non-compliance with Alberta Bills of Sale Ordinance—Validity of bill—As equitable charge.]—Where it is the intention of the parties to give security in the form of a mtge. of chattels within the above Ordinance, but they cannot justify the instrument as such owing to non-compliance with the Act, it cannot be justified as creating an equitable or floating charge, & is absolutely void as against creditors.—*IMPERIAL CANADIAN TRUST CO. v. WOOD VALLANCE* (1915), 32 W. L. R. 260; 9 W. W. R. 44; 24 D. L. R. 241.—CAN.****

PART VI. SECT. 4.

d. Grantor—That chattels not personal chattels.]—Pltfs. were transferees of a chattel mtge. given by deft. over some log buildings & a ferry boat with cables, pulley & other machinery, and they sued defts. for their recovery:

SECT. 4.—ESTOPPEL OF PARTIES FROM DENYING VALIDITY OF BILL OF SALE.

See, generally, ESTOPPEL.

722. Grantor—Grantee returned as secured creditor in bankruptcy proceedings.]—Pltf. gave a bill of sale on his furniture to defts. to secure an advance. Before payment of the first instalment due under the bill of sale he filed a petition in bkpcy., & in his statement of affairs returned defts. as secured creditors. Defts. seized & sold the furniture, & the proceeds being insufficient to pay their debt they proved for the residue. A composition of 2s. 6d. in the pound was proposed, & on the report of the official receiver was sanctioned by the ct. & paid to the creditors, including defts. Pltf. subsequently brought an action for the wrongful seizure of his goods, alleging that the bill of sale was invalid:—*Held*: pltf. having in the bkpcy. proceedings treated the bill of sale as valid, & obtained thereby an advantage to himself, could not afterwards allege that the bill of sale was invalid so as to entitle him to recover in the action.—*ROE v. MUTUAL LOAN FUND* (1887), 19 Q. B. D. 347; 56 L. J. Q. B. 541; 35 W. R. 723; 3 T. L. R. 755, C. A.

Annotations:—*Folld.* Comitti v. Maher (1905), 94 L. T. 158. *Mentd.* Godfrey v. Lazarus (1887), 4 T. L. R. 101; *Re* Deerhurst, *Ex p. Seaton* (1891), 60 L. J. Q. B. 411; *Re* Hobbins, *Ex p. Official Receiver* (1899), 6 Mans. 212; *Re* Wilson, [1916] 1 K. B. 382.

723. ——— Bill held out as valid by grantor & grantee—To grantor's creditors.]—A bill of sale given by deft. to pltfs. was held invalid because the consideration was not truly set forth as required by 1882 Act, s. 8. Both pltfs. & deft. had held out the bill to be valid against creditors of deft.:—Held: as between pltfs. & deft. the bill was valid, & deft. having elected to obtain an advantage by asserting the bill to be valid, could not, to gain a further advantage, be heard to say that it was invalid, even (*semble*) assuming its invalidity was known to both the parties.—*COMITTI v. MAHER* (1905), 94 L. T. 158; 22 T. L. R. 121.

Annotations:—*Refd.* Kinnersley v. Payne (1909), 100 L. T. 229. *Mentd.* *Re* Wilson, [1916] 1 K. B. 382.

—*Held*: deft. was not estopped by the chattel mtge. from treating the buildings, boat, etc., as real estate.—*STIMSON v. SMITH* (1889), 1 Terr. L. R. 183.—**CAN.**

f. ——— That sale fraudulent as against creditors.]—In an action for seizing goods under attachments, it was proved that a few days before the seizure the goods had been sold by auction under the direction of one of the pltfs., who executed a bill of sale to the vendee, witnessed by the auctioneer:—Held: such pltf. could not set up that the sale was void because fraudulent as against creditors, & maintain trespass for seizing the goods as if they were his own.—*MCPHATTER v. LESLIE* (1864), 23 U. C. R. 573.—**CAN.**

g. ——— That instrument not in statutory form.]—Where A., not being a lawyer, or possessed of any special skill or knowledge in the matter, prepared a document not in accordance with Chattel Transfer Act, 1889, in favour of B., representing to B. that the document was a security, & B. lent him money thereon:—Held: A. was not estopped by such representation from setting up & relying on the Act.—*OWLES v. LOVICK* (1892), 11 N. Z. L. R. 178.—**N.Z.**

SECT. 5.—INTERPLEADER.

See, generally, INTERPLEADER.

724. Money paid into court by grantee—Chattels seized second time—Under same execution.]—Goods, which had been taken in execution of the judgment of a county ct., were claimed by a person, who under County Cts. Act, 1888 (c. 43), s. 156, deposited the value of the goods with the bailiff to abide the decision of the judge upon the claim. On the trial of an interpleader issue the claim was not established, & the money deposited was paid out to the judgment creditor. The money so paid out being insufficient to satisfy the judgment, the judgment creditor caused the goods to be seized again for the purpose of realising the balance of his judgment. Claimant again claimed them & deposited their value with the bailiff. Upon a second interpleader issue between the same parties:—*Held*: by taking out of ct. the money deposited by claimant on the first occasion, the judgment creditor accepted the money in lieu of the goods, & thereby estopped himself in respect of the same judgment from denying that as against himself claimant was the owner of the goods, & claimant was entitled to judgment on the issue.—*HADDOW v. MORTON*, [1894] 1 Q. B. 565; 63 L. J. Q. B. 431; 70 L. T. 470; 9 R. 215, C. A.

Annotation:—*Folld. Kotchie v. Golden Sovereigns*, [1898] 2 Q. B. 164.

725. ——— Under different execution.]—Where goods seized in execution under a judgment have been claimed & claimant has paid into ct. money to abide the event of an interpleader issue between himself & the execution creditor, & the goods are again seized in execution by another judgment creditor & again claimed by claimant & an interpleader issue is ordered, to prevent the goods being sold claimant must pay money into ct. as security to the second execution creditor, & to abide the event of the second interpleader.—*KOTCHIE v. GOLDEN SOVEREIGNS, LTD.*, [1898] 2 Q. B. 164; 67 L. J. Q. B. 722; 78 L. T. 409; 46 W. R. 616, C. A.

726. ——— Failure to prove title to chattels.]—Goods, which had been taken in execution upon a county ct. judgment, were claimed by claimants, the grantees of a bill of sale upon them, who deposited under County Cts. Act, 1888 (c. 43), s. 156, a sum of money as representing the value of the goods. The high bailiff of the county ct. thereupon withdrew from possession of the goods, & issued an interpleader summons in the county ct. with regard to the money in ct. Subsequently D. & Co. gave notice to the high bailiff of a claim to part of the goods, as having been let by them to the execution debtor on a hire-purchase agreement, & claimants gave notice to the high bailiff that they withdrew their claim to those goods. The high bailiff gave notice of the claim of D. & Co., to the execution creditor, who thereupon gave notice to the high bailiff that he admitted their title to those goods. Upon the hearing of the interpleader summons the county ct. judge found that the above-mentioned bill of sale was invalid, & he ordered that part of the money in ct. proportionate to the value of the goods which had not been claimed by D. & Co. should be paid out to

the execution creditor, but that the remainder of the money should be paid back to claimants:—*Held*: the execution creditor, upon the failure of claimants to prove a title to any of the goods, was entitled to the whole of the money in ct.—*WELLS v. HUGHES*, [1907] 2 K. B. 845; 76 L. J. K. B. 1125; 97 L. T. 469; 23 T. L. R. 733, C. A.

Annotation:—*Consd. Flude v. Goldberg*, [1915] 2 K. B. 157.

727. Compulsory sale—Power to order.]—Where a person claims as owner under an absolute bill of sale goods which have been seized in execution, & the sheriff interpleads, the ct. or a judge has jurisdiction to order a sale of the goods & payment of the proceeds into ct., if it seems just & reasonable to make that order.—*PAQUIN, LTD. v. ROBINSON* (1901), 85 L. T. 5, C. A.

728. ——— Security insufficient.]—Where goods subject to a bill of sale have been seized by the sheriff at the instance of an execution creditor & it is doubtful whether the security is sufficient, the ct. will not interfere with the rights of the bill of sale holder, & will not order a sale, unless the execution creditor guarantees him against loss.—*STERN v. TEGNER*, [1898] 1 Q. B. 37; 66 L. J. Q. B. 859; 77 L. T. 347; 46 W. R. 82; 42 Sol. Jo. 31; 4 Mans. 328, C. A.

Annotations:—*Mentd. Re Davies, Ex p. Equitable Investment Co.* (1897), 4 Mans. 358; *Paquin v. Robinson* (1901), 85 L. T. 5.

729. ——— Disposal of proceeds of sale.]—A sheriff seized goods in execution under a judgment of the High Ct. The goods were claimed by the grantee of a bill of sale, as security for a debt due to him from the judgment debtor. The debt was payable, with interest at a high rate per cent., by instalments extending over a period of several months, the greater part of which had not expired. The sheriff interpleaded, & a judge at chambers, on the application of the judgment creditor, under R. S. C., Ord. 57, r. 12, ordered the sale of the goods, & the payment to claimant of the balance of his debt with interest at the agreed rate, but only up to the time of such payment:—*Held*: the power of the judge to make an order as to the application of the proceeds of the sale upon such terms as might be just was not limited by the practice of the Cts. of Equity in suits for redemption, & the judge had power to make the order, & the order was just.—*FORSTER v. CLOUSER*, [1897] 2 Q. B. 362; 66 L. J. Q. B. 693; 76 L. T. 825, C. A.

Annotations:—*Consd. Stern v. Tegner*, [1898] 1 Q. B. 37. *Refd. Wickens v. Shuckburgh* (1898), 78 L. T. 213. *Mentd. Re Davies, Ex p. Equitable Investment Co.* (1897), 77 L. T. 567; *West v. Diprose*, [1900] 1 Ch. 337.

730. ——— Grantee bound by particulars.]—Where, upon an interpleader summons by the sheriff, claimant alleges that he is entitled, under a bill of sale or otherwise by way of security for debt, to the goods seized in execution, & an order is made for the sale of the goods & the satisfaction of the claim out of the proceeds of the sale, claimant is not entitled to demand from the sheriff any sum not included in the particulars of claim on which the order was made.—*HOCKEY v. EVANS* (1887), 18 Q. B. D. 390; 56 L. J. Q. B. 253; 56 L. T. 179; 35 W. R. 264; 3 T. L. R. 319, C. A.

Annotation:—*Refd. Peake v. Carter*, [1916] 1 K. B. 652.

PART VI. SECT. 5.

*k. When jurisdiction arises.]—*P. E. I. Assignments Act (61 Vict. c. 4), s. 10, provides the only method for attack upon a chattel mtge. alleged to be fraudulent, & the sheriff has no right to seize goods in hands of the chattel mtgee. & ask for an interpleader

order.—*RACINE v. JOSEPH* (1914), 14 E. L. R. 269.—*CAN.*

l. Limits of jurisdiction.]—Held: after the passing of 47 Vict., c. 53, no chattel mtge. could, upon an interpleader issue, be declared void under C. S. Man. c. 37, s. 96.—*McMILLAN v. BARTLETT* (1885), 2 Man. L. R. 374.—*CAN.*

*m. "Proceeding."]—*An interpleader issue to determine the rights of claimant under a chattel mtgo. & an execution creditor is a "proceeding" taken to impeach the mtgo.—*COLL v. PORTEOUS* (1892), 19 A. R. 111.—*CAN.*

SECT. 6.—SUCCESSIVE BILLS OF SALE.

SUB-SECT. 1.—BEFORE 1878.

731. Bill cancelled—For purpose of granting fresh security—Whether property revested in grantor.]—Pltf. having advanced to F. two sums of money, received as a security two bills of sale of goods, by way of mtge., dated Mar. & May, 1841. The sums advanced having afterwards been incorporated with a debt of £1,100, due from F. to pltf., & secured by an assignment of a policy of assurance on F.'s life, dated June, 1841, the bills of sale were thereupon cancelled. The goods had always remained in the possession of F., the mortgagor:—*Held*: the effect of the cancellation was not to release the debt, & revest the interest of the goods in F., but it was for the jury to say, with what intent the cancellation was made, & pltf. ought not to be nonsuited.—*GUMMER v. ADAMS* (1843), 13 L. J. Ex. 40.

732. Last bill registered—Validity against—Execution creditor.]—A. executed a bill of sale of goods to pltf. on Nov. 20, 1860. On Dec. 10 following A. executed to pltf. a second bill of sale of the same goods, & the first was cancelled, but neither was registered, & on Dec. 31 A. executed a third bill of sale of the same goods to pltf., but the second one was not cancelled. Defts. levied under a *fi. fa.* on Jan. 4, & the third bill of sale was registered on the 10th:—*Held*: the property in the goods passed from A. by the execution of the first bill of sale, & the execution of the other bills of sale was but the exercise of his right of redemption, & the granting a fresh security, & the third bill having been registered within the twenty-one days allowed by 1854 Act was good as against the execution creditor.—*HOLLINGSWORTH v. WHITE* (1862), 6 L. T. 604; 10 W. R. 619.

Annotations:—*Consd.* *Smale v. Burr* (1872), L. R. 8 C. P. 64. *Refd.* *Re Pulling, Ex p. Harris* (1872), 8 Ch. App. 48; *Ramsden v. Lupton* (1873), L. R. 9 Q. B. 17; *Chapman v. Knight* (1880), 49 L. J. Q. B. 425. *Mentd.* *Cheney v. Courtols* (1863), 13 C. B. N. S. 634; *Lamb, Duggan & Cooper v. Bruce* (1876), 45 L. J. Q. B. 538.

733. ———.]—In June, 1871, P. assigned furniture & stock-in-trade to S. by an absolute bill of sale, as security for an advance of £20. The bill of sale was not registered, but, before the expiration of the twenty-one days allowed by 1854 Act for registration, a second bill of sale was substituted for it, & the same operation was from time to time repeated down to July 15, 1872, P. continuing all the time in possession & dealing with the goods as his own, & the £20 being still a subsisting debt. The last bill of sale, which alone was stamped, & the consideration for which was stated to be a present advance of £20, was duly registered on Aug. 1, 1872:—*Held*: the property passed under the last bill of sale, & the bill of sale so registered was available against the claim of an execution creditor of P., & there was a sufficient consideration for it.—*SMALE v. BURR* (1872), L. R. 8 C. P. 64; 42 L. J. C. P. 20; 27 L. T. 555; 37 J. P. 40; 21 W. R. 193.

Annotations:—*Folld.* *Ramsden v. Lupton* (1873), L. R. 9 Q. B. 17. *Distd.* *Cooper v. Zeffert* (1883), 32 W. R. 402.

734. ———.]—W. owing £500 to E., & being pressed to give security, an agreement was come to between them & pltf. that W. should give pltf. a bill of sale of the furniture in W.'s house, that the bill should be kept renewed for twelve months, & neither the original bill nor the renewals

should be registered unless W. should get into difficulties. W. executed a bill of sale on Mar. 8, 1872, by which he assigned all the furniture to pltf., with a proviso for redemption if the £500 were paid on Mar. 8, 1873, or on any earlier day after twenty-four hours' demand in writing, & it was agreed that after default in payment pltf. might take possession & sell, but in the meantime the goods should remain in W.'s possession. A second bill of sale in similar terms was executed on Mar. 27, 1872, but the first bill remained in pltf.'s possession uncanceled. On Apr. 13 pltf. demanded payment; on Apr. 15 W. was in difficulties, & the bill of sale was duly registered on that day under 1854 Act. The goods were afterwards taken in execution at the suit of deft., a judgment creditor of W.:—*Held*: the substitution of the second bill of sale for the first amounted to a transfer of the goods from pltf. to W., & from him to pltf. again, so that the property passed by the second bill, which, being registered, was good against deft.—*RAMSDEN v. LUPTON* (1873), L. R. 9 Q. B. 17; 43 L. J. Q. B. 17; 29 L. T. 510; 22 W. R. 129, Ex. Ch.

Annotations:—*Distd.* *Re Stevens, Ex p. Stevens* (1875), L. R. 20 Eq. 786. *Consd.* *Carrard v. Meek* (1880), 50 L. J. Q. B. 187. *Distd.* *Cooper v. Zeffert* (1883), 32 W. R. 402.

See, also, cases in Part VII., Sect. 2, sub-sect. 4, A. (a), *post*.

735. ——— Trustee in bankruptcy.]—S., a trader, in May, 1870, being in want of money, borrowed of C. £55 on the security of two bills of sale, by which he assigned the whole of his property, worth about £600, to C. It was agreed verbally between S. & C. that the bills of sale should be given up within the period limited for registration, & new bills of sale from time to time substituted for them. That was done twice. The last bills of sale were given on July 20, 1870. No fresh advance was made on the occasion of the renewal. On Aug. 9, 1870, S. filed a petition for liquidation by arrangement, & on the next day the bills of sale of July 20 were registered. The trustee under the liquidation took possession of the goods comprised in the bills of sale, & the mtgee. brought an action of trover against him to recover possession of the goods:—*Held*: the bills of sale were void as against the trustee under the liquidation.—*Re SPARKE, Ex p. COHEN* (1871), 7 Ch. App. 20; 41 L. J. Bcy. 17; 25 L. T. 473; 20 W. R. 69, L. J.J.

Annotations:—*Consd.* *Ramsden v. Lupton* (1873), L. R. 9 Q. B. 17. *Distd.* *Re Cook, Ex p. Izard* (1874), 9 Ch. App. 271; *Re Jackson, Ex p. Hall* (1877), 4 Ch. D. 682. *Refd.* *Re Bent, Ex p. Mackenzie* (1873), 42 L. J. Bcy. 25; *Re Stevens, Ex p. Stevens* (1875), L. R. 20 Eq. 786. *Mentd.* *Re Couston, Ex p. Ward* (1872), 27 L. T. 502; *Halliday v. Harris* (1874), L. R. 9 C. P. 668; *Re Wood, Ex p. Musgrave* (1878), 10 Ch. D. 94; *Re Barnett, Ex p. Reynolds* (1885), 15 Q. B. D. 169.

736. ———.]—P., a trader, on Sept. 23, in consideration of H. discounting some acceptances which would fall due within twenty-one days, gave H. a bill of sale on his furniture. It was arranged that the bill of sale should not be registered before the acceptances became due & were dishonoured. They were so dishonoured on Oct. 12. On that day P. gave H. fresh acceptances in lieu of the old ones, & a second bill of sale of the furniture. The same arrangement as before was made respecting the registration of such bill of sale. On

PART VI. SECT. 6, SUB-SECT. 1.

735 i. Last bill registered—Validity against—Assignee for creditors.]—B., being indebted to pltf., gave him a mtge., which was not subsequently re-filed. B. subsequently executed an

assignment for the benefit of creditors, subject to the mtge. Afterwards B. made an absolute bill of sale, to pltf. of the same goods, which was filed:—*Held*: the assignment for the benefit of creditors was a valid instrument, &

upon the expiration of the first mtge. out it out, & the last bill of sale vested no title in pltf., as the interest of the grantor was vested in the trustees for creditors.—*BOYNTON v. BOYD* (1862), 12 C. P. 334.—CAN.

Sect. 6.—Successive bills of sale: Sub-sects. 1 & 2.
Part VII. Sect. 1: Sub-sect. 1.]

Oct. 30 the last-mentioned acceptances were dishonoured, & N. instructed his broker to take possession of the furniture. On Oct. 31 H. registered the bill of sale, & P. committed an act of bkpcy. On the same day the broker attempted to obtain possession of the goods, but was refused admission to the house until next day, when he took possession:—**Held**: the second bill of sale having been made upon a new arrangement & for a fresh consideration, & having been duly registered within twenty-one days, was valid, & since the creditor before the bkpcy. had done all he could to obtain possession of the goods, the goods belonged to H. & not to the trustee in bkpcy.—*Re PULLING, Ex p. HARRIS* (1872), 8 Ch. App. 48; 42 L. J. Bcy. 9; 27 L. T. 501; 21 W. R. 44, L. JJ.

Annotation:—*Reid. Ramsden v. Lupton* (1873), 22 W. R. 129.

737. — — — — —.]—A. gave B. a bill of sale over the whole of his property, as security for a past debt of £45 & a fresh advance of £15. At A.'s request the bill of sale was not registered, he undertaking to execute another bill of sale whenever required. Within six weeks B. required, & A. executed another bill of sale, which was duly registered, & under which B. took possession. Two months afterwards A. became bkpt.:—**Held**: the agreement to give a fresh bill of sale was lawful, & the bill of sale was good as against the trustee in bkpcy.—*Re JACKSON, Ex p. HALL* (1877), 4 Ch. D. 682; 46 L. J. Bcy. 39; 35 L. T. 947; 25 W. R. 382.

SUB-SECT. 2.—AFTER 1878.

See 1878 Act, s. 9.

738. Second bill executed after expiration of seven days.]—1878 Act, s. 9, does not effect a subsequent bill of sale executed after the expiration of seven days after the execution of a prior unregistered bill of sale of the same goods.—*CARRARD v. MEEK* (1880), 50 L. J. Q. B. 187; 43 L. T. 760; 29 W. R. 244, D. C.

PART VI. SECT. 6, SUB-SECT. 2.

n. Validity of second bill against—Execution creditors—Grantee in actual possession.]—A bill of sale given in connection with the sale of a business having expired, in consequence of failure to renew it, pltf., in pursuance of an agreement made at the time of the sale, received a second bill of sale:—**Held**: the fact that pltf. had taken possession under his bill of sale, & was in possession at the time the sheriff made his levy, was sufficient, in the absence of fraud, to enable pltf. to maintain his action.—*MOSHER v. O'BRIEN* (1905), 37 N. S. R. 286.—CAN.

o. — — — — —.]—A chattel mtge. having been given to secure the mtgee. against liability in respect of his indorsement of promissory notes for the mtgor., the mtgee., having paid the notes during the currency of the mtge., before the expiration of a year took & filed a new mtge. upon the same goods for the amount paid by him & interest. Within sixty days, the mtgor. made an assignment for the benefit of creditors:—**Held**: executions in the sheriff's hands before the second mtge. was filed, but subsequent to the prior mtge., did not gain priority over the second, & the statutory presumption that the latter was made with intent to prefer was rebutted by the circumstances.—*ROGERS v. CARROLL* (1899), 30 O. R. 328.—CAN.

p. — — — — —.]—A trustee in bankruptcy.]—

Bkpt. executed a mtge. of chattels to secure repayment of a loan with interest in three weeks, being the period allowed for registration by 1908 Act, & it was agreed that the security should not be registered if the loan was repaid within the time fixed. A few days after the due date bkpt. repaid the loan with interest, but immediately afterwards the mtgee. lent him the money again for the same period on his executing a new mtge. over the same chattels & subject to the same condition as to registration as before. That process was repeated on three other occasions, & after the last of the securities had been registered the mtgor. became bkpt. with the money still owing. On three occasions bkpt. had obtained the money for repayment of the loan from a man for whom he was building a house under contract; on the fourth he had borrowed it from a friend, to whom he said that he only wanted the money for an hour:—**Held**: the subsisting security was void against the official assignee under 1908 Act, s. 30. *Seemle*: the other securities in the series were also void.—*Re JENSEN*, [1918] N. Z. L. R. 121.—N.Z.

r. Effect of taking second bill—Whether first bill cancelled.]—A chattel mtge. was granted in substitution for an earlier one:—**Held**: the earlier one was cancelled.—*ADAMS v. HUTCHINGS* (1893), 3 Terr. L. R. 206.—CAN.

s. — — — — —.]—H. was in the habit of purchasing sheep from M. &

739. —.]—Act, s. 9, does not make void a subsequent bill of sale executed more than seven days after the execution of a prior unregistered bill of sale of the same goods.—*WILSON v. WATHERSPOON* (1881), 71 L. T. Jo. 230.

740. Second bill to cure defect—First bill held to be properly registered.]—G. executed a bill of sale of chattels in favour of pltf. to secure a debt. The affidavit of attestation & execution did not, in terms, state that the attesting solr. was present when the deed was executed, but it did state that deponent was present, that it was duly attested, & that deponent & the attesting solr. were the only attesting witnesses. Subsequently G., in respect of the same goods & debt, executed, in favour of pltf., a second bill of sale, which recited that it had been executed because doubts had arisen whether the first affidavit was sufficient:—**Held**: the second bill of sale was intended to be effective only in the event of the first being invalid, & did not cancel the bill of sale, which was properly registered.—*COOPER v. ZEFFERT* (1883), 32 W. R. 402, C. A.

Annotation:—*Reid. Re Seaman, Ex p. Furness Finance Co.*, [1896] 1 Q. B. 412.

741. Intention to put an end to first bill.]—A bill of sale was given in 1886. Another bill of sale, which had been given in 1885, was not cancelled when the later bill was given & was held by the grantee, but the jury found that the parties intended to do away with the earlier bill:—**Held**: the finding of the jury could not be disregarded & the earlier bill was intentionally put an end to.—*BRESNOVICH v. LEVISON* (1889), 87 L. T. Jo. 37, D. C.

742. Second bill given under mistake—After bankruptcy.]—A bill of sale was given by debtor to secure repayment of £200 with interest. After bkpcy., debtor gave to the same person a second bill of sale in substitution for the first one, & in practically the same terms, the grantee being unaware at the time that debtor had become bkpt. On application by the trustee to set aside the bills of sale:—**Held**: the second bill of sale having been given under a mistake of fact, & after the

Co. On the purchase of each lot H. executed an instrument under 1889 Act, in favour of M. & Co., over the sheep purchased, to secure the purchase-money. On Nov. 25, 1896, there were three instruments in existence. H., at the request of M. & Co., executed an instrument in their favour over the unsold sheep included in the above instruments, to secure the balance then owing on such instruments. No new liability was incurred by H., nor was any additional property included in the instrument of Nov. 25, but the previous instruments were retained by M. & Co.:—**Held**: the last instrument was void under Bankruptcy Act, 1892, s. 79 (2), but its execution did not cancel the three previous instruments, as there was no intention to do so.—*Re HILL, OFFICIAL ASSIGNEE v. MATSON & Co.* (1897), 16 N. Z. L. R. 120.—N.Z.

t. — — — — —.]—Second bill not registered.]—A bill of sale dated in May, 1873, conveyed to pltf. all W.'s stock-in-trade, goods & merchandise in a store, & for more effectually securing payment of \$14,987, & what might become due to pltf. for further supplies of goods, he was authorised upon default in payment, after demand, to enter W.'s store, & seize & take possession of the goods & merchandise therein, & to sell same, but until default in payment W. might use & enjoy the goods, etc., without any interference by pltf. The bill of sale was filed under C. S., c. 76. By a further deed

bkpcy., was altogether nugatory, & did not operate to cancel the bill of sale.—*Re BARGEN, Ex p. HASLUCK*, [1894] 1 Q. B. 444; 69 L. T. 763; 10 T. L. R. 55; 10 Morr. 301; 10 R. 74; *sub nom.*

Re VON BARGIN, Ex p. HASLUCK, 63 L. J. Q. B. 209.

Annotations:—*Mentd.* Linfoot v. Pockett, [1895] 2 Ch. 835
Attia v. Finch (1904), 91 L. T. 70.

Part VII.—Rights and Liabilities of Parties.

SECT. 1.—RIGHTS OF GRANTOR.

SUB-SECT. 1.—TO RESTRAIN REMOVAL AND SALE.

See 1882 Act, s. 7.

743. Under 1882 Act, s. 7—Application refused—Failure to repay rent paid by grantee.]—On an application for an order under the above sect., that the grantee should be restrained from removing or selling the chattels contained in the bill of sale, the grantee's affidavit admitted that all the instalments under the bill of sale that had become due had been paid, but alleged that £106 10s. & interest was due to him, such sum having been paid by him at the grantor's request to her landlord, who had distrained for rent upon the furniture included in the bill of sale:—*Held*: if the grantor had repaid the grantee the rent that he had paid to her landlord, relief would have been granted under the sect., but in the circumstances the application was entirely groundless.—*COWLEY v. TYLER, Re BILL OF SALE* (1884), Bitt. Rep. in Ch. 189.

744. — Application granted—On what terms.]—A bill of sale was executed to secure £200. The sum advanced was £121 10s., £3 10s. being retained for costs & £75 being "capitalised interest," the £200 to be paid off by monthly instalments of £7 10s., & on default of payment of one instalment the principal sum secured was to become due. The grantor, wishing to pay off the sum advanced, purposely made default in payment of the first instalment & the grantee entered for the whole amount. The grantor thereupon took out a summons under the above sect., calling on the grantee to show cause why upon payment of the principal sum of £125 & £10 for interest & costs, or such other sum as the judge might direct, the grantee should not withdraw & deliver up the bill of sale to be cancelled:—*Held*: on payment of the instalment of £7 10s. & £5 to include all costs & expenses, the grantee should withdraw.—*Re GRAVES & UNION DEPOSIT BANK* (1883), 27 Sol. Jo. 215.

745. — Bill registered before Act.]—The above sect. applies to goods seized after the date of the commencement of the Act under a bill of sale executed & registered before such date.

Where, after goods had been seized under a bill of sale for default in payment of instalments due thereunder, the grantor offered to pay the amount due, but the grantee refused to receive same:—

dated in Aug., 1877, reciting the previous bill of sale, & that \$14,987 was then due from W. to pltf. for goods supplied thereunder, that payment of that sum had been demanded, & it not being convenient for W. to pay, pltf. had agreed to extend the time for payment on certain conditions, it was witnessed that W. agreed to pay that sum with interest in weekly payments of \$150 each, that the bill of sale of May, 1873, should continue as a valid & subsisting security as well on the stock-in-trade then in the store as upon any goods, etc., which might at any time afterwards be therein, till the \$14,987 was paid. It then authorised pltf. in case of default in payment of any of the weekly instalments, to enter

W.'s store & seize the goods, etc., whether acquired before or after the date of the bill of sale, & to dispose of same. This deed was not filed:—*Held*: the deed of May, 1873, was continued in force by the deed of Aug., 1877, which created no new debt, nor gave pltf. any additional security, & his right to seize the goods arose under the deed of May, 1873, & was not affected by the non-registration of the second deed.—*VASSIE v. VASSIE* (1882), 22 N. B. R. 76.—CAN.

w. — Registration of second bill defective—Right to rely on first bill.]—Chattels seized in execution were claimed by pltf. as chattel mtgee. Pltf. had indorsed for the grantor's

Held: the ct. had power, under the above sect., to make an order restraining the grantee from selling the goods on condition that the amount due was paid.—*Ex p. COTTON* (1883), 11 Q. B. D. 301; 49 L. T. 52; 47 J. P. 599; 32 W. R. 58, D. C. *Annotation*:—*Apld.* *Ex p. Wickens*, [1898] 1 Q. B. 543.

746. — Measure of relief—Seizure to realise security.]—Five days after the execution of a bill of sale by which chattels were assigned to secure repayment of a loan at the expiration of one year, & payment of interest thereon by monthly instalments, the grantee demanded in writing that the grantor's rent receipt for the previous quarter should be sent to him by post. The receipt was not sent, & eight days later the grantee seized the assigned chattels, demanding the principal sum lent with the full interest for one year & costs of levy. The grantor applied at chambers for relief under the above sect. The rent, the receipt for which was demanded, was thirty-two days overdue at the time of the seizure, & it did not appear that the landlord had asked for payment of it:—*Held*: (1) as the grantee had seized for the purpose of realising his security the judge at chambers had jurisdiction to order the bill of sale to be given up on payment of the principal with interest to the date of seizure; (2) as the grantee had not shown that the failure of the grantor to produce her last receipt for rent was without reasonable excuse, the seizure was wrongful, & the judge was right in refusing to allow the grantee the costs of levy.—*Ex p. WICKENS*, [1898] 1 Q. B. 543; 67 L. J. Q. B. 397; 46 W. R. 385; 5 Mans. 55; *sub nom.* *WICKENS v. SHUCKBURN*, 78 L. T. 213, C. A.

Annotation:—*Distd.* *Ex p. Ellis*, [1898] 2 Q. B. 79.

747. — Seizure to maintain security.]—Under a bill of sale the principal sum thereby secured was payable at the end of two years, & in the meantime a certain sum was payable monthly as interest. One of the monthly payments of interest being in arrear, the grantee of the bill of sale took possession of the goods thereby assigned for the purpose of holding same until payment of the interest due, but not for the purpose of realising the security by sale of the goods:—*Held*: in the above circumstances, an order could not be made under the above Act, that upon payment of the principal, interest up to date, & costs, the grantee of the bill of sale

accommodation four promissory notes, securing himself by a chattel mtge. dated Jan. 30, 1889. On Apr. 9 three of the notes having been consolidated into a new note, pltf. took a new chattel mtge., but the affidavit of *bona fides* was defective in a material particular. Upon an interpleader summons pltf. rested his claim on the latter mtge., making no mention of the first one, but at the trial both mtges. were proved & relied on:—*Held*: pltf. was entitled to fall back on the previous mtge., there being evidence that when the later mtge. was taken it was not intended to abandon the earlier one.—*BOLDRICK v. RYAN* (1890), 17 A. R. 253.—CAN.

Sect. 1.—Rights of grantor : Sub-sects. 1, 2 & 3.]

should give up his security.—*Ex p. ELLIS*, [1898] 2 Q. B. 79; 67 L. J. Q. B. 734; 78 L. T. 733; 46 W. R. 531; 14 T. L. R. 454; 5 Mans. 231, C. A.

See, also, Sub-sect. 2, & Sect. 2, sub-sect. 1, *post*.

748. Otherwise than under 1882 Act, s. 7—Application refused.]—When at the time of the filing of a liquidation petition the grantee of a bill of sale given by debtor is in actual uncontrolled possession of the property comprised in the deed, the ct. ought not to interfere by injunction with the exercise of the grantee's legal rights, upon the mere suggestion that, if an injunction is granted, it is possible that the trustee in the liquidation, when appointed, may be able to raise a case for impeaching the validity of the deed. In order to justify such an interference appct. for the injunction must at least swear to his belief of some facts which, if established, would render the deed invalid as against the trustee in the liquidation.—*Re HART, Ex p. BAYLY* (1880), 15 Ch. D. 223; 43 L. T. 181; 29 W. R. 28, C. A.

749. — Application granted.]—Pltf. borrowed £300 from deft., a money-lender, in consideration of a premium of £140. The repayment of the loan & premium by quarterly instalments of £50 was secured by a bill of sale, which provided that if pltf. made default in payment of any instalment or failed to pay the rent of the premises where the goods were on the days when same respectively became due, deft. might immediately enter & sell the goods & that the whole £300 together with the premium should at once become due. The first instalment under the bill of sale became due on Sept. 22 & was actually paid on the following day, deft.'s clerk giving a receipt, "Account of Bill of Sale." On Sept. 23 deft. took possession of the goods comprised in the bill of sale & claimed to exercise his power of sale on the ground that pltf. had made default of rent & of the instalment due on Sept. 22. Pltf.'s rent was due on Aug. 6, but it was usual to pay it at the landlord's rent dinner in Oct. Deft. had written to pltf. that the production of the last receipt for rent would be satisfactory:—*Held*: (1) however oppressive such a transaction might be pltf.'s motion to restrain deft. from selling or removing the goods must be refused, unless it could be granted consistently with the established principles of law or equity; (2) as deft.'s conduct was such as to mislead pltf. the injunction should be granted.—*LONGDEN v. SHEFFIELD DEPOSIT BANK* (1888), 24 Sol. Jo. 913.

750. — On what terms.]—On an interlocutory application by the grantor of a bill of sale for an injunction to restrain the grantee, who has taken possession under it, from selling or

continuing in possession, unless the bill of sale is clearly invalid the only relief which will be granted is, that on the grantor bringing into ct. the amount which the grantee swears is due, the grantee will be restrained from making away with the mortgaged property.—*HILL v. KIRKWOOD* (1880), 42 L. T. 105; 28 W. R. 358, C. A.

Annotations:—*Expld. Hickson v. Darlow* (1883), 23 Ch. D. 690. *Mentd. Re Haynes, Ex p. National Mercantile Bank* (1880), 15 Ch. D. 42; *Penwarden v. Roberts, Wilson v. Roberts, Heath v. Roberts* (1882), 9 Q. B. D. 137; *Peace v. Brookes*, [1895] 2 Q. B. 451.

751. — — — — —.]—Pltf. moved for an injunction to restrain deft. from parting or otherwise dealing with a bill of sale given by pltf. to deft. for a loan of £100, payable by instalments, then amounting with interest to £151. Pltf. contended that the bill of sale was void as having been obtained by fraud & misrepresentation, & offered to pay £100 into ct.:—*Held*: (1) the bill of sale could only be vacated by payment into ct. of the whole £151, & the motion must be treated as a redemption action; (2) *prima facie* it was a good bill of sale as it stood, & the issue of fraud could not be tried on affidavit.—*PEARCE v. KIRKWOOD* (1898), 105 L. T. Jo. 424.

752. — — — — —.]—The general rule is that a sale by a grantee of an unregistered bill of sale will be restrained, only on the payment into ct. by the grantor of the amount which the grantee swears to be due to him, but this does not apply where the ct. can see on the terms of the deed that this amount cannot be due on the security.—*HICKSON v. DARLOW* (1883), 23 Ch. D. 690; 48 L. T. 449; 31 W. R. 417, C. A.

Annotations:—*Reid. Brewer v. Square*, [1892] 2 Ch. 111. *Mentd. Ex p. Cotton* (1883), 49 L. T. 52; *Blackburn Corpn. v. Micklethwait* (1886), 54 L. T. 539; *Re Athlumney, Ex p. Wilson*, [1898] 2 Q. B. 547.

753. — — — Measure of relief.]—A. advanced to J. £90 upon a void bill of sale. Default was made in payment of an instalment, & A. entered into possession, whereupon H., a son of A., advanced on a fresh bill of sale £130 in order to pay off his father, whose partner he had recently become. Upon J. filing his petition in bkpcy., the registrar granted an injunction restraining H. from further proceedings under the second bill of sale until further order:—*Held*: the injunction was wrong in form & ought to have been until a certain day, & to have contained an undertaking as to damages.—*Re JOHNSTONE, Ex p. ABRAMS* (1884), 50 L. T. 184; 1 Morr. 32.

SUB-SECT. 2.—TO REDEEM.

See, generally, MORTGAGE.

754. Survives right to restrain removal.]—The grantee of a bill of sale, given by way of

equity will grant relief.—*Re* [1895] 13 N. Z. L. R. 710.—N.Z.

PART VII. SECT. 1, SUB-SECT. 2.

754 i. Survives right to restrain removal.]—Mtgees. put up stock-in-trade of a premises for sale under their mtge. bid it in & took possession with the assent of the mtgor., paid off arrears of wages & rent, & carried on the business with mtgor. in their employ for some months. In an action by the mtgor. to avoid the sale:—*Held*: (1) it was void & the property could be redeemed; (2) in the taking of the accounts mtgor. could not be charged with arrears of wages paid by the mtgee., this payment having not been previously expressly assented to by the mtgor.; (3) a sum stated by the mtgees. to be the value of the goodwill

PART VII. SECT. 1, SUB-SECT. 1.

748 i. Application refused—Admissibility of extrinsic evidence—Absence of fraud.]—On a motion for an injunction to restrain a mtgee. from selling certain mortgaged premises, of which he had taken possession for breach of covenants contained in a mtge. & a bill of sale, extrinsic evidence was tendered to show the nature of the transaction:—*Held*: in the absence of fraud such evidence was not admissible to interpret the deeds, & by strict interpretation it must be assumed that the advance was made as alleged, & as the liability of the mtgors. had not been discharged, the motion should be refused.—*MISKIN v. MEIKLEJOHN* (1870), 2 Q. S. C. Il. 59.—AUS.

750 i. Application granted—On what terms—Payment into court.]—In suit

by mtgor. to set aside a bill of sale an interim injunction to restrain a sale by mtgee. was granted, upon condition of mtgor. paying into ct. the amount due mtgee. The bill of sale was collateral security for promissory notes, some of which had been indorsed over for value:—*Held*: the amount to be paid into ct. should not be reduced by amount of such notes.—*PETROPOULOS v. WILLIAMS (P. E.) & Co.* (1906), 26 C. L. T. 468; 3 N. B. Eq. Rep. 267.—CAN.

a. Payments in nature of penalty—Relief in equity.]—*Semble*: a provision in a bill of sale, in consideration of a loan of £200, to pay £300 by one hundred & four instalments, the whole to become due on default in payment of any one instalment, is in the nature of a penalty against which a ct. of

security for payment of money, seized the goods on default by the grantor in payment of an instalment due under the deed. At the expiration of five days from the seizure the grantee began to remove the goods, & the grantor then tendered the amount due for debt, interest, & expenses. The grantee refused to accept the tender, & the grantor brought an action, claiming in trespass for damages for removal of the goods, & for injury to them in the course of removal, & further, claiming to redeem:—*Held*: the action of trespass would not lie, as at the time of the removal of the goods the property in & the right to possession of the goods were in the grantee, & the grantor was only entitled to redeem on payment of the debt, interest, & expenses, & the costs arising from the claim to redeem.—*JOHNSON v. DIPROSE*, [1893] 1 Q. B. 512; 62 L. J. Q. B. 291; 68 L. T. 485; 57 J. P. 517; 41 W. R. 371; 9 T. L. R. 266; 37 Sol. Jo. 267; 4 R. 291, C. A.
Annotation:—*Reid*. *Re Wood*, *Ex p. Woolfe*, [1894] 1 Q. B. 605.

for the purposes of an amalgamation scheme between them & another co., could not be charged against them in the accounts.—*VAN VOLKENBURG v. WESTERN CANADIAN RANCHING CO.* (1898), 6 B. C. R. 284.—CAN.

b. Time for redemption.—Tender before time fixed for sale.—To impeach a sale under powers in a chattel mtge., on the ground that an offer to redeem was made prior to the time fixed by the notice of sale, the person entitled to redeem is obliged to show that the amount due under the mtge. was actually tendered, or that the mtgee. was distinctly informed that the mtgor. was then & there ready & willing to pay what was so due, & being thus informed of the intention to redeem, that the mtgee. refused to accept payment.—*BRITISH COLUMBIA LAND & INVESTMENT AGENCY v. ISHITAKA* (1911), 20 W. L. R. 308; 1 W. W. R. 549; 45 S. C. R. 302.—CAN.

c. Extension of time for redemption.—Granted on terms.—Deft. gave pltf. a chattel mtge. over certain pictures for \$4,500 with interest at 10 per cent. repayable in three months; a power of sale on default was contained in the mtge. Deft. having been in default for nine months an order was made for foreclosure in four months; unless \$1,000 was paid in three months & \$4,372.45 in four months. Deft. paid the \$1,000 in three months, but applied for a further extension for three months to pay the \$4,372.45 on the ground that he had been disappointed in selling certain other property & that he would suffer irreparable loss if foreclosure took place according to the order:—*Held*: the time for redemption should be extended for three months, deft. to pay costs of the motion, \$1,000 in one month & another \$1,000 in two months. If necessary a new account to be taken to ascertain the amount due allowing for storage charges & insurance.—*MITCHELL v. KOWALSKY* (1909), 14 O. W. R. 792; 1 O. W. N. 95.—CAN.

d. Amount payable on redemption.—Mortgage demanding larger amount than due.—Effect of.—Where a bill of sale contained a power of sale upon default in the payment, on demand, of the amount payable thereunder, a demand of a larger sum than the amount justly payable does not vitiate the sale; & the mtgor. can protect himself by tendering the true sum, or by bringing an action against the mtgees. for demanding & selling for a larger amount.—*HUMPHREY v. ROBERTS* (1866), 5 N. S. W. S. C. R. 376.—AUS.

f. Refusal of redemption.—Effect of.—Where the grantee seized goods covered by the mtge., prematurely, & sold them, refusing to allow the grantor to redeem:—*Held*: the sale was illegal.—*COCHRANE v. BOUCHER* (1883), 3 O. R. 462.—CAN.

g. ———.—A creditor who, holding collateral security, refuses to accept the amount due him, duly tendered by debtor, & proceeds to collect or realise on the security, is liable for the damage thereby caused debtor.—*DESGROSEILLERS v. ANDERSON* (1909), Q. R. 36 S. C. 234.—CAN.

PART VII. SECT. 1, SUB-SECT. 3.

k. Wrongful seizure.—Damages for.—A bill of sale "in consideration of the sum of £50, now paid to B. by M.," assigned to M. certain goods & chattels therein specifically described, by way of security for payment of £50 & interest thereon. No sum of £50 was at the execution of the bill of sale paid to B.; the only money which passed was a sum of £10 solr.'s costs, but there had been previous money transactions between the parties, in which B. was indebted to M. for over £50. B. having made default in payment of the sum secured, M. seized the goods & chattels under the bill of sale. B. brought an action against M. claiming £50 damages for trespass & trover:—*Held*: the bill of sale was entirely void, & the seizure being a trespass, pltf. was entitled to a decree for £50 & costs.—*WHELAN v. WALSH* (1890), 24 I. L. T. 75.—IR.

l. ———.—A mtgor. of chattels has a special property in the mortgaged goods, until "default," & may maintain an action for damages against the mtgee. for seizing & selling before "default."—*FRITH v. MARITIME GENERAL CREDIT & DISCOUNT CO.* (1871), 2 V. L. R. 165.—AUS.

m. ———.—**Sale of part of goods.**—A mtge. being in default, the mtgee., deft., seized the mortgaged chattels & sold a part. Pltf., the mtgor., in order to redeem the remainder, paid, under protest, the sum demanded by deft., & sued deft. for treble the amounts charged by deft. for seizure, mileage, & man in charge, under Distress for Rent & Extra-judicial Seizure Ordinance, & for damages for wrongful detention:—*Held*: pltf. was entitled to recover the excess of the amount paid by him under protest over what was properly due, but was not entitled to damages for wrongful detention.—*COLLINS v. EATON* (1911), 19 W. L. R. 608; 1 W. W. R. 45.—CAN.

n. ———.—**Seizure of goods not**

755. On what terms exercisable.—By trustee in bankruptcy.—Where a bill of sale is given to secure an advance with interest, & the principal sum & interest is made payable by a fixed number of instalments, & the grantor of the bill becomes bkpt. before repayment, his trustee in bkpcy. cannot redeem except upon payment of the full amount of the future instalments.—*Re DAVIES, Ex p. EQUITABLE INVESTMENT CO.* (1897), 77 L. T. 567; 4 Mans. 358.

Annotations:—*Mentd. Barron v. Potter* (1914), 84 L. J. K. B. 751; *Parsons v. Equitable Investment Co.*, [1916] 2 Ch. 527.

See, also, Nos. 746, 747, 751, *ante*; Sect. 2, sub-sect. 1, *post*.

SUB-SECT. 3.—DAMAGES.

See, generally, DAMAGES.

756. Wrongful seizure.—Measure of damages.—By deed dated May 23, 1850, pltf., to secure a debt of £370 owing to defts., assigned to defts.

included in bill.—*WEBB v. NATIONAL BANK OF NEW ZEALAND*, 3 J. R. N. S. 111.—N.Z.

o. ———.—**Set-off against amount due.**—Where pltf. succeeded in an action for damages for the unlawful seizure of his goods by deft. under a chattel mtge.:—*Held*: such damages should not be set-off against the amount due under the chattel mtge.—*SUTTER v. PELLETER* (1914), 20 B. C. R. 212.—CAN.

p. ———.—*Held*: (1) pltf. were entitled to damages for the trespass committed by defts., in seizing & selling mortgaged stock-in-trade, to the possession of which pltf. were entitled; (2) the damages assessed could be set-off against the amount due to defts. under their counterclaim; (3) defts. were entitled to judgment under their counter-claim for the balance found due.—*CLAY v. CANADA GROCERS, LTD.* (1904), 3 O. W. R. 850.—CAN.

r. ———.—Pltf. agreed with the firm of B. & V., of which deft. was a partner, for the cutting of some logs. Certain advances were made to pltf. & he attended at deft.'s office to make his mark to a document which he thought was a written contract. The document being a chattel mtge. deft. seized certain of pltf.'s goods. In an action for damages for wrongful seizure:—*Held*: pltf. was entitled to damages, but deft. could set-off the amount of the advances made to pltf.—*MORIN v. VALOIS* (1908), 12 O. W. R. 923.—CAN.

s. ———.—**Right of action for.—Bill given by co-owner.**—Where two persons are joint owners of chattels & one gives a bill of sale, no action lies for trespass to goods either by two jointly or by one who has not given the bill of sale.—*PARR v. ASH* (1876), 14 N. S. W. S. C. R. 352.—AUS.

756 i. ———.—**Measure of damages.**—H., in consideration of his relieving C. from executions against him, procured from C. & his wife, pltf., a promissory note for the amount thereof, & also a chattel mtge. on the goods of both as collateral security. He discounted the note at a bank & with the proceeds paid off the executions. Before the maturity of the note, claiming there was a breach of the mtge. by the removal of certain goods which was disproved, & refusing to allow the mtgors. to redeem, he took the goods thereunder & sold them, selling goods beyond the amount required to satisfy the mtge., including pltf.'s own goods to the amount of \$137.50.

In an action by pltf. to recover the

Sect. 1.—Rights of grantor: Sub-sect. 3. Sect. 2: Sub-sects. 1 & 2, A.]

his household goods, with a proviso making the deed void if pltf. should pay to defts. £370 on May 23, 1851, or at such earlier day as defts. should appoint for payment thereof, by a notice in writing, to be given twenty-four hours before the day so to be appointed for payment, & should in the meantime pay interest on the sum, & it was declared, that until default in payment of the principal & interest, & until notice, pltf. should remain in possession. Before the day named for payment, & without a twenty-four hours' notice, defts. entered the house of pltf., & seized the goods:—*Held*: pltf. might maintain trespass for taking the goods, but the proper measure of damages was the injury which pltf.'s limited interest in the goods had sustained, & not the value of the goods.—*BRIERLY v. KENDALL* (1852), 17 Q. B. 937; 21 L. J. Q. B. 161; 18 L. T. O. S. 254; 16 Jur. 449; 117 E. R. 1540.

Annotations:—*Consd.* Turner v. Hardcastle (1862), 11 C. B. N. S. 683; Johnson v. Stear (1863), 15 C. B. N. S. 330; Toms v. Wilson (1863), 4 B. & S. 455; Donald v. Suckling (1866), 7 B. & S. 783; Johnson v. L. & Y. Ry. Co. (1878), 3 C. P. D. 499. *Appld.* Belsize Motor Supply Co. v. Cox, [1914] 1 K. B. 244. *Refd.* Chinery v. Viall (1860), 5 H. & N. 288; Spackman v. Miller (1862), 12 C. B. N. S. 659; Mulliner v. Florence (1878), 3 Q. B. D. 484; Hiort v. L. & N. W. Ry. Co. (1879), 4 Ex. D. 188; Armstrong v. Allan (1892), 67 L. T. 417. *Mentd.* Davis v. Underwood (1857), 22 J. P. 8; Edmondson v. Nuttall (1864), 17 C. B. N. S. 280.

757. ———.]—A bill of sale covenanted for payment of the money at a distant day, "or at such other day or time" as the grantee might appoint by notice in writing. The grantee made a demand of payment in half an hour, & in default of payment seized & sold:—*Held*: he was liable in trespass, but the damage must be estimated with reference to the probability of the grantor's having been able to obtain the money, had reasonable notice been given.—*BRIGHTY v. NORTON*

damage thereby sustained the jury gave \$275:—*Held*: pltf. was entitled to recover for even if the sale was merely irregular in selling for a supposed breach, pltf. was entitled to recover the value of the excess of the goods sold, & other damages beyond nominal for her interest in the goods and the verdict was therefore not excessive.—*COCHRANE v. BOUCHER* (1883), 3 O. R. 462.—*CAN.*

756 ii. ———.]—Deft. appealed from a judgment awarding pltf. £200 damages for maliciously & without cause taking pltf.'s goods under a chattel mtge.:—*Held*: the damages were not excessive having regard to the fact that deft. had tried to put pltf. at a disadvantage & had issued a writ merely as a pretext for seizing the chattels under the mtge.—*STEVENS v. DALY* (1902), 1 O. W. R. 621.—*CAN.*

756 iii. ———.]—*COUPLAND v. PARIS PLOW Co.* (1910), 14 W. L. R. 689.—*CAN.*

756 iv. ———.]—Deft. was the holder of two chattel mtges. from pltf., who assigned a judgment & a promissory note to deft., contending that they were accepted in payment of part of the amount due under the chattel mtges. Deft. contended that the judgment & note were collateral:—*Held*: they were received in part payment & as the seizure made by deft. under the chattel mtges. was excessive, though not illegal, damages were assessed at \$1,250, without any allowance for injury to pltf.'s business.—*AVERY & SON v. PARKS* (1915), 9 O. W. N. 125.—*CAN.*

756 v. ———.]—G. made over certain property to his son, W., in consideration that the latter would

(1862), 3 B. & S. 305; 1 New Rep. 93; 32 L. J. Q. B. 38; 7 L. T. 422; 9 Jur. N. S. 495; 11 W. R. 167; 122 E. R. 116.

Annotations:—*Refd.* Moore v. Shelley (1883), 48 L. T. 918; *Mentd.* Fitzgerald's Trustee v. Mellorsh, [1892] 1 Ch. 385; *Re* Brown's Estate, Brown v. Brown, [1893] 2 Ch. 300.

758. ———.]—By a bill of sale pltf. covenanted to pay to defts. the sum secured, with interest, immediately on demand in writing being made to him or left at his place of abode. If he did not immediately on such demand pay the money the instrument authorised defts. to break & enter pltf.'s house, & seize & sell the goods conveyed, but until default in payment on such written demand pltf. was to use & enjoy the goods as his own. By defts.' directions, their attorney wrote a paper demanding from pltf. immediate payment of the sum & interest, not stating the amount of interest, & gave it to J. to give it to pltf., & the attorney authorised J. to receive the money. J. gave the paper to pltf., but did not tell him that he had authority to receive payment. Defts., by their agent, seized pltf.'s goods before reasonable time had been allowed pltf. to pay the money to defts. or to their attorney:—*Held*: as there had been no default in payment on the part of pltf., a reasonable time for making payment not having expired before his goods were seized, pltf. was entitled to maintain an action for taking his goods, but the measure of damages should be, not the value of the goods, but the value of pltf.'s interest in them at the time of seizure.—*TOMS v. WILSON* (1863), 4 B. & S. 455; 2 New Rep. 454; 32 L. J. Q. B. 382; 8 L. T. 799; 10 Jur. N. S. 201; 11 W. R. 952; 122 E. R. 529, Ex. Ch.; *subsequent proceedings* (1867), 17 L. T. 266.

Annotations:—*Consd.* Johnson v. L. & Y. Ry. Co. (1878), 3 C. P. D. 499; Moore v. Shelley (1883), 8 App. Cas. 285. *Refd.* Fitzgerald's Trustee v. Mellorsh, [1892] 1 Ch. 385. *Mentd.* Whariton v. Kirkwood (1873), 29 L. T. 644.

interval between demand & the expiration of a reasonable time for complying with it.—*PETERS v. JOSEPH*, 3 J. R. N. S. 142.—*N.Z.*

756 vii. *Inability of mortgagee to pay debt.*]—Defts. seized goods which had not been assigned to them by pltf. under a chattel mtge. In an action by pltf. for wrongful conversion, it appeared on the evidence, that pltf. was utterly unable to pay the debt. The jury awarded pltf. substantial damages:—*Held*: nominal damages only should have been given.—*PETERS v. JOSEPH*, 3 J. R. N. S. 142.—*N.Z.*

756 viii. *Directions to jury.*]—Even if an action will lie, at the suit of the mtgor. of chattels against the mtgee., for seizure of the chattels before default in payment, where there is no proviso in the mtge. for possession by the mtgor. until default, the jury should be told that pltf. can recover only to the extent of his interest in the goods & for the damage done to such interest, instead of their full value, as in the case of a wrongdoer.—*MCAULAY v. ALLEN* (1870), 20 C. P. 417.—*CAN.*

756 ix. ———.]—*Seizure by third party.*]—Where sheep had been wrongfully seized by deft., & transferred by him to his creditor who sold them, & a mtgee. of the sheep had recovered from the person selling, the value at the time of the sale, as damages for the conversion:—*Held*: pltf. the mtgor. could recover, in trespass against the person who so seized, the difference between such value, & the value at the time of seizure.—*CAVE v. BEVERIDGE* (1877), 3 V. L. R. 302.—*AUS.*

pay to him a weekly sum of £3, & £100 to each of his three children at his death. The due payment of the sums was secured by a bill of sale over property, containing the following proviso:—"Provided also, if any act, deed, matter or thing, shall be done, or knowingly or willingly permitted or suffered by the mtgor., or by or through his means or instrumentality, whereby or by reason or means whereof this present security shall, in the opinion of the mtgee. become deteriorated or lessened in value . . . it shall be lawful for the mtgee. to re-enter, etc., etc."

W. gave way to habits of intoxication. G. seeing that the security was becoming depreciated prevailed upon W. to execute a formal surrender; G. then re-entered. W. thereupon sequestered his estate & the present action was brought by his official assignee:—*Held*: the measure of damages to which pltf. was entitled for the wrongful seizure was the value of the goods on the premises when the security was executed, less the value of the annuity.

After the premises, etc., had been so surrendered to G. he, in pursuance of a clause therein, received debts due to W.:—*Held*: pltf. was entitled to sums of money so received as they could only have been received by G. as agent for W. & consequently as agent for his official assignee.—*MACKENZIE v. WILLIAMS* (1872), 11 N. S. W. S. C. R. 178, 193.—*AUS.*

756 vi. ———.]—*Seizure too prompt.*]—Where a seizure has been made too promptly, the measure of damages is the loss which pltf. has actually sustained by being deprived of the possession of the goods during the

759. —.]—In an action of trespass by pltf. against deft. for wrongfully seizing, under a bill of sale, his horses, in which pltf. claimed damages by reason of such seizure:—*Held*: pltf. was not entitled to recover anything in addition to the value of the horses, as special damage resulting from the loss of them, & deft. was not entitled to make any deduction on account of the balance of the debt remaining due to him from pltf. on the security of the bill of sale, but must recover that, if at all, by a proper proceeding against pltf.—*GREENBIRT v. SMEE* (1876), 35 L. T. 168.

760. — **Aggravated circumstances—Vindictive damages.**—Deft., under an assignment by an extrix. of all money due to her under her husband's will, seized & sold the stock upon pltf.'s farm, claiming under a bill of sale to her by a former occupier of the stock then on the farm, as security for money advanced by her. Pltf. had repeatedly applied to deft. in vain for accounts of his claim, & there was no satisfactory evidence as to whether the original debt was subsisting, & the sale included many things which deft. must have known were not in the bill of sale at all, & there were circumstances of great aggravation:—*Held*: (1) it was rightly left to the jury whether they believed the debt to be due, & whether it was due to the assignor as extrix., & that if not they should find for pltf., & that it was a proper case for vindictive damages; (2) the jury having given beyond the full value of the stock seized, more than double that value by way of damages, the ct. were reluctant to interfere, although they thought the amount excessive, but would recommend a compromise.—*THOMAS v. HARRIS* (1858), 27 L. J. Ex. 353.

761. — **Whether right of action passes—To trustee in bankruptcy.**—An action was brought for trespass & conversion of pltf.'s goods which had been given as security for a bill of sale, & damages were claimed in addition for the personal annoyance caused thereby to pltf. After the action was entered for trial pltf. became bkpt. His trustee in bkpcy. ceased to prosecute the action, but pltf. brought on the action for trial, when all proceedings were stayed, on the ground that all causes of action were vested in the trustee in bkpcy. The damage to pltf.'s land & goods was merely nominal, & if substantial damages could be recovered at all it would be for the annoyance & personal inconvenience caused to pltf.:—*Held*: the action was one in which the primary personal injury to pltf. was the principal & essential cause of action, & though the facts made vindictive damages in the popular sense improbable, the ct. would not be justified in interfering with pltf.'s right to have the stay removed if the cause of action was in point of law

762 i. *Negligence in seizing & removing—Liability of bank for acts of employees.*—*Semble*: though the bill of sale stipulated that the bank who were mtgees. should not be liable for damage arising for acts or defaults of any person in seizing, removing or managing the property they might have been liable for loss by gross negligence of persons employed.—*WEBB v. NATIONAL BANK OF NEW ZEALAND*, [1877] 3 O. A. 334; 2 J. R. N. S. C. A. 1.—N.Z.

w. Loss of goods—Negligence of agent common to both parties.—Action for damages for the loss of a racing filly, pltf. being owner & deft. chattel mtgee. The loss was alleged to have taken place through negligence of N., a trainer, in whose charge the filly

was, pltf.'s claim being based on N.'s agency for deft.:—*Held*: on the evidence pltf. had failed to establish that the filly at the time of the accident was under the control of deft. without the consent of pltf. so that if N. was guilty of negligence deft. was not chargeable as N. was agent of both pltf. & deft. & not of deft. alone.—*MCCULLOUGH v. ALEXANDER* (1904), 3 O. W. R. 388.—CAN.

Reckless & improvident sale, see Sect. 2, sub-sect. 3, *post*.

PART VII. SECT. 2, SUB-SECT. 2. —A.

x. Default in payment—Foreclosure.—The mtgee. of chattels, like the mtgee. of real estate, is entitled to a fore-

vested in him notwithstanding his bkpcy.—*v. BUCKETT*, [1901] 2 K. B. 449; 70 L. J. K. B. 736; 84 L. T. 670; 50 W. R. 8; 17 T. L. R. 544; 8 Mans. 259, C. A.

Annotations:—*Reid*, Lord v. G. E. Ry. Co., [1908] 1 K. B. 195; *Wilson v. United Counties Bank*, [1920] A. C. 102.

See, generally, BANKRUPTCY & INSOLVENCY, Vol. V., pp. 971-976.

— **What amounts to.**—See Sect. 2, sub-sect. 2, *post*.

762. Negligence in removal.—The grantee of a bill of sale, given by way of security for payment of money, seized the goods on default by the grantor in payment of an instalment due under the deed. At the expiration of five days from the seizure the grantee began to remove the goods, & the grantor then tendered the amount due for debt, interest, & expenses. The grantee refused to accept the tender, & the grantor brought an action for injury to the goods in the course of removal, & further, claiming to redeem:—*Held*: the grantor was only entitled to redeem on payment of the debt, interest, & expenses, & the costs arising from the claim to redeem, but was entitled to set off any damages arising from injury done to the goods through the negligence of the grantee in the course of removal.—*JOHNSON v. DIPROSE*, [1893] 1 Q. B. 512; 62 L. J. Q. B. 291; 68 L. T. 485; 57 J. P. 517; 41 W. R. 371; 9 T. L. R. 266; 37 Sol. Jo. 267; 4 R. 291, C. A.
Annotation:—*Consd. Re Wood, Ex p. Woolfe*, [1894] 1 Q. B. 605.

SECT. 2.—RIGHTS OF GRANTEE.

SUB-SECT. 1.—PAYMENT BEFORE DUE DATE.

763. Interpleader—Sale ordered.—*FORSTER v. CLOWSER*, No. 729, *ante*.

764. Sale by grantee—With grantor's consent.—Principal & interest secured by a bill of sale were payable by equal monthly instalments. The borrower authorised the lender to sell, & out of the proceeds deduct the amount for which she was "liable":—*Held*: on sale interest ceased to run, & the lender was entitled to retain unpaid principal & interest to date only.—*WEST v. DIPROSE*, [1900] 1 Ch. 337; 69 L. J. Ch. 169; 82 L. T. 20; 64 J. P. 281; 48 W. R. 389; 44 Sol. Jo. 175; 7 Mans. 152.

See, also, Nos. 754, 755, *ante*.

SUB-SECT. 2.—TO SEIZE.

A. Justification for Seizure.

See 1882 Act, s. 7.

765. Default in payment—"After notice" or "on demand"—Necessity for reasonable time for payment.—By a deed, in consideration of £410

closure in default of payment of the amount secured by the mtge.

Where a party held a mtge. on chattel property, & also mtges. on real estate, the ct. refused to make a decree for sale of the chattels & of foreclosure as to the realty.—*COOK v. FLOOD* (1856), 5 Gr. 403.—CAN.

765 i. — "After notice" or "on demand"—*Necessity for reasonable time for payment.*—*Held*: there being no interest unpaid at the time of seizure deft. could not rely upon the provision entitling him to take possession upon interest being in arrear, simply because the payments were made after the dates on which they became due.—*STEVENS v. DALY* (1902), 1 O. W. R. 621.—CAN.

765 ii. —.]—At the trial of an action to recover damages for

Sect. 2.—Rights of grantee: Sub-sect. 2. A.]

money advanced, the present & future stock, etc., of pltf. were assigned to deft., subject to a proviso that if the money were repaid at the end of ten years, or at such earlier day or time as deft. should appoint by notice in writing, sent by post, or delivered to pltf., or left at his house or last place of abode, the deed should cease & be void, provided that if default should be made in payment contrary to the proviso, then & immediately thereupon it should be lawful for deft. to enter upon pltf.'s premises & seize & sell the goods, etc. Deft. served a notice on pltf. at noon to pay the money due at half-past twelve o'clock p.m. of the same day, & then, on default, seized & sold the goods on pltf.'s premises:—*Held*: the notice, under the deed, must be a reasonable notice, & half-an-hour's notice was not reasonable.—*BRIGHTY v. NORTON* (1862), 3 B. & S. 305; 1 New Rep. 93; 32 L. J. Q. B. 38; 7 L. T. 422; 11 W. R. 167; 9 Jur. N. S. 495; 122 E. R. 116.

Annotations:—*Reid*. Fitzgerald's Trustee v. Mellersh, [1892] 1 Ch. 385; *Re Brown's Estate*, Brown v. Brown, [1893] 2 Ch. 300. *Mentd.* Moore v. Shelley (1883), 48 L. T. 918.

766. ————.]—By a bill of sale pltf. covenanted to pay to defts. the sum secured, with interest, immediately on demand in writing being made to him or left at his place of abode. If he did not immediately on such demand pay the money the instrument authorised defts. to break & enter pltf.'s house, & seize & sell the goods conveyed, but until default in payment on such written demand pltf. was to use & enjoy the goods as his own. By defts.' directions, their attorney wrote a paper demanding from pltf. immediate payment of the sum & interest, not stating the amount of interest, & gave it to J. to give it to pltf., & the attorney authorised J. to receive the money. J. gave the paper to pltf., but did not tell him that he had authority to receive payment. Defts., by their agent, seized pltf.'s goods before reasonable time had been allowed pltf. to pay the money to defts. or to their attorney:—*Held*: there had been a due demand of payment, but there had been no default in payment on the part of pltf., as a reasonable time for making payment had not expired before his goods were seized.—*TOMS v. WILSON* (1863), 4 B. & S. 455; 2 New Rep. 454; 32 L. J. Q. B. 382; 8 L. T. 799; 10 Jur. N. S. 201; 11 W. R. 952; 122 E. R. 529, Ex. Ch.; *subsequent proceedings*, (1867) 17 L. T. 266.

Annotations:—*Distd.* Wharltton v. Kirkwood (1873), 29 L. T. 644. *Consd.* Moore v. Shelley (1883), 8 App. Cas. 285. *Reid*. Fitzgerald's Trustee v. Mellersh, [1892] 1 Ch. 385. *Mentd.* Johnson v. L. & Y. Ry. Co. (1878), 3 C. P. D. 499.

conversion & trespass, it was proved that defts. seized pltf.'s goods immediately after demand for payment made by a person having no authority to receive payment. The judge directed the jury that the entry & seizure were unlawful, because they too promptly followed the demand:—*Held*: no misdirection.—*PETERS v. JOSEPH*, 3 J. R. N. S. 142.—N.Z.

a. ———— *Whether demand necessary.*]—A bill of sale provided for seizing & selling the goods after demand & default; but also provided that the mtgees., a bank, might seize & sell without any notice if "they in any way considered it necessary for the protection of their interests."—*Semble*: under this provision the bank, considering it necessary to seize, need not give notice or make any demand.—*WEBB v. NATIONAL BANK OF NEW ZEALAND*, [1877] 3 C. A. 334; 2 J. R. N. S. C. A. 1.—N.Z.

b. ————.]—Pltf. gave deft. a chattel mtge. over all her

stock-in-trade, fixtures & goods at her store as collateral security for her liability on certain promissory notes & for a further indebtedness. The mtge. was not repaid on the date mentioned in the deed but was renewed by a renewal statement under the Act. Deft. having complained of the smallness of the remittances, pltf.'s husband who managed pltf.'s business, had an interview with deft. at which it was arranged that an employee of deft. should be placed in charge as manager & that pltf.'s husband should assist in the management at a salary. A warrant was issued to deft.'s employee authorising him to seize under the mtge. on which he entered & advertised the stock-in-trade for sale. The goods were sold realising a much smaller amount than the amount of the mtge. In an action by pltf. for damages for conversion & illegal proceedings, pltf. contended that deft. had made no demand for the money due under the mtge., had not advertised the sale & had sold the goods

767.

—.]—A bill of sale contained a provision that it should be void in case the mtgor. should pay the principal money thereby secured "upon demand, if & when the mtgee. should so require by a notice in writing," & until payment of the principal should pay interest thereon half-yearly, & also a proportionate part thereof "to the expiration of the notice, when same shall be given"; & in default of payment power was given to the mtgee. to seize & sell the property comprised in the deed. *Semble*: the mtgee. was not entitled to seize on the same day on which he made a demand for payment, the demand not being at once complied with.—*R. BURGHARDT, Ex p. TREVOR* (1875), 1 Ch. D. 297; 45 L. J. Bcy. 27; 33 L. T. 756; 24 W. R. 301.

768. ———— *Demand on grantor's wife.*]—By a bill of sale debtor assigned goods & chattels to deft., to secure payment of a debt, which debtor thereby covenanted to pay "on demand being made for same," & the deed empowered deft., in default of payment, "upon demand being made as aforesaid," to enter upon any premises in debtor's occupation, & to distrain the goods & chattels there found. Deft. went to the premises, & in the absence of debtor from home, made a demand of payment upon debtor's wife, which was not complied with, & he thereupon seized & sold certain goods & chattels of debtor. Debtor having become bkpt., an action was brought by his assignees against deft. for conversion of bkpt.'s goods:—*Held*: the demand on the wife was not a compliance with the terms of the power, which required a personal demand on debtor, & there having been no demand, the power to seize never became exercisable.—*BELDING v. READ* (1865), 3 H. & C. 955; 6 New Rep. 301; 34 L. J. Ex. 212; 13 L. T. 66; 11 Jur. N. S. 547; 13 W. R. 867; 159 E. R. 812.

Annotations:—*Mentd.* Greenbirt v. Smece (1876), 35 L. T. 168; *Leatham v. Amor* (1878), 47 L. J. Q. B. 581; *Lazarus v. Andrade* (1880), 5 C. P. D. 318; *Re D'Epineuil*, Tadmam v. D'Epineuil (1882), 20 Ch. D. 758; *Clements v. Matthews* (1883), 11 Q. B. D. 808; *Joseph v. Lyons* (1884), 54 L. J. Q. B. 1; *Reeves v. Barlow* (1884), 12 Q. B. D. 436; *Re Clarke*, Coombe v. Carter (1887), 36 Ch. D. 348; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523.

769. ————.]—By the terms of a mtge. deed pltfs. were to remain in possession on their own account, & manage the mortgaged property until they should make default in payment of the mtge. money upon demand in writing in manner specified: such demand was made on the wife of one of pltfs. during pltfs.' absence by a person who represented himself as deft.'s agent, & upon non-payment deft. forthwith entered upon possession

below their market price:—*Held*: (1) pltf.'s husband having been a consenting party & the mtge. being overdue, deft. was entitled to enter & seize the goods; (2) no demand was necessary under R. S. O. 1897 (c. 75) s. 15 on account of the arrangement entered into by pltf.'s husband with deft.—*GORMLEY v. BROPHY CAINS, LTD.* (1907), 10 O. W. R. 913.—CAN.

c. ———— *Waiver.*]—The material parts of a bill of sale read:—"It is provided that if the mtgor. shall make default in payment of the sum of £130 or of any one instalment thereof as they shall fall due on the respective dates, then the whole of the sum of £130 shall immediately thereafter & without any demand being necessary, become due & payable, & in case default shall be made, it shall be lawful for the mtgee. to receive & take into his absolute possession all the goods, chattels, etc."

Pltf. made default in the payment of some of the instalments. Deft. did

& seized the mortgaged property. In an action of trespass against the mtgee. :—*Held* : such non-payment before pltf. had had any opportunity to inquire into the truth of the alleged agency did not constitute default, & deft. was liable to the mtgors. in substantial damages.—*MOORE v. SHELLEY* (1883), 8 App. Cas. 285 ; 52 L. J. P. C. 35 ; 48 L. T. 918, P. C.

770. — Demand on grantor's son.]—To secure a floating balance, pltf. conveyed to defts. by bill of sale the machinery, etc., in & upon pltf.'s mill. The bill of sale contained a proviso for redemption if pltf. should instantly on demand, & without delay on any pretence whatsoever, pay the sum due, & it provided that the demand might be made personally on pltf., or by giving or leaving verbal or written notice to or for him at his place of business, etc., so nevertheless that a demand be in fact made, that on default of payment defts. might enter, & seize, & sell, but that until default pltf. should remain in possession. In pltf.'s absence from his place of business, a demand was made there by defts. upon his son, who stated his inability to meet it, & defts. immediately seized :—*Held* : the notice required by the deed in case of pltf.'s absence was such a notice as might be reasonably supposed to reach pltf., & to give him an opportunity of complying with it within a reasonable time, & the seizure was not justified.—*MASSEY v. SLADEN* (1868), L. R. 4 Exch. 13 ; 38 L. J. Ex. 34.

Annotations :—*Consd.* Wharleton v. Kirkwood (1873), 29 L. T. 644. *Mentd.* Moore v. Shelley (1883), 8 App. Cas. 285.

771. — Demand on grantor's wife & son—Grantor's whereabouts unknown.]—By a bill of sale dated Apr. 15, 1873, pltf. assigned all his goods, etc., to deft. to secure £100, upon the express condition that if pltf. did not "immediately upon demand thereof in writing," delivered to pltf., or left for him at his home, pay the money due, it should be lawful for deft. to seize & sell the goods comprised in the bill of sale. On Apr. 22 deft. went with bailiffs to pltf.'s house & there saw pltf.'s wife & son, who told him that pltf. was from home, they knew not where, & that he might be gone to America for aught they knew. Deft. then read & delivered to the wife & son a written demand for payment, which not being complied with, he at once put the bailiffs in possession, & after an interval of eight days sold the goods. Pltf. returned to his home on May 8, & said he had started with the £100 to go to S. on business, but had gone to R., had got drunk, & remained away on a spree. In an action against deft. for so seizing & selling pltf.'s

not at once exercise his power under the bill of sale, but suggested to pltf. that she should sell the business as a going concern. Pltf. adopted his suggestion & proceeded to carry it out. Soon afterwards, & before pltf. had succeeded in affecting a sale, deft. seized & sold under his bill of sale :—*Held* : (1) no demand for payment was necessary before seizure ; (2) the fact of the mtgee. suggesting to the mtgor. that she should sell her business was no waiver.—*TAGRESS v. SEELIGSON* (1899), 1 W. A. L. R. 94.—*AUS.*

d. — Bill continued in force by unregistered deed—Mortgagor in possession.]—A bill of sale, dated May, 1873, conveyed to pltf. all W.'s stock-in-trade, etc., & for more effectually securing payment of the sum of \$14,987, & what might become due to pltf. for further supplies of goods, he was authorised upon default in payment, after demand, to enter W.'s store, & seize & take possession of

the goods & merchandise therein ; but until default in payment W. might use & enjoy the goods, etc., without interference by pltf. This bill of sale was filed in June, 1875, under C. S., c. 75. By a further deed, dated Aug., 1877, reciting the previous bill of sale, & that \$14,987 was then due from W. to pltf. for goods supplied thereunder, that payment of that sum had been demanded, & it not being convenient for W. to pay, pltf. had agreed to extend the time for payment on certain conditions ; it was witnessed that W. agreed to pay that sum with interest in weekly payments of \$150 each ; that the bill of sale of May, 1873, should continue as a valid & subsisting security till \$14,987 was paid. It then authorised pltf., in case of default in payment of any of the weekly instalments, to enter W.'s store & seize the goods, etc. This deed was not filed under Bills of Sale Act :—*Held* : (1) the deed contemplated that

goods :—*Held* : deft. was, in the circumstances, perfectly justified by the terms of the bill of sale in seizing the goods as he did, immediately upon the demand having been made as above stated.—*WHARLTON v. KIRKWOOD* (1873), 29 L. T. 644 ; 22 W. R. 93.

772. — Verbal promise to give time—Effect of.]—Pltf., in order to secure repayment of a sum of money lent to him by defts., assigned by a bill of sale all his household furniture, etc., subject to a proviso for redemption if the sum was paid by weekly instalments, provided that if pltf. should "make default in payment" of the sum or any part thereof when it should become due, the whole of the money secured should be then immediately due, & payable, & it should be lawful for defts. to take possession of the goods & sell them. Pltf. being unable to pay one of the instalments went to the offices of defts., & saw their secretary, who consented to wait till a later day, but before that day possession of the goods was taken, & on a subsequent day, after the tender of a sum which pltf. had been told would be sufficient to cover all claims, the goods were removed & sold. In an action to recover damages for the seizure & sale :—*Held* : (1) parol evidence of the time having been enlarged for payment of the money was admissible, & showed that there had been no default within the deed ; (2) the word "default" imported something wrongful, the omission to do some act which, as between the parties, ought to have been done by one of them.—*ALBERT v. GROSVENOR INVESTMENT CO.* (1867), L. R. 3 Q. B. 123 ; 8 B. & S. 664 ; 37 L. J. Q. B. 24.

Annotation :—*Consd.* Williams v. Stern (1879), 5 Q. B. D. 409.

773. — — — — —.]—By a bill of sale, dated July 9, 1878, pltf. assigned to deft. certain furniture & goods in his house, subject to the proviso that if pltf. should pay to deft. £42 by twenty-five consecutive weekly payments on every Monday before noon the assignment should be void. It was also agreed that pltf. might at any time after the execution of the bill of sale take possession of the property therein comprised & retain possession thereof, until all the money payable should be fully paid, & further that if default should be made by pltf. in payment of any of the instalments on the days on which such should become due, the whole amount which at the time of such default should be unpaid should at once become due, & deft. was empowered thereon to sell the property & to receive the money arising from such sale. The previous instalments having been paid by pltf., he failed to pay the

W. should have the right to sell the goods in the store in the ordinary course of his business, & that such rights would continue till pltf. exercised his right of entry under the deed ; (2) the deed of May, 1873, was continued in force by the deed of Aug., 1877, which created no new debt, nor gave pltf. any additional security, & his right to seize the goods arose under the deed of May, 1873, & was not affected by the non-registry of the second deed.—*VASSIE v. VASSIE* (1882), 22 N. B. R. 76.—*CAN.*

772 i. — Verbal promise to give time—Effect of.]—A mtgor. of chattels is not guilty of "default" so as to make the mtge. absolute by non-payment of the mtge. money at the time specified in the mtge. deed, if the mtgee. has agreed by parol to extend the time for payment.—*FRITH v. MARITIME GENERAL CREDIT & DISCOUNT CO.* (1871), 2 V. L. R. 165.—*AUS.*

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fourteenth instalment, due on Oct. 14, & he saw deft. on Oct. 16, & asked for time. Deft. replied that he "would not look to a week." On pltf.'s returning home on Oct. 17 he found that the goods had been seized & sold. In an action for conversion & for an improper sale, the jury found for pltf., on the ground that deft. had induced him to believe that he would not seize the goods:—*Held*: there must be a new trial, for deft. was entitled by the provisions of the bill of sale to seize on default, & there had been a default & he had not in any way induced pltf. to alter his position.—*WILLIAMS v. STERN* (1879), 5 Q. B. D. 409; 49 L. J. Q. B. 663; 42 L. T. 719; 28 W. R. 901, C. A.

Annotation:—*Reid*. *Re Tyrer & Hessler* (1901), 84 L. T. 653.

774. — Or on grantor becoming embarrassed.]
—A bill of sale of chattels, made to secure repayment of an advance by instalments, empowered the grantee to take possession after default should be made in payment of any instalment on the appointed day, or in case (*inter alia*) the grantor

should become embarrassed in his affairs, or in case any action at law or other legal process should be commenced against him. There was a subsequent proviso in the bill of sale that, until default should be made in payment according to the covenant & proviso therein contained, it should be lawful for the grantor to retain possession:—*Held*: the subsequent proviso did not override the clause empowering the grantee to take possession on the happening of one of the specified events, &, on the grantor becoming embarrassed in his affairs, the grantee was entitled to take possession, although no default in payment had been made by the grantor.—*Re FRANCIS, Ex p. NATIONAL GUARDIAN ASSURANCE CO.* (1878), 10 Ch. D. 408; 40 L. T. 237; 27 W. R. 498, C. A.

775. — Of instalment—No provision for whole debt to become due on default.]—A bill of sale made the amount, & interest, payable by monthly instalments, but there was no express provision entitling the grantee to seize the whole of the goods on default in payment of one instal-

775 i. — Of instalment—Variation of contract.]—*ROBILLARD v. CHEVALIER* (1911), 17 R. de J. 432.—*CAN.*

f. — Or failure to retire bill.]—A. & S. mortgaged to pltf. with a proviso for redemption if they should within twelve months pay a certain debt, & duly retire & pay a certain protested bill of exchange indorsed by pltf., etc., but in default of either of said provisos, pltf. might enter & take possession & sell. A. & S. did not retire the bill:—*Held*: pltf. had a right to enter & take possession without waiting for the twelve months.—*ECCLES v. SMALL* (1857), 6 C. P. 479.—*CAN.*

g. — Mortgagor attempting to sell.]
—Pltf. sued for damages for wrongful seizure & conversion of horses. Deft. alleged that the horses were seized under a chattel mtge. made by pltf. to him, deft. The mtge. contained a clause enabling deft. to seize if he felt insecure. Deft. alleged that at the date of the seizure, Oct. 14, 1908, the payments under the chattel mtge. were overdue, & also that pltf. had attempted to sell the horses, & that he (deft.) felt insecure. The amount of the chattel mtge. was by its terms, to be repaid in two instalments, on Aug. 1, 1907, & Feb. 1, 1908. Deft. counterclaimed for the balance due under the chattel mtge. after crediting the proceeds of the sale of the horses, & also for expenses incurred for pltf. at his request in defending an action, & also for damages for breach of an agreement whereby pltf. agreed to deliver cordwood to deft. In reply pltf. alleged the chattel mtge. was given as security for the wood agreement, under which pltf. was to deliver the wood before Apr. 1, 1908; that he did deliver large quantities of wood, until, on Jan. 30, 1908, deft. requested him to postpone delivery of the residue until the following winter, & that he, pltf., had always been willing & ready to complete. Pltf. also asked that the chattel mtge. should be rectified so as to conform to the agreement:—*Held*: (1) even if the mtge. were rectified, pltf. would still be in default, as on Apr. 1, 1908, he admittedly had not wholly repaid deft. either in wood or money; & upon the evidence, pltf. had not established that deft. had requested him to delay delivery of the rest of the wood; (2) on the evidence, pltf. was not entitled to succeed upon his counterclaim.—*MAYER v. MACKIE* (1910), 15 W. L. R. 128.—*CAN.*

h. Seizure before default—Absence of proviso as to possession by mortgagor until default.]—*Held*: an action will

not lie, at the suit of the mtgor. of chattels against the mtgee., for seizure of the chattels before default in payment, where there is no proviso in the mtge. for possession by the mtgor. until default.—*MCAULAY v. ALLEN* (1870), 20 C. P. 417.—*CAN.*

k. Removal of goods—By or on behalf of mortgagors.]—A removal of goods to justify a seizure under a chattel mtge. must be by the mtgors. or on their behalf & not a wrongful removal by others.—*COCHRANE v. BOUCHER* (1883), 3 O. R. 462.—*CAN.*

l. — Absence of fraud.]—Deft. justified the seizure of the stallion C. under the mtge. on the ground of the removal of another stallion F. to another county contrary to the provisions of the mtge.:—*Held*: in view of the fact that F. was of no value & his removal not fraudulent, pltf. should be relieved from the seizure on assigning all his accounts from the services of C. & returning F. to the proper county & paying the cost of keeping C. since the seizure.—*HORTON v. SMITH* (1908), 12 O. W. R. 910.—*CAN.*

m. Breach of agreement not to sell or dispose of goods.]—Pltf. mortgaged to deft., with a proviso for redemption on payment of £125 on Oct. 20, & an agreement that pltf. should account to deft. for the price of any of the goods sold by him in the course of business before that day, & that on default, or in case pltf. should attempt to sell or dispose of the goods without deft.'s consent in writing, deft. might enter & take said goods. On the same day deft. gave pltf. a writing authorising him to proceed to sell the goods that day mortgaged to him, "& to continue selling same until further notice in writing, subject nevertheless to the proviso of the said bill of sale in other respects." Pltf. mortgaged the same goods to one C. to secure a debt:—*Held*: a violation of the agreement between pltf. & deft., & deft. was entitled to enter & take possession of the goods.—*CLOSTER v. HEADLEY* (1855), 12 U. C. R. 364.—*CAN.*

n. — Verbal assent of grantee.]—Pltf. mortgaged to H. certain goods, the mtge. containing a covenant for entry in case the mtgor. should sell, etc., the goods or any of them without the mtgee.'s written assent. The usual statement as to putting the mtgee. in possession was struck out. H. assigned to deft. Subsequently pltf., claiming to have deft.'s verbal assent, which deft. wholly denied, sold some of the goods to H., whereupon deft. took the goods & removed them off

the premises, but they were forcibly brought back by pltf., & seized by his landlord for rent. Deft. then replevied the goods & sold them by auction. Pltf. having sued deft. for the taking & conversion, the jury found that deft. verbally consented to the sale:—*Held*: (1) deft. was entitled to take the goods; for even if in equity a verbal assent would be sufficient if admitted or clearly proved to have been given & acted upon, the evidence here failed to establish such assent; (2) even if pltf. could recover it would only be to the extent of his interest in the goods.—*BUNKER v. EMMANY* (1878), 28 C. P. 438.—*CAN.*

o. — —.]—A chattel mtge. contained a proviso that in case the mtgor. should attempt to sell, etc., the mortgaged goods, or any of them, without the mtgee.'s written consent, the mtgee. might enter & take the goods. The mtgor., without such written consent, sold a pair of horses, part of the mortgaged goods, to pltf., when deft., the mtgee., entered & took them, & after keeping them for four days returned them to pltf., who was not subsequently disturbed in his possession. Pltf. having sued deft. for the taking:—*Held*: (1) he was entitled to recover, for that the evidence, as set out in the case, showed that deft. either verbally consented to the sale or acted in such a manner as estopped him from denying that the property passed to pltf.; (2) pltf. could only recover damages for the four days' detention, & not for the value of the horses in addition.—*LOUCKS v. MCSLOY* (1878), 29 C. P. 54.—*CAN.*

p. — No default in payment.]—In an action against the sheriff for goods seized, pltf. claimed under a mtge. of Nov. 12, 1857, & deft. under an execution of the 18th. The time for payment had not arrived, but the mtge. provided that if the mtgor. should sell any of the goods, the mtgee. might take possession; & pltf. who were in possession at the seizure, claimed to have taken the goods under this condition, though the breach of it & pltf.'s entry therefor were not proved:—*Held*: pltf. need not prove the consideration for their mtge. in the first instance, but it must be presumed until impeached.—*SQUAIR v. FORTUNE* (1859), 18 U. C. R. 547.—*CAN.*

q. — —.]—A chattel mtge. contained a clause that the mtgee. might take the goods if the mtgor. attempted to sell, dispose of, or part with the possession of the goods:—

ment. An instalment being in arrear, the grantee, after demand of payment, seized the goods. A receiving order was afterwards made against the grantor, & the goods sold. A county ct. judge having refused to order that the proceeds of sale should be paid to the grantee:—*Held*: the seizure was rightful, as the grantee, in consequence of the default in payment of one instalment, became entitled to possession of the whole of the goods, & an order for payment to him of the proceeds of sale must be made.—*Re WOOD, Ex p. WOOLFE*, [1894] 1 Q. B. 605; 63 L. J. Q. B. 352; 70 L. T. 282; 1 Mans. 87; 10 R. 157, D. C. *Annotation*:—*Reid*, *Parsons v. Equitable Investment Co.* (1916), 85 L. J. Ch. 761.

776. Non-production of receipts.—A mtgee. is entitled to enter into possession under a bill of sale, if the mtgor. fails to produce his rent receipt after a reasonable demand on the part of the mtgee.—*NUNN v. KIRKWOOD* (1883), 75 L. T. Jo. 134.

777. — Reasonable excuse—Payment not demanded by landlord.—In Oct., 1882, C. granted a bill of sale over his furniture, etc., to secure an

advance made by applt. The bill of sale was duly registered under 1878 Act before Nov. 1, 1882. One of the terms of the bill of sale was to the effect that, if the grantor should "fail to deposit with the grantee a receipt for rent due in respect of the premises" the grantee might enter & seize. Certain instalments became due & were unpaid. Two days before the first of the unpaid instalments became due a sum became due from the grantor for rent, but it did not appear that the landlord had asked for payment. The grantee wrote to the grantor requiring payment of the instalments, stating that if they were not paid he should enter & seize, & in the same letter he also required the grantor to produce the receipt for the rent last due. The grantor did not pay the instalments or produce the required receipt, & the grantee entered & seized:—*Held*: in the circumstances, the grantor had not "without reasonable excuse" failed to produce his last receipt for rent, & so constituted a cause of seizure under 1882 Act, s. 7 (4).—*Ex p. COTTON* (1883), 11 Q. B. D. 301; 49 L. T. 52; 47 J. P. 599; 32 W. R. 58, D. C. *Annotation*:—*Apprvd. Ex p. Wickens*, [1898] 1 Q. B. 543.

Held: the mtgee. had the right to take the goods, although default in payment had not been made.—*WHIMSELL v. GIFFARD* (1883), 3 O. R.

r. — Security endangered.—Action to restrain deft. from dealing with goods described in a chattel mtge. to secure \$2,200 which was made by plfts. to S. & was duly registered. The principal was to be paid in four years without interest & in default an extension for a year was to be given. If plft. failed to observe & perform certain covenants in the mtge. the principal would become due at an earlier date. S. assigned the mtge. to deft. In the duplicate mtge. in S.'s hand's the proviso for payment had been altered & it was made to appear that the principal became due in two years & that the rate of interest was 7 per cent. In the assignment it was recited that the interest was 7 per cent. & that the time of maturity was two years. Pltf. alleged that the mtge. was so materially altered as to make it void:—*Held*: (1) what was assigned was a mtge. duly filed & the erroneous reference to the date of maturity & the rate of interest did not invalidate it; (2) pltf. had committed a breach of a covenant in the deed in selling some of the mortgaged goods, & deft., feeling unsafe as a consequence, was justified in making the seizure complained of.—*WOODBECK v. WALLER* (1917), 11 O. W. N. 386.—*CAN.*

s. — Mortgagors absconding.—On the mtgors. absconding, defts. took possession under a clause in the mtge. which allowed them to do so in case the mtgors. "should attempt to sell, dispose of, or in any way part with the possession of said goods," & removed them to their own warehouse. The mtge. also contained a redemise clause. *Semble*: defts. were justified in taking possession when the mtgors. absconded, leaving no one in charge of the goods.—*ROBINS v. CLARK* (1880), 45 U. C. R. 362.—*CAN.*

t. Issue of writ for money demand against mortgagor—Writ issued by mortgagee.—*Held*: a provision entitling deft. to take possession upon issue of a writ of summons for a money demand against plft., did not entitle deft. to seize the chattels upon the issue at his own suit of a writ to enforce payment of the same money demand as the chattel mtge. was given to secure, the object of the provision being to protect deft. if a claim other than his own was pressed by issue of a writ against plft.—*STEVENS v. DALY* (1902), 1 O. W. R. 621.—*CAN.*

v. Seizure under execution—For debt secured by mortgage.—The mtgee. of the chattels, seized the mortgaged goods under an execution in a suit for the debt secured by the mtge. The execution was set aside as being against good faith. In an action for the wrongful seizure & conversion of the goods:—*Held*: the mtgee. could not justify the seizure under the mtge.—*DEDRICK v. ASHDOWN* (1888), 15 S. C. R. 227.—*CAN.*

w. Breach of agreement as to maintenance of security.—A. was lessee & licensee of a hotel, in which he had been placed by his father, deft. In 1916 A. gave a bill of sale over the lease, license, goodwill, stock-in-trade, etc., in favour of deft. A term of the mtge. deed provided that if the mtgor. abandoned the hotel or did not continue to manage it, or did or neglected to do any act or thing whereby the license for the hotel might become liable to cancellation, the mtgee. could take possession of the mortgaged property, & could sell it. In Dec., 1916, A. abandoned possession to B., his sister, who was acting as his manageress, & A. went to Sydney. B. continued to manage the hotel for A. until Mar., 1917. A. in writing consented to deft. taking possession of the mortgaged property & realising same. In Mar. B. obtained a transfer of the license to herself. Transfer of the lease from A. to deft. was registered in May, 1917. In Mar., 1917, deft. took possession of the hotel, & entered into an agreement for the sale thereof to B. under which the property was not to pass until the performance of certain conditions, & B. continued in possession under the agreement until the sale of the property to C. The conditions of the agreement were not carried out. A. was adjudicated insolvent in Feb., 1918. In Mar. deft. sold the property to C. for its full value, who thereafter carried on the business. The proceeds of the sale did not however cover the mtge. debt:—*Held*: (1) the facts established a default in compliance with the terms of the mtge. & which entitled the mtgee. to take possession; (2) such default was a failure on the part of the mtgor. to perform obligations which he had agreed to perform & which were proper & necessary for the preservation of the security, & the mtgee. had a right to enter peaceably into possession, damages not being recoverable for his so doing.—*MCGRATH (TRUSTEE) v. MCGRATH* (1919), 12 Q. S. R. 228.—*AUS.*

x. Drunkenness of mortgago

Construction of proviso.—The due payment of the sums secured by a bill of sale over property, containing the following proviso: "Provided also, if any act, deed, matter or thing, shall be done, or knowingly or willingly permitted or suffered by the mtgor., or by or through his means or instrumentality, whereby or by reason or means whereof this present security shall, in the opinion of the mtgee become deteriorated or lessened in value . . . it shall be lawful for the mtgee. to re-enter, etc., etc."

The mtgor. gave way to habits of intoxication, & the mtgee., seeing that the security was becoming depreciated, re-entered:—*Held*: the words of the proviso did not comprehend "drunkenness" as an "act, deed, matter, or thing whereby, etc."—*MACKENZIE v. WILLIAMS* (1872), 11 N. S. W. S. C. R. 178, 193.—*AUS.*

y. Absence of re-demise clause—Whether mortgagee entitled to immediate possession.—When a chattel mtge. contains no re-demise, the mtgee. may take immediate possession.—*PATERSON v. MAUGHAN* (1876), 39 U. C. R. 371.—*CAN.*

z. — Before default in payment.—*Held*: an action will not lie by a mtgor. of chattels against the mtgee., for seizure thereof before default in payment, where there is no re-demise clause.—*SAMUEL v. COULTER* (1877), 28 C. P. 240.—*CAN.*

a. being no re-demise clause or proviso in the mtge. whereby the mtgor. might have remained in possession until default, the mtgees. were entitled to immediate possession of the property granted thereby, & might if they had pleased, at any time have exercised their right to sell thereunder without the mtgor.'s intervention or consent.—*MERCHANTS BANK OF CANADA v. R.* (1881), 1 Exch. C. R. 1.—*CAN.*

b. — — — — ——A chattel mtge. contained no re-demise clause. It was provided, however, that on default of payment, etc., or in case of the mtgor. attempting to sell or part with the possession of the goods without the mtgee.'s consent in writing, etc., the mtgee. might enter & take the goods, & sell same; & also on default of payment the mtgee. might distrain; & further, that it should not be incumbent on the mtgee. to sell & dispose of the goods, but in case of such default should peaceably & quietly have, hold, & occupy the said goods without the let, etc., of the mtgor. Before any default was made

Sect. 2.—Rights of grantee: Sub-sect. 2, A., B. & C.]

778. Demand for receipt to be sent by post.]—The grantee of a bill of sale gave the grantor notice in writing to send by post the last quarter's receipt for rent. The rent had not been paid, the landlord not having demanded it. No receipt having been sent, the grantee seized, & claimed the sum advanced, the whole of the interest secured by the bill of sale, & the costs of the levy:—*Held*: (1) the grantor had not "without reasonable excuse" failed to produce his last receipt for rent, within 1882 Act, s. 7 (4); (2) a demand that the last receipt should be sent to the grantee by post was not a demand to produce the receipt to him within the sub-sect.—*Ex p. WICKENS*, [1898] 1 Q. B. 543; 67 L. J. Q. B. 397; 46 W. R. 385; 5 Mans. 55; *sub nom. WICKENS v. SHUCKBURGH*, 78 L. T. 213, C. A.

Annotation:—Distd. Ex p. Ellis, [1898] 2 Q. B. 79.

Validity of power of seizure—Whether bill in statutory form.]—See Part V., Sect. 2, sub-sect. 6, B, *ante*.

B. Limitations on Right of Seizure.

779. Bill of exchange taken as collateral security.]—Goods were assigned by S. to debt. by a bill of sale under seal in consideration of £50 advanced by debt., with a proviso that if S. paid the £50 upon demand in writing given to him, or left at his last place of abode, the deed should be void, but in default of payment contrary to the proviso, "then at any time thereafter" it was to be lawful for debt. to take possession of the goods, which were to remain in S.'s possession until default. At the same time S. accepted & gave debt. a bill of exchange at four months for £50 to secure the same debt, & debt. at once indorsed it

the mtgee. entered & seized & sold the goods, for which the mtgor. brought an action, the first & second counts being in trespass & trover, & the third count being for seizing & selling the goods without pltf.'s consent before default made, whereby pltf. was deprived of his right to redeem, etc.:—*Held*: pltf. was entitled to recover on the third count, pltf. being entitled to the restitution of his property on the performance of the condition on which he mortgaged it, which the mtgee. by his wrongful act had prevented from being accomplished.—*BINGHAM v. BETTINSON* (1879), 30 O. P. 438.—*CAN.*

c. ——— Intention of parties.]—*Held*: the fact that the chattel mtge. was collateral to a mtge. or real estate, & the nature & purpose for which the chattels were employed, showed that it was intended that the mtgor. should retain possession till default, & debt. could not rely on the absence of the re-demise clause as entitling him to take possession without default.—*STEVENS v. DALY* (1902), 1 O. W. R. 621.—*CAN.*

PART VII. SECT. 2, SUB-SECT. 2. —B.

d. Chattel mortgage given as collateral security—Principal security outstanding.]—H., in consideration of relieving C. from executions against him, procured from C. & his wife, pltf., a promissory note for the amount thereof, & also a chattel mtge. on the goods of both as collateral security. He discounted the note at a bank, & with the proceeds paid off the executions. Afterwards, but before the maturity of the note, & while it was in the bank's hands, claiming that there was a breach of the mtge. by the removal of certain goods which was disproved, & refusing to allow

the mtgors. to redeem, he took the goods thereunder & sold them:—*Held*: the note being the principal security, & the chattel mtge. merely collateral, H. could not proceed on the mtge. while the note was thus outstanding.—*COCHRANE v. BOUCHER* (1883), 3 O. R. 462.—*CAN.*

781 i. Bankruptcy of grantor—Chattels in possession of—Trustee in bankruptcy.]—L. being indebted to L. gave him a chattel mtge. & confession of judgment, & after the mtge. became due made an assignment for the benefit of creditors to W. & S., who took possession of the goods. L. then put a writ of *fi. fa.* in the sheriff's hands, directing him to levy and make the amount of his debt out of the goods of R.:—*Held*: the fact of L. having put an execution in the sheriff's hands at his suit, directing to levy of the goods mortgaged to him as the goods of R., did not estop him from setting up his title under the chattel mtge.—*WAKEFIELD v. LYNN* (1856), 5 C. P. 410.—*CAN.*

781 ii. —.]—By an agreement pltf. sold to M. their interest in a certain timber berth for \$19,000 payable by instalments. It made use of language implying the transfer of the property in the logs as soon as cut, but contained this proviso, "that during the currency of this agreement all logs, etc., shall be deemed to be the property of the vendors unless & until the purchaser shall have paid all arrears of principal & interest which may be due hereunder & the purchaser hereby covenants with the vendors not to sell, assign, or transfer any such logs, etc., until all arrears are fully paid & satisfied."

Pursuant to another clause in the agreement, pltf. on Feb. 4, 1908, gave notice terminating the agreement, & forfeiting M.'s payments previously

over for value:—*Held*: the mere taking of the bill of exchange did not suspend debt.'s remedy under the bill of sale.—*BRAMWELL v. EGLINTON* (1864), 5 B. & S. 39; 4 New Rep. 56; 33 L. J. Q. B. 130; 10 L. T. 295; 10 Jur. N. S. 583; 12 W. R. 551; 122 E. R. 747; *affd.* on another point (1866), L. R. 1 Q. B. 494, Ex. Ch.

Annotation:—Mentd. Re Southam, Ex p. Southam (1874), L. R. 17 Eq. 578.

780. Bankruptcy of grantor—Chattels in possession of—Receiver under liquidation.]—A farmer filed his petition for liquidation, & a receiver was appointed & took possession at once. Five days after, on Mar. 23, the holder of a registered bill of sale of live & dead stock forcibly took some horses of debtor's out of the possession of the receiver:—*Held*: however good the title of the holder of the bill of sale might have been, he had no right to remove the horses from the possession of the receiver without leave of the ct. *Semble*: the position of a receiver in bkpcy. did not differ from that of a receiver in Ch.—*Re MEAD, Ex p. COCHRANE* (1875), L. R. 20 Eq. 282; 44 L. J. Bcy. 87; 32 L. T. 508; 23 W. R. 726.

781. ——— Trustee in bankruptcy.]—The grantee of a bill of sale & the trustee in bkpcy. of the grantor were in concurrent possession of the property comprised in it. The grantee had taken possession first. The trustee impeached the validity of the bill of sale. Before the question of its validity had been decided, the grantee forcibly removed part of the property:—*Held*: notwithstanding the fact that the grantee had taken possession first, the removal was an unlawful act, & the grantee must pay the trustee's costs of a motion, which had been refused in the county ct., to compel the restoration into the joint possession

made for default in payment of the instalment due on Jan. 1, 1908. Logs had been cut before that date & removed from the limit by M.'s assignees who on Mar. 31, 1908, gave debts. a security under Bank Act, s. 88, for advances:—*Held*: the logs having been in the possession & ownership of M.'s assignees until May 1, 1908, when pltf. first attempted to take possession of them, the Bills of Sale & Chattel Mortgage Act prevented pltf. from acquiring any title to them by virtue of the agreement as against the claim of debts.—*MUTCHENBACKER v. DOMINION BANK* (1911), 21 Man. L. R. 320.—*CAN.*

781 iii. Liquidator.]—On application of the mtgee. a liquidator was directed to deliver up plant & chattels mentioned in appct.'s mtge. If parties cannot agree as to the specific chattels, the mtgee. may bring an action or an issue will be directed.—*SHORTREED v. RAVEN LAKE PORTLAND CEMENT CO.* (1909), 13 O. W. R. 720.—*CAN.*

f. Mortgage given by agent—Principal dead at time of execution.]—T. K. & Co., gas fitters & plumbers, contracted verbally with D., a hotel-keeper, to supply a new hotel he was erecting with various articles in the way of their trade, which were to be paid for as the work progressed. D. afterwards left this Province on account of ill-health, having previously executed a power of attorney to S., authorising him to carry on his business during his absence. T. K. & Co. having discovered that D.'s estate was greatly involved, refused to proceed with their contract unless secured for their work & materials; whereupon S., with a view of inducing them to complete their contract, in pursuance of a previous arrangement, executed as such attorney a chattel mtge. of the goods furnished by them, securing

of the property which had been removed.—*Re FIELDS, Ex p. ANDREWS* (1876), 4 Ch. D. 509; 46 L. J. Bcy. 23; 36 L. T. 38; 25 W. R. 382.

C. Effect of Wrongful Seizure.

782. Premature seizure—Whether validity of bill affected.]—Goods were assigned by S. to deft. by a bill of sale under seal in consideration of £50 advanced by deft., with a proviso that if S. paid the £50 upon demand in writing given to him, or left at his last place of abode, the deed should be void, but in default of payment contrary to the proviso, "then at any time thereafter" it was to be lawful for deft. to take possession of the goods, which were to remain in S.'s possession until default. At the same time S. accepted & gave deft. a bill of exchange at four months for £50 to secure the same debt, & deft. at once indorsed it over for value. On Feb. 16, the bill being still current, deft., knowing S. to be in gaol under a *ca. sa.*, left a demand in writing at his house, & took possession of the goods the same evening. S. was adjudicated a bkpt. on Feb. 23:—*Held*: assuming Feb. 23 to be the material date, on that day the goods were not in the order & disposition of bkpt. with the consent of deft., the true owner, for, if deft. had been premature in taking the goods the same day as the demand, yet that did not prevent his taking possession in proper time before the 23rd.—*BRAMWELL v. EGLINTON* (1864), 5 B. & S. 39; 4 New Rep. 56; 33 L. J. Q. B. 130; 10 L. T. 295; 10 Jur. N. S. 583; 12 W. R. 551; 122 E. R. 747; *affd.* on another point (1866), L. R. 1 Q. B. 494, Ex. Ch.

Annotation:—*Mentd. Re Southam, Ex p. Southam* (1874), L. R. 17 Eq. 578.

783. ———.]—An illegal seizure does not affect the validity of a bill of sale in respect of payments becoming due under it after the date of the seizure.—*MONSON v. MILNER* (1892), 8 T. L. R. 447.

784. ——— Sale affirmed by grantor—Position of trustee in bankruptcy.]—On Nov. 2, 1870, B. & H. executed a bill of sale of their machinery & plant, etc., to R. for securing repayment of a certain sum advanced by him. The bill of sale contained a proviso for entry & seizure by R. in case default should be made in payment for the space of twenty-four hours after demand. R.

demand payment on May 3, 1871, by a notice which was served on B. at 2.30 o'clock p.m. & on H. at 5 o'clock p.m. R. took possession at 9.30 o'clock on the following morning. On May 6 B. & H., having previously surrendered the keys to R., filed their petition for liquidation, & N. was appointed receiver & took possession. The workmen were paid off by N. on the morning of May 9. The person put in possession by R. continued in possession until May 19. N. was subsequently appointed trustee under the liquidation. It was contended on behalf of the trustee under the liquidation that the possession of R. having been taken before the expiration of twenty-four hours after demand was illegal & that R. could not set up a title through an illegal act:—*Held*: as no objection had been taken by debtors to the possession taken by R., the title of R. must prevail over that of the trustee.—*Re BALL & HEATH, Ex p. REDFERN* (1871), 19 W. R. 1058.

785. Seizure under void bill—Whether sale affirmed by grantor.]—In an action for damages for the alleged wrongful sale & conversion of goods comprised in a bill of sale given to deft. by pltf., as security for a loan of £1,300, it was conceded that the bill of sale was void as not being in accordance with the statutory form, but the defence was that pltf. had by her acts affirmed & adopted the sale. At the trial the judge decided that pltf. had not adopted the sale, & he directed an inquiry to be conducted before an official referee, as to the damages occasioned by the sale. On the inquiry the official referee reported that there were no damages which he could assess, as he considered that there was no evidence of any improper or negligent conduct in the sale, & no evidence that the grantee had gone beyond the rights given by the bill of sale, & he adjourned the inquiry as to the value of the goods. Pltf. then applied to the ct. that directions might be given to the referee as to the principle on which the damages ought to be assessed, whereupon the judge remitted the action to the referee with a direction that regard was to be had to the fact that the bill of sale was admitted to be void, but he declined to exclude from the consideration of the referee any evidence showing that the sale was made at the request, or with the consent, of pltf.:—*Held*: (1) the facts did not establish adoption

to them payment of their demand. At the time of the execution of this instrument D. was dead, but this fact was not known to the parties until some time after the completion of the work:—*Held*: T. K. & Co. were not under this mtgo. entitled to remove any of the fittings put in the hotel, their remedy being for the price of their work & material under their contract with D.—*MCQUESTON v. THOMPSON* (1862), 2 E. & A. 167.—*CAN.*

g. Mortgagor bailee of first mortgage—Rights of second mortgagee.]—The first mtgo. on certain chattels provided that the mtgor. should hold them as bailee for the mtgee.:—*Held*: notwithstanding this clause a second mtgee. might have a right of seizure, subject to the rights of the first mtgee.—*GREAT WEST LIQUOR CO. v. COLQUHOUN* (1914), 17 D. L. R. 568.—*CAN.*

h. Necessity to obtain leave of court—Mortgages Extension Acts.]—Before the passing of Mortgages Extension Act, 1914, M. executed in favour of deft. a bill of sale over certain chattels therein sufficiently described for the purposes of Chattels Transfer Act, 1908, s. 20, & over other chattels which were not sufficiently so described. The instrument was not registered under the last-mentioned Act. After

the passing of Mortgages Extension Amendment Acts, 1914, 1915, an agreement in writing was executed by M. & deft. whereby it was agreed that Mortgages Extension Act, 1914, should not apply to the bill of sale. M. having subsequently made default under the bill of sale, deft. seized certain of the chattels comprised in the bill of sale. On the following day M. executed an assignment of his property to trustees for the benefit of his creditors:—*Held*: deft. had committed a breach of Mortgages Extension Acts in seizing the chattels without the leave of the Supreme Ct.—*JOHNS v. MULINDER*, [1915] N. Z. L. R. 422.—*N.Z.*

j. ——— Or consent of mortgagor—War Precautions (Moratorium) Regulations.]—*MCGRATH (TRUSTEE) v. MCGRATH* (1919), 12 Q. S. R. 228.—*AUS.*

PART VII. SECT. 2, SUB-SECT. 2.
—C.

784 i. Premature seizure—Concurrence of grantor.]—Where the events in which a chattel mtgee. is by the mtge. permitted to seize have not arisen but nevertheless the grantor concurs in his seizure the seizure is lawful.—*ADAMS v. HUTCHINGS* (1893), 3 Terr. L. R. 206.—*CAN.*

785 i. Seizure under void bill—Rights of trustee in bankruptcy.]—The grantees of a bill of sale (which is in fact invalid as against the official assignee of the grantor), before the commencement of the grantor's bkpey., took possession of the goods comprised in it:—*Held*: this did not oust the operation of Bills of Sale Act, 1898, s. 5, & the official assignee of the grantor was entitled to the goods comprised in such bill of sale.—*Re CATIP* (1912), 12 S. R. N. S. W. 552.—*AUS.*

k. Extra-judicial seizure—Subsequent sale—Rights of purchaser.]—A purchaser of goods from one who has bought them from a bailiff who sold them under a chattel mtge. as authorised by the terms of the warrant issued by the mtgee. to the sheriff, but without obtaining the order required by 1914 Statutes, c. 4, s. 4, has as against such mtgee. a right to the goods & may recover damages against such mtgee. & the sheriff & bailiff for any interference with his possession.—*LIPSEY v. ROYAL BANK OF CANADA*, [1919] 2 W. W. R. 979; 47 D. L. R. 545.—*CAN.*

l. Leave & licence—Mortgagor standing by & permitting sale.]—Pltf.'s wife procured deft. to indorse a note made

Sect. 2.—Rights of grantee: Sub-sect. 2, C.; sub-sects. A. (a).]

& affirmation of the sale on the part of pltf.; (2) the matter should be referred back to the referee on the footing of the sale itself being wrongful.—*WALLIS v. SAYERS*, [1890] W. N. 120; 6 T. L. R. 356, C. A.

Annotation:—Mentd. Spalding v. Gamage (1918), 35 R. P. C. 101.

See, also, Sect. 1, sub-sect. 3, ante.

SUB-SECT. 3.—TO REMOVE AND SELL.

See 1882 Act, s. 13.

786. Goods seized in public street—Removal to grantee's premises—Sale after five days.]—A horse & carriage were seized, under a bill of sale, in a public street & at once removed to premises of the grantee, & after five days were sold by him:—*Held*: the seizure in the street was lawful, & in the absence of actual damage arising from the removal within the five days, no action would

by her for the price of furniture, to carry on a boarding house, & executed to debt. a chattel mtge. under seal in her own name on the furniture. The rent being in arrear & part of the mtge. money overdue, the landlord distrained & debt. enforced his mtge., pltf.'s wife assenting, the balance after payment of rent & mtge. being handed to her. Pltf. sued debt. in trespass & trover:—*Semle*: the wife standing by & permitting the sale, was some evidence under the plea of leave & license.—*HALPENNY v. PENNOCK* (1873), 33 U. C. R. 229.—**CAN.**

m. — Mutual mistake of fact—Acquiescence.]—When a mtgee., in seizing the goods over which he holds security, takes goods pointed out to him by the mtgor., which the latter believes to be, though in fact they are not, included in the security, it is a mutual mistake of fact, & does not amount to leave & licence by the mtgor. A subsequent purchase by the mtgor. from the mtgee. of part of the goods improperly seized indicates no more than a continued ignorance by the mtgor. of his rights, not an acquiescence in the seizure.—*HURREY v. BANK OF NEW SOUTH WALES* (1882), 1 N. Z. L. R. C. A. 115.—**N.Z.**

PART VII. SECT. 2, SUB-SECT. 3.

n. Right of entry—For removal of goods mortgaged.]—The grantees, under a bill of sale, after default, may enter upon the premises of the grantor for the purpose of removing the property covered by the bill of sale.

Where the grantor occupies a lease, the grantees are entitled, for the purposes of entry, to all the rights that the grantor enjoyed.—*BOSTON MARINE INSURANCE CO. v. LONGARD* (1894), 26 N. S. R. 387.—**CAN.**

o. Removal of live stock—Duties of mortgagee.]—Where a chattel mtgee. of live stock knows at the time he makes a seizure under his mtge. that he will require to obtain the permission of the sheriff to sell the chattels, he should not remove them when the owner has feed for them, but should put a man in possession until he obtains such permission, & he will not be allowed the additional costs of removing the chattels & keeping them in a livery stable. In this case:—*Held*: the mtgee. was only entitled to the costs of twenty-one days' possession although nearly three months had elapsed between seizure & sale owing to the necessity for obtaining the sheriff's permission to sell.—*MARSHALL*

v. SIGER (1916), 34 W. L. R. 803; 10 W. W. R. 918.—**CAN.**

p. Seizure condition precedent to sale.]—Defts. gave pltf. a bill of sale over certain personal property to secure a sum of money advanced to debts. by pltf. The bill of sale contained a condition that in case of default it should be lawful for pltf. to enter & seize & take possession of the property secured by the bill of sale & sell same. Pltf. exercised his power of sale, but owing to no fault of pltf. the sale went off. Pltf. then sued debts. on bonds given by them as collateral security for repayment of the amount secured by the bill of sale. At the trial there was no finding as to whether pltf. had seized before sale, & in the absence of this finding debts., appealed against a decision giving judgment for pltf.:—*Held*: in order to make good the alleged sale, seizure in accordance with the conditions of the bill of sale was indispensable, & as there was no proof that the provision as to seizure before sale had been complied with, there must be a new trial.—*WILLIAMSON v. TAIT* (1893), 19 V. L. R. 3.—**AUS.**

r. Exercise of power of sale—Duty of mortgagee to use due care & diligence—To prevent sale at undervalue.]—If for want of due care & diligence the mtgee. does not realise on a sale of the property what might have been received on it, he is liable for the full value of the property sold.

A chattel mtgee. acting under his powers seized & sold to his father, goods mortgaged to him. The sale was effected privately & unknown to the mtgor.:—*Held*: the purported sale was a collusive arrangement & the mtgor. was entitled to recover damages.—*GRIMES v. GAUTHIER* (1908), 7 W. L. R. 485; 1 Sask. L. R. 54.—**CAN.**

s. — — — — —.]—Deft. having seized under his chattel mtge., sold two days after seizure. The speed was caused by the fact that rent would be due on the day following sale:—*Held*: the mtgee. standing in a fiduciary character should have taken all reasonable means to prevent a sacrifice, & there should have been at least five days' notice of sale.—*WOOD v. DETLOR* (1909), 14 O. W. R. 192.—**CAN.**

t. — — — — —.]—In of his power of sale, a mtgee. of chattels is bound merely to act in good faith & avoid conducting the sale proceedings in a manner so recklessly improvident as to sacrifice the goods by sale at an undervalue.—*BRITISH COLUMBIA LAND & INVESTMENT AGENCY*

lie.—O'NEIL v. CITY & COUNTY FINANCE CO. (1886), 17 Q. B. D. 234; 55 L. T. 408; 34 W. R. 545, D. C.

787. Removal within five days—With grantor's consent.]—1882 Act, s. 13, is for the benefit of grantors only; & where goods are seized & removed by the grantee, with the grantor's consent, within such period of five days, the grantor's landlord has no right of action against the grantee owing to such removal.—*LANE v. TYLER* (1887), 56 L. J. Q. B. 461, D. C.

Annotation:—Apprvd. Tomlinson v. Consolidated Credit & Mortgage Corpn. (1889), 24 Q. B. D. 135.

788. — — — — — To avoid distress.]—Where a tenant of pltf. had given debts. a bill of sale over his furniture, & debts. seized the furniture under their bill of sale, & within five days removed it by the authority of the tenant, with the intention of preventing pltf. from distraining for rent then due:—*Held*: pltf. had no cause of action in respect of the removal of the goods within five days after the seizure under the bill of sale.—*TOMLINSON v. CONSOLIDATED CREDIT & MORTGAGE CORPN.*

v. ISHITAKA (1911), 20 W. L. R. 308; 1 W. W. R. 549; 45 S. C. R. 302.—**CAN.**

v. — — — — —.]—A mtgee. in possession who sells mortgaged goods in a reckless & improvident manner is liable to account not only for what he actually receives, but for what he might have obtained had he acted with proper regard for the interests of the mtgor.—*RENNIE v. BLOCK* (1896), 26 S. C. R. 356.—**CAN.**

w. — — — — — Expenses of realization.]—It is the duty of a mtgee. when realising the mortgaged property by sale to behave in conducting such realisation as "reasonable man would behave in the realisation of his own property, so that the mtgor. might receive credit for the fair value of the property sold. But such a doctrine recognises as a necessary corollary the right of the mtgee. to treat the reasonable expenses of such realisation as a deduction from the amount realised, & unless that is done the sale price does not truly represent the value of the property sold because it is a sum which the owner could not have obtained for it without paying the necessary costs of realisation.—*McHUGH (FELIX A.) v. UNION BANK OF CANADA, McHUGH (THOMAS P.) v. UNION BANK OF CANADA*, [1913] A. C. 299; 29 T. L. R. 305, P. C.—**CAN.**

x. — — — — — Whether advertisement of sale adequate.]—Pltf. who was a tenant of debt. executed two chattel mtges. in favour of debt. as security for the rent of his farm & for advances made by the firm of A. & R. of which debt. was a partner. Pltf. not being able to repay the amount due, debt. seized & sold the goods comprised in the chattel mtges. In an action to recover damages for conversion of the goods pltf. contended that the amount due to debt. was trifling compared with the value of the goods sold, & that the sale was not adequately advertised:—*Held*: debt. was justified in selling the goods, but pltf. was entitled to damages by reason of the sale not having been adequately advertised.—*NEAL v. ROGERS* (1911), 19 O. W. R. 873; 2 O. W. N. 1482.—**CAN.**

y. — — — — —.]—Pltf., a chattel mtgor., sued for damages, alleging the sale by the mtgee. had been improvident & not adequately advertised:—*Held*: debt. was not liable as the sale had been duly advertised in three local papers & carried out by an experienced firm of auctioneers.—*O'NEIL v. EDWARDS*

(1889), 24 Q. B. D. 135; 38 W. R. 118; 6 T. L. R. 54; *sub nom.* TOMKINSON v. CONSOLIDATED CREDIT & MORTGAGE CORPN., LTD., 62 L. T. 162; 54 J. P. 644, O. A.

Chattels in hands of receiver or trustee in bankruptcy.]—See Nos. 780, 781, ante.

Validity of power of sale—Whether bill in statutory form.]—See Part V., Sect. 2, sub-sect. 6, C, ante.

SUB-SECT. 4.—AGAINST THIRD PARTIES.

A. On Disposal of Chattels by Grantor.

(a) Before 1878.

789. Priority according to date of execution.]—A non-trader gave, on Feb. 10, 1870, a bill of sale of goods to A., as security for advances, & on Feb. 28, a second bill of the same goods to P. as security for advances, P. having no notice of A.'s bill. On Mar. 2 A. registered his bill, & on Mar. 18 P. registered his. Neither having been repaid, on Mar. 21 P. took possession under his

(1913), 25 O. W. R. 292; 5 O. W. N. 348.—CAN.

z. Sale by auction on instructions from mortgagor—Mortgagee acting as auctioneer—Fraudulent bidding.]—A sale of mortgaged chattels by the mtgee., acting as auctioneer under instructions from the mtgor., is a sale by the mtgee. at the request of the mtgor., & if articles are knocked down at such sale to the mtgor., then, whether he pays cash or is given credit for the price, the property reverts in him as purchaser.

If the mtgor.'s bid is, to the knowledge of the mtgee., a sham for the purpose of buying in, then, the sale being without reserve, there is a fraud on other bidders. The mtgee. cannot contend that there was no real sale, as that would be setting up his own fraud.—*Re CHRISTIE* (1901), 19 N. Z. L. R. 615.—N.Z.

a. Mortgagees bidding in at sale—Payment of arrears & wages on taking possession—Rights of mortgagor.]—Mtgees. put up stock-in-trade of a business for sale under their mtge., bid it in & took possession with the assent of the mtgor., paid off arrears of wages & rent, & carried on the business with the mtgor. in their employ for some months. In an action by the mtgor. to avoid the sale:—*Held*: (1) it was void & the property could be redeemed; (2) in the taking of accounts the mtgor. could not be charged with arrears of wages paid by the mtgees., this payment having not been previously expressly assented to by the mtgor.; (3) a sum stated by the mtgees. to be the value of the goodwill for the purposes of an amalgamation scheme between them & another co., could not be charged against them in the accounts.—*VAN VOLKENBURG v. WESTERN CANADIAN RANCHING CO.* (1898), 6 B. C. R. 284.—CAN.

b. Who may restrain sale—Simple contract creditor.]—Pltf. moved to continue, till the trial, an *interim* injunction restraining debts from seizing & selling under a chattel mtge. the goods of a firm alleged to be indebted to pltf. Pltf. sued on behalf of himself & all other creditors of the firm, & did not allege insolvency, but grounded his action upon the allegation that the proposed seizure & sale would create an unjust preference:—*Held*: a simple contract creditor, even suing in a class action, cannot invoke the aid of the ct. to restrain a chattel mtgee. from realising upon his security, unless alleging more than this pltf. alleged without satisfying the ct. that the

circumstances indicated some infraction of the statutes relating to preferences; & the ct. will not, upon such an application, take the account, nor restrain realisation by a solvent creditor upon his mtge., except upon at least *prima facie* proof of invalidity.—*BASSI v. SULLIVAN* (1914), 32 O. L. R. 14; 18 D. L. R. 452; 7 O. W. N. 38; 26 O. W. R. 813.—CAN.

c. — Second mortgage—Debt of first mortgage satisfied.]—(On Aug. 29, 1905, B. mortgaged to S. the goods & chattels set out in the mtge. which also provided that all goods & chattels which might thereafter be taken & brought into stock or possession of the mtgor. during the currency of the mtge., or any renewal thereof, should at once become mortgaged without any fresh instrument being executed for that purpose, to secure to S. an amount for future advances not to exceed \$4,000. On Aug. 28, 1905, B. mortgaged to pltf. the same goods & chattels to secure the sum of \$6,650, but, by agreement between the parties, the mtge. to deft. S. was to be considered a first charge to the extent of \$4,000. From Aug. 29, 1905, until Jan. 7, 1907, deft. B. paid to deft. S. all the money he received daily from the sales of the mortgaged goods, averaging about \$4,000 per month, without any special appropriation being made of such payments, & the amount so paid would be more than sufficient to satisfy the mtge. debt. Pltf. applied to continue injunction restraining S. from selling goods of B., referred to in the chattel mtge., until the trial:—*Held*: pltf. was entitled to the relief asked for.—*McDONALD v. SCARCE* (1907), 5 W. L. R. 324.—CAN.

See, further, Sect. 1, sub-sect. 1, ante.

d. Loss of right to sell—Repudiation of mortgage.]—H. & I. being indebted to a bank, arranged with pltf. T., the bank's agent at H., where the debt arose, that in order to secure same a mtge. should be given to him & the other pltf., the bank's general manager in Canada. T. had no express power to bind the bank to take this security, & his co-pltf. was at the time absent from the country, & ignorant of the transaction. A mtge. was accordingly drawn up, dated June 22, 1867, & purported to be made between H., I., and S., of the first part, & pltf.s., as trustees for the bank, of the second part, reciting that the parties of the first part were indebted to the bank in certain bills of exchange, & witnessing that H. in consideration, etc., assigned to pltf.s. the household furniture in his residence,

bill, & in spite of a notice of A.'s claim sold the goods. Between the seizure & the sale, debtor committed an act of bkpcy., & was adjudicated bkpt.:—*Held*: P. had not acquired any priority over A. since A.'s legal title to the goods was complete as against P. without taking possession.—*Re MIDDLETON, Ex p. ALLEN, Ex p. PAGE* (1870), L. R. 11 Eq. 209; 40 L. J. Bcy. 17; 19 W. R. 274.

790. Goods sold by grantor—Claim by grantee before time for payment.]—A., by deed, dated Sept. 28, 1845, conveyed goods to B. absolutely, subject to a proviso that if he should pay to B. the sum secured on Mar. 22, 1850, or any earlier day, after receiving from B. fourteen days' notice, & should pay the interest meanwhile half-yearly, then the conveyance should be void. By the deed it was also agreed that, until default in payment of the principal as before specified or of the interest after notice to pay, A. should be allowed to hold & enjoy the goods. No notice for earlier payment was given, nor any notice for payment of the interest, & A. continued in possession of the goods

with a proviso that the mtge. was to be void on payment by parties of the first part of the bills of exchange. On the ct. of directors in England being apprised of the transaction both by T. & his co-pltf., they at once repudiated it, & on Aug. 22 following wrote T. distinctly to that effect; & when their letter reached him, on Sept. 5, the goods were still in H.'s possession, & nothing had been done under the mtge. beyond recording it. On Sept. 7 T. resigned his position in the bank, & on Sept. 16 deft.'s execution against the goods of H. & I. was placed in the sheriff's hands. In the following Oct. the bank instructed T.'s successor to realise the security:—*Held*: the bank by their repudiation of the mtge. had let in deft.'s execution, & their subsequent ratification of T.'s acts & adoption of the security could not defeat the writ.—*TAYLOR v. AINSLIE* (1868), 19 C. P. 78.—CAN.

Application of proceeds of sale, see sub-sect. 5, *post*.

PART VII. SECT. 2, SUB-SECT. 4.

—A (a).

790 i. Goods sold by grantor—Grantor in apparent possession—Purchaser without notice.]—A farmer conveyed his growing crops by an absolute deed. After harvest, he, being in possession as apparent owner, sold a portion to a purchaser ignorant of the previous conveyance:—*Held*: the second sale passed no title as against the grantees under the deed.—*MUELLER v. WHITE* (1877), 3 V. L. R. 92.—AUS.

790 ii. — Not in ordinary course of business—To pay out distress for rent.]—A bill of sale of stock-in-trade on the premises was executed by W. in favour of A. to secure repayment of a loan. The bill of sale was dated July 4, 1876, & duly registered. On Nov. 17 the grantor's landlord distrained for rent, & seized the stock. Applt., at the request of the grantor, agreed to advance the amount of the landlord's claim in consideration of the sale to him of a chattel then on the premises forming part of the stock. A sale note was given & the chattel marked with applt.'s initials, who thereupon paid the landlord's claim. On Nov. 22 the mtgee. A. assigned the bill of sale to resp.; on the 23rd applt. demanded the chattel from a bailiff, who had taken possession for resp. under the bill of sale; this was twice refused, & he gave notice to resp. that the chattel was his property, & cautioned him against selling it. He did sell it. No demand had been made on the mtgor. by resp. for the amount

Sect. 2.—Rights of grantee: Sub-sect. 4, A. (a) & (b).] until Dec. 13, 1849, when he became bkpt., & defts., his assignees, then took possession of the goods & sold them on Feb. 19, 1850. B. had previously assigned the goods to pltf. :—*Held*: although the right to the possession of the goods was vested in A. until Mar. 22, 1850, defeasible by non-payment of the principal & interest according to the provisions of the deed, yet the sale of the goods before that day put an end to the term, & the assignees had thereby been guilty of a conversion for which pltf. were entitled to maintain trover.—*FENN v. BITTLESTON* (1851), 7 Exch. 152; 21 L. J. Ex. 41; 18 L. T. O. S. 197; 155 E. R. 895.

Annotations:—*Folld.* Brierly v. Kendall (1852), 17 Q. B. 937; Letts v. Whitmore (1852), 18 L. T. O. S. 254. *Distd.* Spackman v. Miller (1862), 12 C. B. N. S. 659. *Refd.* Nyberg v. Handelaar, [1892] 2 Q. B. 202. *Mentd.* Donald v. Suckling (1866), 7 B. & S. 783; Mulliner v. Florence (1878), 3 Q. B. D. 484; Whiteley v. Hilt, [1918] 2 K. B. 808.

791. Bankruptcy of grantor—Before claim by grantee—Under bill of sale given by way of indemnity.]—A. by indenture, reciting that B. had mortgaged to C. certain premises to secure a sum of £400 advanced by C. to A. & that A. had agreed with B. to execute an effectual indemnity against the payment of that sum & interest, did grant, bargain, sell, & assign to B. a certain messuage, & also, secondly, certain household furniture, goods, & chattels specified therein, to have, hold, receive, & take the furniture & other effects unto B. for her own use, subject to the trusts & provisions, & with the powers thereafter contained; the trusts were, that the effects should be a protection, defence, & indemnity to B. against the payment of the £400; & that for that purpose, in case B. should at any time be called upon to pay that sum, or any part thereof, etc. then it should be lawful for B. immediately to enter & take possession & sell the effects. Before B. had been called upon to pay any part of the £400 A. became bkpt., & his assignees took possession of the goods & sold them:—*Held*: A. was entitled to recover their value in an action of trover.—*LETTS v. WHITMORE* (1852), 18 L. T. O. S. 254.

792. Unregistered bill—Followed by registered bill to third party—Goods seized by holder of first bill.]—A., in consideration of an advance of £650 made to him by B. & C., by deed in the form of a mtge. assigned to them all the goods, chattels, & effects upon his farm & premises, to secure repayment of the advance, with power to the mtgees., on default, to sell at their discretion & to pay over the surplus to A. B. & C. took possession under the deed, which was not registered, & sold the goods by auction. D. after B. & C. had taken possession entered under a subsequent bill of sale, duly registered, & paid out a claim of the landlord for rent:—*Held*: (1) B. & C. having perfected their title by taking possession under

their mtge., had a right to sell, & they were not responsible to D. for any default in the mode of conducting the sale; (2) D. could not recover against B. & C. the sum paid by him to the landlord, as money paid to their use.—*MAUGHAM v. SHARPE* (1864), 17 C. B. N. S. 443; 4 New Rep. 332; 34 L. J. C. P. 19; 10 L. T. 870; 10 Jur. N. S. 989; 12 W. R. 1057; 144 E. R. 179.

Annotations:—*Consd.* Johnson v. Diprose, [1893] 1 Q. B. 512. *Refd.* Ramsden v. Lupton (1873), L. R. 9 Q. B. 17; Re Barrand, *Ex p.* Cochrane (1876), 3 Ch. D. 324. *Mentd.* Reeves v. Watts (1866), L. R. 1 Q. B. 412; Simmons v. Woodward, [1892] A. C. 100; Wray v. Wray, [1905] 2 Ch. 349; Re Smith, Johnson v. Bright-Smith, [1914] 1 Ch. 937.

793. ——— Followed by execution.]—In an interpleader issue between claimant under a *bond fide* bill of sale duly registered & an execution creditor of the assignor, the latter cannot set up a prior bill of sale to a third party, also *bond fide*, but void as against execution creditors for want of due registration under 1854 Act, s. 1.—*EDWARDS v. ENGLISH* (1857), 7 E. & B. 564; 26 L. J. Q. B. 193; 29 L. T. O. S. 89; 3 Jur. N. S. 934; 5 W. R. 507; 119 E. R. 1355.

Annotations:—*Consd.* Smale v. Burr (1872), L. R. 8 C. P. 64; Richards v. Jenkins (1886), 17 Q. B. D. 544. *Refd.* Re Barrand, *Ex p.* Cochrane (1876), 3 Ch. D. 324; Chapman v. Knight (1880), 5 C. P. D. 308; Lyons v. Tucker (1881), 6 Q. B. D. 660; Re Toomer, *Ex p.* Blalberg (1883), 23 Ch. D. 254; Peake v. Carter, [1916] 1 K. B. 652.

794. ———.]—Deft. made a bill of sale of his goods to S., which bill of sale was not registered. Afterwards deft. made another bill of sale of the sale goods to H., which bill of sale was registered. Execution having issued against deft., the goods still remaining in his possession, S. & H. both claimed the goods, & an order was made by which the execution creditors were barred, & the proceeds of the goods ordered to be paid to H.:—*Held*: the order was right, & S. could not, in the circumstances, set up against H. the prior unregistered bill of sale.—*RICHARDS v. JAMES* (1867), L. R. 2 Q. B. 285; 8 B. & S. 302; 36 L. J. Q. B. 116; 16 L. T. 174; 15 W. R. 580; *subsequent proceedings, sub nom. Re RICHARDS v. JAMES, SPARK v. JAMES, Ex p. HOLLINGSWORTH*, 16 L. T. 672.

Annotations:—*Folld.* Begbie v. Fenwick (1871), 24 L. T. 58. *Distd.* Hunter v. Turner (1875), 32 L. T. 556; Payne v. Cales (1878), 38 L. T. 355. *Folld.* Chapman v. Knight (1880), 5 C. P. D. 308. *Consd.* Lyons v. Tucker (1881), 6 Q. B. D. 660; Re Artistic Colour Co., *Ex p.* Fourdrinier (1882), 21 Ch. D. 510. *Refd.* Re Nurse, *Ex p.* Foxley (1868), 17 L. T. 623; Ramsden v. Lupton (1873), L. R. 9 Q. B. 17; Meux v. Jacobs (1875), L. R. 7 H. L. 481; Re Barrand, *Ex p.* Cochrane (1876), 3 Ch. D. 324; Re Toomer, *Ex p.* Blalberg (1883), 23 Ch. D. 254. *Mentd.* Re O'Sullivan, *Ex p.* Ferd Baller (1892), 66 L. T. 619.

See, also, cases in Part VI., Sect. 2, ante.

795. ——— Followed by bankruptcy.]—A., by an unregistered bill of sale, assigned all his property to C. By a subsequent registered bill of sale he assigned the same property to B. A. filed his petition for liquidation, & a trustee was ap-

due under the bill of sale:—*Held*: as the property in the chattel was in resp. by virtue of the bill of sale, & the sale to applt. was not in the ordinary way of trade, & as no facts were disclosed which would estop resp. from setting up his right of property as against applt., resp. was entitled to judgment.—*HUNT v. STEADMAN*, 2 J. R. N. S. 279.—*N.Z.*

790 iii. ——— Assignment on swearing out of jail.]—Pltf. held a bill of sale of a pair of oxen from M., the owner, who continued in possession, the bill of sale being duly recorded & upheld as valid by the jury. After making the bill of sale, M. was arrested at the suit of deft., & on swearing out of jail,

assigned the oxen to deft., who sold them at auction to W.; whereupon pltf., under a writ of replevin against deft., took the oxen out of the possession of W., who was no party to the suit. Pltf. having obtained a verdict, the ct. set the verdict aside with costs.—*FRASER v. BRUCE* (1878), 3 R. & C. 61.—*CAN.*

1. After-acquired property—Property disposed of by grantor when acquired—By bill of sale.]—The grantee, by bill of sale, of after-acquired property, cannot at law, retain it against the grantee by a bill of sale executed after such property has been acquired, & before the first grantee has done anything to complete his title at law.

An act of the first grantee, after the second bill of sale, will not have relation back.—*HENRY v. MILLER* (1877), 3 V. L. R. 293.—*AUS.*

g. Failure of consideration for first mortgage—Subsequent mortgage operative.]—Where a stock mtge. is executed on condition that the mtgee. shall indorse a promissory note, which he afterwards refuses to do, the property reverts in the mtgor. without the necessity for reassignment, & a subsequent mtge. over the same sheep comes into operation.—*SYNNOT v. ETTERS HANK* (1877), 3 V. L. R. 136.—*AUS.*

pointed. B. then claimed the goods under his registered bill of sale from the trustee, but the county ct. judge decided that as between C. & B. all the property in the goods passed to C. by his prior security, & as nothing passed to B. under his bill of sale, & as C.'s bill of sale was void against the trustee, the trustee was entitled:—*Held*: after the petition C.'s security was gone, & B. having a good bill of sale was entitled against the trustee.—*Re BARRAND, Ex p. COCHRANE* (1876), 3 Ch. D. 324; 45 L. J. Rcy. 122; 34 L. T. 950; *affd. sub nom. Re BARRAND, Ex p. LEMAN*, 4 Ch. D. 23, C. A.

Annotations:—*Foll.* *Re Cross, Ex p. Payne* (1879), 11 Ch. D. 539. *Consd.* *Lyons v. Tucker* (1881), 6 Q. B. D. 660. *Refd.* *Crawcour v. Salter* (1881), 18 Ch. D. 30.

796. ————.]—A. executed a bill of sale to B., which bill of sale was not registered. Subsequently he executed a bill of sale of the same property to C., which bill of sale was registered. On the following day, C. took possession under his bill of sale & advertised the property for sale. After the seizure, but before the sale, A. filed a petition in bkpcy., & a trustee was appointed. C. sold the goods, & after satisfying his own claim, paid over the balance to the trustee. B. brought an action for illegal seizure & sale of goods assigned to him against C., & claimed the amount owing to him by A.:—*Held*: C.'s seizure was illegal & gave B. a good cause of action against him, which A.'s bkpcy. did not take away.—*PAYNE v. CALES* (1878), 38 L. T. 355.

797. ————.]—The fact that a bill of sale is set aside as void against the trustee in bkpcy. of the grantor does not entitle the trustee to stand in the place of the grantee, & thus acquire priority over the grantee under a valid bill of sale subsequently executed by the grantor.—*Re Cross, Ex p. PAYNE* (1879), 11 Ch. D. 539; 40 L. T. 563; 27 W. R. 808, C. A.

Annotations:—*Refd.* *Lyons v. Tucker* (1881), 6 Q. B. D. 660. *Mentd.* *Re Emery, Ex p. Chief Official Receiver* (1888), 37 W. R. 21; *Sanguinetti v. Stuckey's Banking Co.*, [1895] 1 Ch. 176.

798. Successive bills to same grantee—Last bill registered—Bill to third party prior to execution of registered bill.]—A. renewed bills of sale on his goods to pltf. from time to time, so as to evade the necessity for registration under 1854 Act, & after seizure by the sheriff on a judgment against A., pltf. duly registered his last bill. Before the execution of such last bill, but after that of pltf.'s previous bills, defts. had, without pltf.'s knowledge, obtained & registered another bill of sale from A. On an interpleader issue:—*Held*: pltf. was entitled to the goods, notwithstanding defts.' previously registered bill of sale.—*HUNTER v. TURNER* (1875), 32 L. T. 556; 39 J. P. 662; 23 W. R. 792.

PART VII. SECT. 2, SUB-SECT. 4. —A (b).

802 i. Sale by grantor—In ordinary course of business—Question of fact.]—Deft., a farmer, executed a chattel mtge. to M., whereby he assigned all the goods, chattels, & property mentioned in a schedule, & also any & all the property that might thereafter be bought to keep up same, in lieu thereof & in addition thereto, either by exchange or purchase. The instrument also contained a proviso that deft. should remain in possession of the mortgaged property until default, with power to use same in the ordinary way while so in possession, but with full power, right, & authority to M. to enter & take possession of the property in case of default of payment, or on the death of deft., or in the event of the seizure of the property at the suit of

any creditor, or in the event of deft. disposing of or attempting to dispose of or make away with said property or of any part thereof without the written consent of M. Included in the property mortgaged was a stallion, which a few months after the execution of the mtge. & before any default on the part of deft., but without the written consent of M., he exchanged with pltf. for a horse belonging to him. After the exchange pltf., having discovered that the stallion was covered by the mtge., attempted to avoid the transaction sending the stallion back to deft. & demanding the return of his own horse, which deft. refused to deliver:—*Held*: (1) as the mtge. must be taken to contain the whole contract entered into between deft. & M., effect could not be given to a mere verbal license, which preceded the mtge. & was not in harmony with many of its

provisions; (2) it was a condition of the mtge., & the intention of the parties thereto, that deft. should be allowed to sell or exchange the mortgaged property provided such sale or exchange was in the ordinary course of deft.'s business, & as whether this exchange had been in the ordinary course of deft.'s business or not was a question of fact which had not been passed upon by the ct. below, there should be a new trial to have that point determined.—*MCPHERSON v. MOODY* (1900), 35 N. B. R. 51.—CAN.

802 ii. ———— Purchaser with notice.]—A farmer who mortgages some 50 or 60 horses may be classed as a dealer in horses & under the implied licence for the mtgor. to continue the business he may sell any number of the horses to *bona fide* purchasers for value.

sub-sect. 1, *ante.*, further, Part VI., Sect. 6,

799. Prior bill to third party—Set up by execution creditor—To defeat valid bill to claimant.]—In an interpleader issue, to try whether certain goods were, at the time of the seizure thereof by the sheriff under a writ of execution, the goods of claimant, claimant proved a valid bill of sale to him of the goods:—*Held*: it was competent for the execution creditor to defeat claimant's title by proving a prior bill of sale to a third party.—*GADSDEN v. BARROW* (1854), 9 Exch. 514; 23

Annotations:—*Refd.* *Edwards v. English* (1857), 7 E. & B. 564; *Richards v. Jenkins* (1886), 17 Q. B. D. 544. *Mentd.* *Green v. Stevens* (1857), 2 H. & N. 146; *Nicholson v. Cooper* (1858), 31 L. T. O. S. 184; *Shingler v. Holt* (1861), 7 H. & N. 65; *Peake v. Carter*, [1916] 1 K. B. 652; *Daniel v. Rogers*, [1918] 2 K. B. 228.

800. Grantee of unregistered bill—Right to set up later bill to third party—Against trustee in bankruptcy.]—In trover by assignees of bkpt., deft., who claimed under an invalid bill of sale, was not allowed to set up a subsequent bill of sale to a third party, who himself had not set it up, & who, even if he were the true owner, would be defeated by bkpt.'s reputed ownership.—*NICHOLSON v. COOPER* (1858), 3 H. & N. 384; 27 L. J. Ex 393; 157 E. R. 519.

Annotations:—*Refd.* *Hollingsworth v. White* (1862), 6 L. T. 604; *Re Barrand, Ex p. Cochrane* (1876), 3 Ch. D. 324. *Mentd.* *Bath v. Sutton* (1858), 27 L. J. Ex. 388.

(b) After 1878.

See 1878 Act, s. 10.

801. Consolidation—Bill of sale & security over other property of grantor.]—The doctrine of consolidation of mtges. does not enable the grantee by a registered bill of sale of goods seized under a *fi. fa.* to tack a prior mtge. of other property of the grantor, & claim that the surplus proceeds of the goods, after discharging the sum secured by the bill of sale, shall be applied in satisfaction of the prior mtge., so as to defeat the right of the execution creditor to such surplus.—*CHESWORTH v. HUNT* (1880), 5 C. P. D. 266; 49 L. J. Q. B. 507; 42 L. T. 774; 44 J. P. 605; 28 W. R. 815, D. C.

—See, generally, MORTGAGE.

802. Sale by grantor—In ordinary course of business.]—Claim, that pltf. were holders of a bill of sale duly registered, comprising all the growing crops & all the goods, chattels, & effects which then were or thereafter should be on or about the farm & premises of S., farmer, & that deft. wrongfully deprived pltf. of the use & possession of twelve quarters of wheat comprised in the bill of sale. Defence, that pltf. suffered S. to have the possession of the goods, & to hold himself out as having not only the possession but

Sect. 2.—Rights of grantee: Sub-sect. 4, A. (b).]

the property in them, & that he sold same to deft., who bought them in the ordinary course of business, & without any notice that they did not belong to S., that S. was suffered by pltf. to carry on his business as a farmer & dealer in grain at the time of the sale, & it was the ordinary course of business of S. in such business to make such sales:—*Held*: the defence was good, for the bill of sale by implication conferred a licence on the grantor to carry on his business & dispose of the goods so as to give a valid title to purchasers.—*NATIONAL MERCANTILE BANK v. HAMPSON* (1880), 5 Q. B. D. 177; 49 L. J. Q. B. 480; 28 W. R. 424, D. C.

Annotations:—*Consd.* Taylor v. M'Keand (1880), 5 C. P. D. 358. *Foll.* Walker v. Clay (1880), 49 L. J. Q. B. 560; Payne v. Fern (1881), 6 Q. B. D. 620. *Refd.* Joseph v. Webb, Joseph v. Lyons, Joseph v. Pidcock, Joseph v. Jones (1883), Cab. & El. 262; Musgrave v. Stevens & Bradbury (1883), Cab. & El. 38.

803. ———.]—The grantor of a bill of sale, described in the instrument as an innkeeper & horse-dealer, in consideration of a loan of £100 assigned to pltf. by the bill all his personal property, including an "entire horse called F., a cob called C., a pony called N." The bill of sale contained a covenant that so long as the money should remain owing the grantor would not remove any of the premises from the messuage without the consent of pltf., & provided that until default in payment the grantor should hold, make use of & possess the premises thereby assigned. Subsequently, & without the consent of pltf., the grantor sold the three horses, F., C. & N., at a public

Held: the purchaser of two mares & their two colts was not a *bond fide* purchaser, the evidence tending to show that he had knowledge of the mtge. & that the transaction was intended to defraud the mtgees.—*CASE THRESHING MACHINE CO. v. GOULEY* (1914), 29 W. L. R. 811; 7 W. W. R. 584.—CAN.

k. ——— *Subject to lien of unpaid vendors.*—Claimants sold a co. a machine upon an order signed by the co., the conditions of which were that the co. should pay a part of the price in cash & the balance in instalments, with interest on such instalments payable with the last of them, & that the title should not pass to the co. until the moneys payable by them under the order, as well as under any other orders which might be given by the co. to claimants, should be paid. At the time of the commencement of the winding-up of the co., one instalment, the interest, & a further sum for goods ordered after the first order, remained unpaid. The liquidator came into possession of the machine, & sold it to H., subject to an alleged lien in favour of claimants for the amount of the unpaid instalment only:—*Held*: the rights of claimants under the contract still existed, & were not affected by Bills of Sale & Chattel Mortgage Act, nor by the liquidator's sale to H., & they were entitled to recover the full amount due under the terms of the order out of the estate.—*Re CANADIAN CAMERA & OPTICAL CO., WILLIAMS (A. R.) Co.'s CLAIM* (1901), 22 C. L. T. Occ. N. 677; 2 O. L. R. 677.—CAN.

l. ——— *Prior unregistered hire-purchase agreement.*—Resps. delivered to T. an agricultural implement under a hire-purchase agreement, under which T. was entitled to determine his liability at any time after the payment of the first instalment due thereunder. Before payment of the last instalment T. sold the implement to applt.

In an action by resps. to recover the implement or the amount of the last instalment applt. contended that resps. were estopped under Sale of Goods Act, 1908, s. 23 (1), from denying T.'s

authority to sell, as the instrument was not registered, & as they had allowed T. to remain in possession of instruments under two other bailments after default entitling them to recover possession of the same:—*Held*: resps. had done nothing amounting to an estoppel, & were entitled to judgment, the sole effect of non-registration of an instrument being that specially provided in Chattels Transfer Act, 1908.—*GALYER v. MASSEY-HARRIS CO., LTD.* (1914), 33 N. Z. L. R. 1392.—N.Z.

m. ——— *Prior unregistered bill—Purchaser with notice.*—A bill of sale of a horse, given to secure a balance due on the purchase price, although unregistered, cannot be defeated by a fraudulent sale to a third party with notice.—*MCLEOD v. DOUCETTE* (1905), 38 N. S. R. 151.—CAN.

n. ——— *Prior registered mortgage—Purchaser without notice—Damages for detention.*—The owner of goods, having executed a chattel mtge., which was duly recorded in the proper registration district in the province of S., afterwards fraudulently removed them to the province of A., where he sold them to a *bond fide* purchaser for value without notice of the mortgage:—*Seem*: in an action by the mtgee. for a return of the goods & damages for detention, the goods having been returned, the measure of damages was the amount of the interest on the price paid by deft. for the goods.—*JONES v. TWOHEY* (1908), 8 W. L. R. 295; 1 Alta. L. R. 267.—CAN.

o. ——— *Notice subsequent to completion of contract.*—The fact that a purchaser of goods has actual notice of a prior bill of sale to another does not prevent him from being a purchaser in good faith under Bills of Sale Ordinance, s. 11, if such notice does not reach him until after he has bound himself to buy the goods, & has issued in payment of them a cheque which he knows to be then in the hands of a *bond fide* holder for value.—*MCMILLAN v. PIERCE*, [1917] 3 W. W. R. 614; 37 D. L. R. 242.—CAN.

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auction, where one of them, the cob, was purchased by deft. In an action of detinue brought by pltf. to recover the cob or its value from deft.:—*Held*: the object of the bill of sale being to enable the grantor to carry on his business, the sale of the horses, which must be taken to have been sold in the ordinary course of his business, was not a breach of the covenant, & the action was not maintainable.—*WALKER v. CLAY* (1880), 49 L. J. Q. B. 560; 42 L. T. 369; 44 J. P. 396, D. C.

Annotation:—*Refd.* Taylor v. McKeand (1880), 28 W. R. 628.

804. ——— *Not in ordinary course of business—Purchaser taking in good faith.*—B., a trader, assigned to pltf. his stock-in-trade by a bill of sale with a proviso that until default in payment of the money advanced, B. should be entitled to make use of such stock without hindrance or disturbance on the part of the grantee. B. afterwards sold the goods to defts. by private contract, & absconded. The jury found that "B. sold the goods fraudulently, & not in the ordinary course of his business," but defts. did not know that, & bought the goods *bond fide*:—*Held*: upon the above finding, the verdict was properly entered for pltf., the right of the grantor to deal with the goods being subject to the implied condition that the dealing should be only in the ordinary course of his business.—*TAYLOR v. M'KEAND* (1880), 5 C. P. D. 358; 49 L. J. Q. B. 563; 42 L. T. 833; 44 J. P. 784; 28 W. R. 628, D. C.

Annotations:—*Foll.* Payne v. Fern (1881), 6 Q. B. D. 620. *Refd.* Musgrave v. Stevens & Bradbury (1882), 47 J. P. 295; Joseph v. Webb, Joseph v. Lyons, Joseph v. Pidcock, Joseph v. Jones, (1883), Cab. & El. 262.

statutory form.—R. S. O. 1914 (c. 135), ss. 5, 7, are imperative & must be strictly complied with, otherwise, as against creditors of the mtgor. & subsequent purchasers or mtgees. in good faith for valuable consideration, the mtgee's position is just as if the mtge. had not been made.—*PETINATO v. SWIFT CANADIAN CO., LTD.* (1919), 46 O. L. R. 247.—CAN.

q. ——— *Consideration not truly expressed.*—Where the possession of personal property is left with the bargainor after a sale, & there is a subsequent sale by the bargainor or his assigns to a *bond fide* purchaser for value, this subsequent sale is good unless the original purchaser has complied with the provisions of Bills of Sale Act as to the execution & registration of his bill of sale.

Where the consideration was not truly expressed in accordance with the Act:—*Held*: the bill was void against a subsequent purchaser for value without notice.—*PALMER v. MAY* (1911), 18 W. L. R. 676; 5 Sask. L. R. 20.—CAN.

Statement of consideration, *see* Part V., Sect. 1, sub-sect. 2, *ante*.

r. ——— *Prior verbal mortgage—Property identifiable.*—In an action of trover for the conversion of pulpwood, the evidence was that under a verbal contract, P., in consideration of advances made & to be made, agreed to get out & deliver to pltf. 5,000 cords of pulpwood, the wood to be marked with pltf.'s mark, the letter "Q," & to be pltf.'s property immediately it was cut, & to be delivered to pltf. along the railway track at Peters Siding:—*Held*: if the jury found that pulpwood in question was cut & marked with pltf.'s mark, or, if not so marked, if it could be identified as pulpwood cut under the contract, it was pltf.'s property as against deft., a purchaser for value, without notice.—*QUEBEC FOREST PRODUCTS CO. v. SHANNON* (1919), 46 N. B. R. 294.—CAN.

s. ——— *In part payment on exchange of goods—Knowledge of grantee.*]

Mortgage not in

. 4, A. (b) & B.]

808. .] bill of sale attested registered under 1878 Act, takes priority over one that is earlier but unregistered, as to any chattels which may be comprised in both.—*CONELLY v. STEER* (1881), 7 Q. B. D. 520; 50 L. J. Q. B. 326; 45 L. T. 402; 29 W. R. 529, C. A.

Annotation :—*Folld. Lyons v. Tucker* (1881), 7 Q. B. D. 523.

809. After-acquired property—Property disposed of by grantor when acquired—By pledge.—By a bill of sale a jeweller, for a valuable consideration, assigned to pltf. his after-acquired stock-in-trade subject to a proviso for redemption. Before pltf. took possession of the after-acquired stock-in-trade, the jeweller pledged a portion of it with deft., who had no notice of pltf.'s bill of sale :—*Held* : deft. was entitled to retain the stock-in-trade pledged with him as against pltf., & no action of detinue of conversion would lie.—*JOSEPH v. LYONS* (1884), 15 Q. B. D. 280; 54 L. J. Q. B. 1; 51 L. T. 740; 33 W. R. 145; 1 T. L. R. 16, C. A.; *reversg. S. C. sub nom. JOSEPH v. WEBB*, 1 Cab. & El. 262, N. P.

bona fides mtge., unregistered, is void as against a subsequent mtgee. in good faith. Where a chattel mtge. was expressed to be an absolute conveyance from mtgor. to mtgee., then a defeasance on a certain event, then a provision that the mtgor. would forever warrant & defend the goods unto the mtgee., then a declaration that the mtgor. doth put the mtgee. in possession of the goods by delivery of some kind :—*Held* : (1) possession followed the property conveyed & the mtgee., though no fault had been made, was entitled to assume possession at any time; (2) he was entitled to compel a mtgee. who had seized & sold the goods under a prior unregistered mtge., to account.—*STEWART SHEAF LOADER v. JACOBSON* (1914), 29 W. L. R. 575; 30 W. L. R. 944.—CAN.

a. Unregistered agreement—Subsequent unregistered mortgage to third party—Possession taken by holders of agreement.—W. & Co. sold a piano to W. under the terms of a memorandum in writing by which W. agreed to pay the purchase price within twelve months from date, the property in the meantime to remain in W. & Co. W. & Co. failed to register the agreement, as required by R. S. N. S. 1900 (c. 142), & W. transferred the piano by chattel mtge. to pltf., who also failed to file his mtge. until after W. & Co., the original owners, had regained possession by paying to G., who had caused the piano to be distrained for rent, the amount due him for rent & expenses of the distress, & by taking an assignment of the debt due to G. :—*Held* : (1) as between W. & Co. & pltf., the agreement entered into between W. & Co. & W., not having been filed, was null & void under the Act; (2) the legal title having passed from W. to pltf. upon the execution of the chattel mtge., W. & Co. were neither purchasers nor creditors within the Act, as against whom the instrument would only take effect & have priority from the time of filing; (3) while W. & Co. had a right to be subrogated to the claim of the landlord as against the tenant, the right could not be enforced as against pltf. who in addition to having the legal title, had equities equal to those of W. & Co.—*LAPIERRE v. McDONALD* (1906), 39 N. S. R. 24; 1 E. L. R. 41.—CAN.

b. Void mortgage—Chattel left in possession of hotel-keeper—Lien.—R., who had mortgaged a vehicle to applt., made default in payment, & left the vehicle in the possession of resp., a hotel-keeper, who claimed a lien over

it as against R. Applt. saw it in resp.'s yard, & producing the mtge. which was void, under Chattel Mortgage Act, 1889, s. 26, claimed delivery of it to himself. Resp. did not deliver it, & applt. sued him for the detention, & sought to rely on a verbal contract between himself & R. :—*Held* : applt. having produced the void document, as the basis of his demand upon resp., could not be allowed to set up an entirely different claim in the action against resp.—*WRIGHT v. CARMODY* (1897), 16 N. Z. L. R. 155.—N.Z.

c. Fraudulent bill—Subsequent unregistered lien note to third party—Possession taken by holder of lien note.—In an action for conversion, pltf. claimed title under a registered bill of sale which the jury found was made without consideration, & in fraud of creditors. Deft. justified the taking under an unregistered lien note given subsequent to the bill of sale :—*Held* : the verdict was properly entered for deft.—*POITRAS v. PELLETIER* (1907), 2 E. L. R. 463; 38 N. B. R. 63.—CAN.

d. — Subsequent bill to third party—For debt bona fide due.—The owner of a horse made a fraudulent bill of sale of it to his son, deft., for the purpose of protecting it from the claims of creditors. Deft. took delivery of the horse & afterwards sold it. Subsequently to the conveyance to deft., but before the sale, the father conveyed the horse, by a bill of sale, to pltf., for a debt bona fide due from him to pltf. In an action of trover by pltf. against the son for the alleged conversion of the horse :—*Held* : although the first conveyance was fraudulently made to defeat the rights of creditors & was void as against them, under 13 Eliz., c. 5, the grantor could not impart any title to pltf., who could only appropriate it to the satisfaction of her claim by virtue of some legal process, & pltf. could not attack the conveyance under 27 Eliz., c. 4, as that did not apply to personal property.—*MOORE v. MOORE* (1880), 1 R. & G. 525.—CAN.

See, further, FRAUDULENT & VOIDABLE CONVEYANCES.

1. Invalid lien note—Subsequent mortgage—Mortgage without notice.—On Dec. 10, 1903, pltf. sold to C., three head of cattle; he swore that C. agreed at the time to give him a lien on the cattle; the reason it was not given at the date of the sale was that he had no form of lien note at the house; he procured one & had it signed by C. on Dec. 31. Besides the cattle, the lien note included a gray horse; pltf. stated that, when he

Annotation :—*Folld. Hallas v. Robinson* (1885), 15 Q. B. D. 288.

810. — By bill of sale.—By a bill of sale executed in 1875, R. granted to M. the after-acquired chattels which should be upon certain premises of R. The title of M. under the bill of sale ultimately vested in deft. R. brought upon the premises chattels acquired by him after 1875, & before the coming into operation of 1882 Act, by a bill of sale granted to pltf. the after-acquired chattels. Pltf. had no notice of the bill of sale in favour of M. In Jan., 1884, deft. seized the after-acquired chattels then upon the premises of R. Pltf. having demanded possession of them from deft., who refused to give them up :—*Held* : pltf. was entitled to recover from deft. the value of the goods, for the grant of the after-acquired chattels to M. carried only an equitable interest, while pltf. by the grant to him took the legal interest without notice of the prior equitable interest vested in M. & had a better title than deft.—*HALLAS v. ROBINSON* (1885), 15 Q. B. D. 288; 54 L. J. Q. B. 364; 33 W. R. 426; 1 T. L. R. 309, C. A.

presented the note to C. for signature, the latter wanted to put in the horse, & it was done. He never owned the horse & did not claim it. On Jan. 21, 1904, C., who was indebted to deft., gave him a chattel mtge. covering the cattle, horse, & other chattels which was duly registered. On Mar. 29 pltf., having heard that C. had left the province, went to see deft. & ascertained that he held the chattel mtge., but had not yet taken possession of the cattle. They were in the stable of one P., to whom it was stated C. had sold them. Pltf. made a warrant of distress under his lien note & tried to seize the cattle, but during the night deft. had taken possession of them under his chattel mtge. & prevented pltf. from taking them :—*Held* : deft. having obtained the chattel mtge. from C. in good faith & without notice of any lien or other right of the original owner, came within R. S. M. 1902 (c. 152), s. 26 (a), & was entitled to claim the goods under the chattel mtge.—*COLLOM v. McGRATH* (1904), 24 C. L. T. 376; 15 Man. L. R. 96.—CAN.

g. Lien for advances—Subsequent unregistered mortgage to third party—Innocent mortgagee for value.—Pltf. sued for conversion of certain "withes lying on the island in the mouth of the river Moira," claimed by him under a written instrument, whereby A., the owner, assumed to assign the withes to pltf., as security for money lent. Defts. asserted a lien on the withes for advances to A., & also alleged that there had been an actual delivery thereof to them, under which they had taken possession prior to pltf.'s mtge. :—*Held* : (1) the mortgage was not void for want of registration as against defts. claiming under the alleged prior delivery; (2) the alleged lien for advances could not be enforced against pltf., who was an innocent mtgee. for value.—*HALL v. COLLINS BAY RAFTING & FORWARDING CO.* (1884), 12 A. R. 65.—CAN.

810 i. After-acquired property—Property disposed of by grantor when acquired—By unregistered bill of sale.—M., the lessee of a hotel, gave a bill of sale over his furniture in the hotel, & "all after-acquired furniture, goods & chattels which might be brought upon the premises," to S. Subsequently the S. B. Co., to enable M. to sell beer on the "quick lunch" system put up certain fittings in the hotel, & took from M. a bill of sale over them, which was not registered. Subsequently, M. disposed of his lease to B., & S., exercising his power under his registered

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& Part VI., Sect. 3, sub-sect. 2, A, ante.

811. Absolute bill—Followed by bill to third party.]—In Sept., 1885, a husband assigned his furniture to his wife absolutely. The deed was not registered. In Apr., 1888, he executed a bill of sale of the same furniture as security for a loan. That bill was registered. In July, 1888, the husband died:—*Held*: (1) the assignment to the wife was a bill of sale, & ought to have been registered under 1878 Act; (2) at the time of the execution of the second bill of sale the grantor was not the true owner of the chattels therein comprised, & under 1882 Act, s. 5, it was void as against everyone except the grantor, & the grantor's widow was entitled to the furniture, & not the grantee of the second bill of sale.—*TUCK v. SOUTHERN COUNTIES DEPOSIT BANK* (1889), 42 Ch. D. 471; 58 L. J. Ch. 699; 61 L. T. 348; 37 W. R. 769; 5 T. L. R. 719, C. A.

Annotations:—*Distd.* *Thomas v. Searles*, [1891] 2 Q. B. 408. *Consd.* *Thomas v. Roberts*, [1898] 1 Q. B. 657.

812. Bill by way of security—Followed by bill to third party.]—The grantor of chattels by a bill

bill of sale, & with the approval of M., assigned all the furniture, etc., to B. The S. B. Co. thereupon sued B. for the return of the fittings or their value. B. claimed that the fittings had been acquired by M. after the execution of the bill of sale held by S., & that they passed to S. under the "after-acquired property" clause of the bill of sale, & that in purchasing from S. he acquired a good title, & that in any event the fittings had been the constructive property of M., & that the S. B. Co. were debarred by Bills of Sale Act, 1899, s. 27, from setting up their title:—*Held*: S. had never acquired, & could not therefore have given any title to the fittings, & the S. B. Co. were not debarred by s. 27, from asserting their title.—*BANNAN v. SWAN BREWERY CO.* (1909), 11 W. A. L. R. 15.—*AUS.*

810 ii. — *Bond fide purchaser without notice.]—*Deft., under a bill of sale purporting to cover after-acquired property of the mtgor., took possession of a cow, which had been sold for valuable consideration to pltf., who had no actual notice of the bill of sale:—*Held*: deft.'s title being in equity merely had to give way to pltf.'s legal title obtained *bond fide* & without actual notice.

Constructive notice to subsequent purchasers does not arise from the filing of a bill of sale.—*WYNACHT v. MCGINTY* (1912), 12 E. L. R. 116.—*CAN.*

810 iii. — *Mortgage covering mares & increase—Mortgagee's right to offspring.]—*The legal estate in the offspring of mares comprised in a chattel mtge. covering them & also the increase from them, is in the mtgee., & title to such offspring cannot be acquired by one who purchases them in good faith for value, although he receives delivery from the mtgor. before the mtgee. attempts to get possession.—*ROPER v. SCOTT, WALLACE v. SCOTT, GALBRAITH v. SCOTT* (1907), 5 W. L. R. 341; 16 Man. L. R. 594.—*CAN.*

See, generally, ANIMALS, Vol. II., pp. 212, 213.

k. — *Property assigned to trustee for benefit of creditors.]—*In May, 1880, D., being indebted to M., gave a chattel mtge. on all his stock-in-trade, chattels & effects then being in his store on G. st., in Halifax; & agreed to convey to M. all stock which during the continuance of the indebtedness he might purchase for the purpose of substituting in place of stock then owned by him in connection with

his said business. These goods were never so conveyed. By the terms of the mtge. the debt was to be paid in three years, in twelve equal instalments at specified times, & if any instalment should be unpaid for fifteen days after becoming due, the whole to become immediately payable, & M. could take possession of & sell the mortgaged goods. It was further agreed that to save the business credit of D. the mtge. was not to be filed & was to be kept secret; & it was not filed until Dec. 12, 1881. On Dec. 13, 1881, D. assigned to F. in trust for the benefit of creditors, by trust deed executed by D., F., & one of D.'s creditors, & subsequently by a number of other creditors. At the time F. had no notice of the mtge. to M., & took possession of the goods in the store on G. st., & refused to deliver them to M. on demand, default having been made in payments under the mtge., & a suit was brought for recovery of the goods & an account. Previous to the suit F. delivered a small portion of the goods in the store to M., which, as he alleged, were all that remained of the stock on the premises in May, 1880:—*Held*: the legal title to the property vested in F. must prevail, pltf.'s title being merely equitable & the equities between the parties being equal.—*MCALLISTER v. FORSYTH* (1885), 12 S. C. R. 1.—*CAN.*

PART VII. SECT. 2, SUB-SECT. 4.

1. Distress by landlord—Exercise of power.]—In exercising his right of distress a landlord's right is subordinate to that of the mtgee. On a distress being made a specific lien upon the goods is created. This lien must be enforced with due regard to the rights of the chattel mtgee. If the usual procedure following upon distress would be an undue interference with the mtgee.'s rights other appropriate proceedings must be invoked.—*CALGARY BREWING & MALTING CO. & MIQUELON v. MARTIN & CO.* (1915), 33 W. L. R. 68; 9 W. W. R. 563; 25 D. L. R. 859.—*CAN.*

m. — *Measure of damages.]—*D. conveyed two horses to pltf. by a bill of sale conditioned to become void on the return by D. of a quantity of grain, etc., loaned him by pltf., & on payment of a sum of money, D. retained possession of the horses. During the continuance of the security deft. took the horses under an alleged distress for rent against D.:—*Held*: (1) the property being in pltf., he was not bound

of sale by way of security is still the true owner of the chattels within 1882 Act, s. 5, & may execute a subsequent valid bill of sale of the same chattels.—*THOMAS v. SEARLES*, [1891] 2 Q. B. 408; 60 L. J. Q. B. 722; 65 L. T. 39; 39 W. R. 692; 7 T. L. R. 606, C. A.

Annotations:—*Mentd.* *Edwards v. Marcus* (1894), 70 L. T. 182; *Parsons v. Equitable Investment Co.*, [1916] 2 Ch. 527.

Who is "true owner."]—*See* Part VI., Sect. 3, sub-sect. 2, B, ante.

Liability of auctioneer—Sale of goods subject to bill of sale.]—*See* AUCTION & AUCTIONEERS, Vol. III., pp. 46, 47.

B. Grantor's Landlord.

813. Distress by landlord—Bankruptcy of grantor—Marshalling.]—In 1844, a person mortgaged some household furniture, fixtures, stock-in-trade, & personal chattels, but was permitted by the mtgee. to remain in possession of them. In Aug., 1847, all the property in the mtgor.'s house, consisting partly of property included in the mtge., & partly of property belonging to the mtgor. absolutely, was

under the plea of not guilty to show a right to present possession; (2) no demand of possession was necessary; (3) it was not a misdirection to tell the jury that they might find as damages the full value of the horses.—*COATES v. GOSLIN* (1880), 20 N. B. R. 323.—*CAN.*

813 i. — *Bankruptcy of grantor—Grantee not entitled to possession.]—**Held*: according to 5 Vict. No. 17, s. 41, the prohibition of "distress for rent" after sequestration of the tenant's estate only applies to a distress on goods which form part of an insolvent estate to be administered as assets, & does not authorise the holder of a bill of sale to take his goods the subject of such bill out of the hands of the landlord's bailiff in possession thereof under such distress.—*RAILTON v. WOOD* (1890), 15 App. Cas. 363, P. C.—*AUS.*

n. — *Chattels left on premises in mortgagor's possession—Whether liable to seizure by mortgagee.]—*A bailiff seized certain goods under a landlord's warrant, for rent in arrear, but did not remain in possession, or take any further steps to execute it, except that, as the jury found, the tenant was constituted the landlord's agent to take possession of the goods for him under the warrant. After more than a month, a person having a mtge. on the goods took possession under it, & removed the goods, for which the landlord replevied:—*Held*: the action could not be maintained.—*ROE v. ROOPER* (1873), 23 C. P. 76.—*CAN.*

o. — *Where the goods of a tenant, which had been mortgaged by him, were distrained for rent & impounded, & were left on the premises in his charge for over three weeks by agreement between him & the bailiff, when on being advertised for sale under the distress they were seized & taken away by the mtgee.:—**Held*: as regards the mtgee., that the goods were no longer *in custodia legis*, & that in taking them he had not committed a breach of the pound within 2 Wm. & M. sess. 1, c. 5.—*LANGTRY v. CLARK* (1896), 27 O. R. 280.—*CAN.*

p. — *Where the goods seized are left by the landlord's bailiff upon the demised premises, in the possession of the tenant, the taking of a bond from the tenant to the bailiff to produce & keep & deliver the chattels & crops & not to remove or allow them to be removed from the premises & to hold them for the bailiff, is not evidence of an abandonment of*

Sect. 2.—Rights of grantee: Sub-sect. 4, B., C. & D.]

distrained by the direction of his landlord. The mtgee. thereupon directed the bailiff to hold the goods included in the mtge. as his bailiff. Part of the goods so distrained was sold, & satisfied the landlord's claim. After the sale the mtgor. became bkpt. :—*Held*: the mtgor. was entitled as against the assignees to the benefit of the doctrine of marshalling, so as to throw the landlord's debt exclusively on the property not subject to the mtge.—*Re STEPHENSON, Ex p. STEPHENSON* (1847), De G. 586; 17 L. J. Bcy. 5; 10 L. T. O. S. 310; 12 Jur. 6.

814. Chattels sold by landlord—After notice of bill of sale—Duty to hand surplus to grantee.]—A. gave a bill of sale on his furniture to pltf., but remained in possession. Deft. was a broker, & on the authority of the landlord distrained on the goods for rent, & the goods were removed to an auction room for sale, & after the landlord's claim & expenses were satisfied the remainder were taken back to the premises & a small surplus in cash was paid to A., notwithstanding a notice by pltf.'s attorney not to do so :—*Held*: there was no evidence to go to the jury of a conversion, or of money had & received to pltf.'s use.—*EVANS v. WRIGHT* (1857), 2 H. & N. 527; 27 L. J. Ex. 50; 30 L. T. O. S. 104; 157 E. R. 217.

815. Chattels seized by grantee & left on premises—Landlord paid out by grantee—Whether money recoverable from grantor.]—Pltf. under a bill of sale seized goods on deft.'s premises, & with his knowledge, but without any express request, allowed them to remain there until rent became due. The landlord having distrained them, pltf. paid the rent & expenses :—*Held*: there was not a compulsory payment by pltf. of a debt of deft., for his benefit or at his implied request.—*ENGLAND v. MARSDEN* (1866), L. R. 1 C. P. 529; Har. & Ruth. 560; 35 L. J. C. P. 259; 14 L. T. 405; 12 Jur. N. S. 706; 14 W. R. 650.

Annotations:—*Consd. Re Fox, Walker, Ex p. Bishop* (1880), 15 Ch. D. 400. *Dbtd. & Distd. Edmunds v. Wallingford* (1885), 14 Q. B. D. 811.

816. — Expiration of tenancy.]—Where, after

the seizure, but the contrary. Pending the distress, the goods taken are in the custody of the law, & not liable to seizure under a chattel mtge., so long as no fraud is on foot & no intention or contrivance exists to prejudice the mtgee.—*ANDERSON v. HENRY* (1898), 29 O. R. 719.—CAN.

q. — Abandonment of—Mortgagee entitled to possession.]—A landlady seized a piano for rent due, but later released possession of the piano, taking a bond providing that she might repossess if the amount claimed for rent, costs, etc., was not paid in a few days. The tenant could not meet the amount when due & arranged to have the bailiff take the piano in storage & hold it until he could pay it all up. The piano was subject to a chattel mtge. to pltf., who brought action to recover possession. Deft. contended that he was holding the piano under the distress warrant :—*Held*: so soon as the piano, in accordance with the arrangement, was removed from the demised premises, the distress was abandoned, the landlady's lien ceased, & the mtgee. was entitled to possession of the piano.—*GOSNELL v. MCTAMNEY* (1910), 16 O. W. R. 176.—CAN.

r. — Breach of agreement not to sell or remove goods—Evidence as to goods seized.]—The mtge. contained a proviso, that in case the mtgor. should attempt to sell or part with the possession of or to remove out

of the county the goods, or any of them, the mtgee. might take possession of & sell them, etc. The mtgee., claiming under this proviso, brought trover for the goods, which deft. had seized under a distress for rent. It appeared that the goods were seized in Oct. in the house mentioned in the mtge., which had been executed in the previous Aug., & were of the same kind & description as those set out in the mtge. :—*Held*: sufficient evidence that they were the same goods as those mortgaged.—*NATTRASS v. PHAIR* (1875), 37 U. C. R. 153.—CAN.

814 i. Chattels sold by landlord—After insufficient distress.]—Pltf. was mtgee. of certain goods of F., a tenant of his father, deft. C. The landlord on Feb. 17, 1883, went to the house of the tenant, & declared that he seized everything for rent. He touched nothing & made no inventory. On Feb. 24 he went again & told the tenant's wife that the property had been seized for rent & to let no one take anything away, when she promised to do her best for him. On Mar. 5 pltf., hearing that the goods were going to be seized for rent, took possession under his mtge. & removed the goods. A bailiff went the next day for taxes in arrear, & the landlord gave him a distress warrant to take goods for rent. The bailiff then took the goods which had been removed, & on the tenant waiving an inventory, advertising, etc., sold them within two days to a nephew of

the expiration of a tenancy for years, the holder of a bill of sale of the furniture of the late tenant put & continued a man in possession of the furniture upon the premises under a power in his security :—*Held*: the landlord was entitled to treat the bill of sale holder as a mere trespasser, & in an action against him by the landlord to restrain him from selling the goods on the premises or continuing in possession, an interlocutory injunction should be granted in those terms.—*SMITH v. BROWN* (1879), 48 L. J. Ch. 694.

817. — Rent payable in advance—Power of landlord to distrain.]—Defts. let a house to a tenant upon a yearly tenancy under an agreement whereby the rent was reserved "payable quarterly on the usual quarter days, & always if required in advance." The tenant granted a bill of sale of his goods in the house to pltf., who, upon default in payment of the amount secured by the bill of sale, took possession of the goods & fixed a day for their sale. On the morning of the sale, which occurred in the middle of a quarter, defts. demanded of the tenant, under threat of immediate distress, the rent for the current quarter in advance. Pltf., to prevent the sale from being interrupted, paid the rent under protest, & then brought an action to recover it back :—*Held*: under the above agreement defts. were entitled to demand the quarter's rent in advance at any time during the currency of the quarter, & as in the event of non-payment upon such demand they would in the circumstances have been entitled to distrain immediately, the money paid by pltf. could not be recovered back.—*LONDON & WESTMINSTER LOAN & DISCOUNT CO. v. LONDON & NORTH WESTERN RY. CO.*, [1893] 2 Q. B. 49; 62 L. J. Q. B. 370; 69 L. T. 320; 41 W. R. 670; 37 Sol. Jo. 497; 5 R. 425, D. C.

818. Bill of sale of growing crops—Lease surrendered by grantor—Crops cultivated & reaped by landlord.]—B., the tenant of a farm, by bill of sale made in Sept., 1880, assigned to pltf. his stock-in-trade & effects on the farm, together with all the growing & other crops "which at any time thereafter should be in or about same or any other premises" of B. On Apr. 25, 1881, deft., B.'s

the landlord :—*Held*: the landlord's two visits did not amount to a distress.—*WHIMSELL v. GIFFARD* (1883), 3 O. R. 1.—CAN.

815 i. Chattels seized by grantee & left on premises—Landlord paid out by grantee—Whether money recoverable from assignee of grantor.]—B., leased certain premises to Y., who assigned the lease to P., & sold to him the goods on the premises subject to a chattel mtge. to pltf. & others. P. gave a chattel mtge. to pltf. & others upon these goods to secure to them the purchase money thereof. On Feb. 1 deft. took possession of the premises under an oral agreement with P. that the latter should assign the lease to him, & it was so assigned on June 4 following. There was no evidence as to what bargain there was between P. & deft. as to the goods, but the goods remained on the premises without the request of deft. Pltf. & his co-mtgees. subsequently took possession of the goods under their chattel mtge., but on the same day before they were removed, the landlord seized them for rent, a portion of which was due before deft. took possession. Upon the promise of pltf. to pay the rent, the landlord withdrew. Pltf. having refused to keep his promise the landlord brought an action against him & compelled payment. Pltf. now sued deft. to recover the amount so paid :—*Held*: (1) there being no privity of contract or estate between

landlord of the farm, distrained for rent, & afterwards agreed with B. to withdraw such distress & to forego all claim for rent on B. agreeing to give up possession & surrender the tenancy to deft. on June 24 then next. Deft. withdrew the distress, & on June 24 he took possession of the farm according to the agreement, & afterwards cultivated the crops which were growing there, & when they arrived at maturity he reaped & sold them. Between the time he withdrew the distress & the time he took possession of the farm, viz., on May 19, deft. had notice for the first time of pltf.'s claim under the bill of sale to the growing crops. The amount of rent which would have been due to deft. had the tenancy continued, & the expenses he incurred in cultivating & reaping the crops, exceeded their market value when sold:—*Held*: assuming pltf. had a right in equity to such crops as against deft., yet such right was subject to the payment of the rent & of the expenses of cultivating & reaping the crops, & as such rent & expenses exceeded the value of the crops pltf. had not been injured, & had no cause of action against deft.—**CLEMENTS v. MATTHEWS** (1883), 11 Q. B. D. 808; 52 L. J. Q. B. 772, C. A. *Annotations*:—**Mentd.** Joseph v. Lyons (1884), 15 Q. B. D. 280; Reeves v. Barlow (1884), 12 Q. B. D. 436; *Re* Clarke, Coombe v. Carter (1887), 36 Ch. D. 348; Tailby v. Official Receiver (1888), 13 App. Cas. 523.

Mortgagor attorning tenant to mortgagee.—See Part II., Sect. 5, sub-sect. 1, *ante*, & generally, **MORTGAGE**.

Distress for rent.—See, generally, **DISTRESS**; **LANDLORD & TENANT**.

C. Rates and Taxes.

See 1882 Act, s. 14.

819. Priority for taxes & rates—Recovery by distress warrant—Not by execution.—1882 Act, s. 14, does not apply where the local authority proceeds to recover the rate in default in the county ct. under Public Health Act, 1875 (c. 55), s. 261, & not by distress warrant under s. 256.—**WIMBLEDON LOCAL BOARD v. UNDERWOOD**, [1892] 1 Q. B. 836; 61 L. J. Q. B. 484; 67 L. T. 55; 56 J. P. 633; 40 W. R. 640, D. C.

820. — General district rate.—The general

deft. & pltf. & the goods not having been originally placed on the premises, at the tenant's request, & having in fact been in the possession of pltf. when seized, deft. was not bound to protect them against seizure for rent, which he was not shown to have been liable for: (2) pltf.'s payment was voluntary so far as concerned deft., & he could not recover.—**HERRING v. WILSON** (1884), 4 O. R. 607.—**CAN.**

t. Chattels bought by landlord at auction—With assent of grantor.—The property in goods, under Distress Act, 1885, s. 4, of the tenant or person in possession who has given a bill of sale over them is a limited property, only "for the purposes of distress," & does not give the tenant a right to deal with them outside the distress. Where, a landlord who has distrained buys such goods at auction with the consent of the tenant, no property in the goods passes, & the mtgee. can maintain trover against the landlord.—**MANNING v. JONAS**, [1894] 14 N. Z. L. R.

PART VII. SECT. 2, SUB-SECT. 4. —C.

819 i. Priority for taxes—Municipality.—A municipality to which arrears of taxes are owing has no greater rights than any other creditor in the goods of its debtor until it actually levies under legal process against particular goods, & until such levy, it is not one of the class of

creditors protected by Bills of Sale Ordinance.—**ROYAL TRUST CO. v. CASTOR TOWN**, [1917] 3 W. W. R. 586; 37 D. L. R. 277.—**CAN.**

819 ii. — Goods purchased from mortgagee.—Goods purchased from the chattel mtgee. thereof are not "claimed by purchase, gift, transfer, or assignment" from the mtgor. within R. S. O. 1897 (c. 224), s. 135 (4), so as to make them liable in the purchaser's hands to distress for taxes due by the mtgor.—**HORSMAN v. TORONTO CITY** (1900), 27 A. R. 475.—**CAN.**

PART VII. SECT. 2, SUB-SECT. 4. —D.

821 i. Seizure by third party—Right of possession in mortgagor.—An action of trespass will not lie by a mtgee. against a sheriff for seizing goods which were subject to a mtge., but of which the mtgors. had possession.—**STREET v. HAMILTON** (1837), 5 O. S. 658.—**CAN.**

821 ii. — Reversionary estate in mortgagee.—A mtgee. may maintain an action against a person seizing & selling the property mortgaged, the right of possession of the goods at the time of such sale being rightfully in the mtgor., & the reversionary estate in pltf. as mtgee.—**MCLEOD v. MERCER** (1856), 6 C. P. 197.—**CAN.**

v. — Mortgagor carrying on business—Property distinguishable.—Pltf. owning a stock of goods & some

district rate of an urban sanitary authority is not a tax or poor or other parochial rate within 1882 Act, s. 14.—**RICHARDS v. KIDDERMINSTER OVERSEERS**, **RICHARDS v. KIDDERMINSTER CORPN.**, [1896] 2 Ch. 212; 65 L. J. Ch. 508, n.; 74 L. T. 483; 44 W. R. 505; 12 T. L. R. 340; 4 Mans. 172. *Annotations*:—**Mentd.** *Re* Marriage, Neave, North of England Trustee, Debenture & Assets Corpn. v. Marriage, Neave, [1896] 2 Ch. 663; National Provincial Bank v. United Electric Theatres (1915), 85 L. J. Ch. 106.

D. Wrongdoer.

821. Seizure by third party—Right of possession in grantor—Until default.—A., being indebted to B., by a bill of sale executed *bonâ fide*, conveyed to him all his stock-in-trade, household furniture, etc., absolutely. The bill of sale, which was under seal, contained a covenant by A. to pay the debt on demand, & a proviso for redemption on payment of the debt & interest on demand, & a further proviso that the assignor should continue in possession until default. The goods having been subsequently, & before any demand made by B., seized by the sheriff under a *fi. fa.* upon a judgment entered up against A. on a warrant of attorney:—*Held*: B. had not such a right of immediate possession as to entitle him to maintain trover against the sheriff.—**BRADLEY v. COPLEY** (1845), 1 C. B. 685; 14 L. J. C. P. 222; 5 L. T. O. S. 198; 9 Jur. 599; 135 E. R. 711.

Annotations:—**Consd.** Manders v. Williams (1849), 4 Exch. 339. **Distd.** White v. Morris (1852), 11 C. B. 1015. **Consd.** Barker v. Furlong, [1891] 2 Ch. 172; Jelks v. Hayward, [1905] 2 K. B. 460. **Refd.** Fenn v. Bittleston (1851), 7 Exch. 152.

822. — — — — ——A. gave a bill of sale to B. to secure him against payments which he might be obliged to make as surety for A.:—*Held*: B. might maintain trespass against the sheriff for seizing the goods conveyed by the bill of sale under a *fi. fa.* against A., notwithstanding that up to the time of the seizure they remained in A.'s possession.—**WATSON v. MACQUIRE** (1848), 5 C. B. 836; 136 E. R. 1108.

Annotation:—**Mentd.** Canning v. Raper (1852), 1 E. & B. 164.

823. — Right to immediate possession in grantee.—Where goods are assigned as security for an advance of money, upon trust to permit

furniture & shop fixtures, sold out to one S., taking a mtge. in security, which was duly filed. S. continued to carry on business, bringing in other goods, till he became involved & absconded, when the sheriff under an attachment seized all the property in the store:—*Held*: the property being distinguishable, the sheriff was liable for trespass.—**BOYS v. SMITH** (1859), 8 C. P. 248.—**CAN.**

823 i. — Right to immediate possession in mortgagee.—B. mortgaged to pltf. certain goods, with a covenant that in case of default in payment, or of B.'s attempting to dispose of the goods, pltf. might take possession & sell or retain them for his own use, but there was no clause authorising B. to remain in possession until default:—*Held*: pltf. had a sufficient right to possession to maintain trespass against the sheriff seizing under a *fi. fa.* against B., the jury having found the mtge. to be *bonâ fide*.—**PORTER v. FLINTOFF** (1857), 6 C. P. 335.—**CAN.**

823 ii. — — — — ——In an action for recovery of chattel, or its value, taken by deft. co., & claimed by pltf. as his property:—*Held*: pltf. was entitled to recover under chattel mtge., power of attorney giving him possession & power to sell, & bill of sale.—**FULLER v. HUNKER MERCANTILE CO.** (1907), 7 W. L. R. 80.—**CAN.**

823 iii. — — — — ——M. took a chattel mtge. on certain goods from Y.,

Sect. 2.—Rights of grantee: Sub-sect. 4, D.; sub-sect. 5.]

the assignor to remain in possession of them until default in payment at the time stipulated, & upon further trust to sell them upon such default being made, the assignee has a sufficient possession to enable him to maintain trespass against a wrongdoer.

Such an assignment, though void as against creditors, is good as between the parties, & as between either party & a stranger; & a bailiff of

which contained no redemise clause. F. was a mtgee. of Y.'s land, on which these goods were situate, under a mtge. purporting to be made in pursuance of Short Forms Act. This mtge. contained an attornment clause, the statutory power to distrain for arrears of interest & an express power to distrain for arrears of principal, but no redemise clause, & was not executed by F. F. distrained for both principal & interest.—*Held*: (1) there was a valid distress prior to the registration of M.'s chattel mtge.; (2) the distress for overdue principal was only valid in so far as it caught goods which were the property of Y., but the goods comprised in M.'s chattel mtge. had, at the time of distress, become the property of M. & so could not be distrained upon by F.—*McDERMOTT v. FRASER* (1915), 8 W. W. R. 196; 23 D. L. R. 430; 25 Man. L. R. 298.—**CAN.**

823 iv. ——— Symbolic delivery.]—Pltf. brought replevin against deft., a sheriff, for goods taken on execution, but claimed by pltf. under a registered bill of sale from the party against whom the execution issued, & who was suffered to remain in possession:—*Held*: pltf., who had had a symbolic delivery, & had a right to immediate possession, had sufficient possession to maintain the action.—*McNAB v. SAWYER* (1872), 9 N. S. R. 38.—**CAN.**

823 v. ——— Bill covering after-acquired property.]—Defts. sold a quantity of goods to H. who, previous to receiving delivery, made a bill of sale to pltf., covering after-acquired property. Pltf., after the goods had been delivered, went into possession. The goods were removed by one of defts. without the knowledge of his partner:—*Held*: both defts. were liable for the wrongful removal.—*SHATFORD v. NELSON* (1888), 20 N. S. R. (8 R. & G.) 323; 9 C. L. T. 62.—**CAN.**

823 vi. ——— Damages.]—A mtgee. under a mtge. by a firm, having taken possession of goods, they were seized by the sheriff, under an attachment against one of the partners as an absconding debtor, & afterwards delivered by the sheriff to the assignee in insolvency of such partner:—*Held*: (1) the sheriff had no right, either as representing the attaching creditor or the assignee in insolvency of one of the partners, to take the goods out of the possession of the mtgee.; (2) he was liable for the full amount of pltf.'s interest in them, his having handed them over to the assignee could form no ground for reducing the damages.—*PATERSON v. MAUGHAN* (1876), 39 U. C. R. 371.—**CAN.**

823 vii. ——— Right of mortgagee to repayment.]—*Held*: (1) goods & chattels in the possession of a mtgee. of them cannot be seized & sold, & the proceeds paid over to a sheriff acting under a writ of attachment in insolvency against the mtgor.; (2) the possession of deft., to whom such goods had been sent by pltf., the mtgee., to be sold, & their proceeds paid over to him, was the possession of the mtgee., & deft. having assented to the seizure by the sheriff, & acting under his

directions, sold the goods & paid over the proceeds, was liable to repay them to the mtgee.—*WATSON v. HENDERSON* (1876), 25 C. P. 562.—**CAN.**

823 viii. ——— Possession taken by grantees.]—Pltfs. in pursuance of a previous agreement, purchased the business, plant, & stock-in-trade of L. Brothers, subject to their debts & liabilities. One of these was a loan of \$4,000 from defts. secured by a chattel mtge. of all the plant & stock-in-trade of L. Brothers. This chattel mtge. contained a provision that it should cover all after-acquired goods & chattels brought upon the premises owned or occupied by pltfs. or used in connection with their business during the currency of the mtge. Pltfs. had been incorporated as a co. prior to the date of the chattel mtge., & L. Brothers were the principal promoters & became the president & vice-president respectively, being in fact the controlling shareholders. \$2,104.64 of the money lent by defts. to L. Brothers was handed over to pltfs., & by them applied towards payment of the debts of L. Brothers. Pltfs. paid on instalment of the interest due to defts. on the \$4,000 loan:—*Held*: (1) the provision in the chattel mtge. as after-acquired goods was as binding upon pltfs. as purchasers of the mortgaged property with notice of it as it would be upon the exors. or administrators of the mtgors., & defts. had a good valid lien & charge upon all after-acquired goods brought upon the premises in question by pltfs.; (2) pltfs. were, in the circumstances, estopped from disputing such lien & charge; (3) the mtge. was not void as to the after-acquired goods because of the generality & vagueness of the description.—*IMPERIAL BREWERS, LTD. v. GELIN* (1908), 18 Man. L. R. 283; 9 W. L. R. 99.—**CAN.**

823 ix. ——— Order for re-delivery.]—A mtgee. having taken possession, as he alleged, under the mtge., the sheriff seized the property under an execution against the mtgor., & the mtgee. then applied for an order, to have it delivered up to him again:—*Held*: there was no power to make such order.—*SMITH v. COBBOURG & PETERBOROUGH RY. CO.* (1859), 3 P. R. 113.—**CAN.**

a. ——— After assignment of mortgage—Goods in possession of assignee.]—M. sold goods to P., & took a mtge. on them for the price, together with P.'s note. Afterwards, M., who was then insolvent, assigned the mtge. to F., & F.'s agent received possession of the goods, most of which had been originally purchased by M. from F., & were still unpaid for. The goods having been seized under an execution against M.:—*Held*: (1) the assignment of the mtge. to F. was void under 22 Vict. c. 96; (2) M., as mtgee., had no interest which could be sold under execution, & F., having possession, was entitled to hold the goods as against the execution creditor.—*FERRIE v. CLEGHORN* (1860), 19 U. C. R. 241.—**CAN.**

b. ——— Mortgage taken by agent in own name.]—The treasurer of a mutual insurance co. may take a chattel mtge. to himself for a debt due

a county ct., claiming to seize goods on behalf of a judgment creditor, is a stranger within that rule, unless he proves the legal authority under which he seized on behalf of such creditor, viz., the judgment.—*WHITE v. MORRIS* (1852), 11 C. B. 1015; 21 L. J. C. P. 185; 18 L. T. O. S. 256; 16 Jur. 500; 138 E. R. 778.

Annotations:—*Consd. Haylock v. Sparke* (1853), 1 E. & B. 471; *Burling v. Harley* (1858), 3 H. & N. 271; *Barker v. Furlong*, [1891] 2 Ch. 172. *Mentd. Bowes v. Foster* (1858), 2 H. & N. 779; *McMahon v. Lennard* (1858), 6 H. L. Cas. 970.

to the co., & such treasurer may sue a wrongdoer for taking the goods mortgaged, although he has no beneficial interest in them.—*BRODIE v. RUTTAN* (1858), 16 U. C. R. 207.—**CAN.**

c. ——— Possession under unregistered bill.]—Possession under an unrecorded bill of sale:—*Held*: good as against a party levying subsequently under execution.—*EASTERN CANADA SAVINGS & LOAN CO. v. CURRY* (1896), 28 N. S. R. 323.—**CAN.**

d. ——— ———.]—The grantor of a bill of sale under Bills of Sale Act, 1885, failed to pay the money secured by it on the due date. There was no registration of & extension or renewal of the bill of sale:—*Held*: notwithstanding the non-registration of an extension or renewal, the bill of sale was not void under s. 29 of the Act as against an execution creditor who had seized the goods comprised in the bill of sale.—*HISLOP v. JUDGE*, [1887] 21 S. A. L. R. 16.—**AUS.**

f. ——— Mortgagee becoming execution creditor.]—Certain goods of deft. seized by a sheriff under pltf.'s execution were claimed by a chattel mtgee., whereupon an interpleader issue was directed. The goods were sold under the interpleader order by the sheriff, who deducted his fees from the proceeds, & by consent retained the residue in his hands pending the result of the issue, entering it in his books as held under Creditors' Relief Act. Claimant never delivered any issue, & abandoned the interpleader proceedings. He obtained judgment against deft., & within thirty days of the entry in the sheriff's books, placed an execution in the sheriff's hands:—*Held*: claimant was entitled to participate in the proceeds, & was not barred of his rights as an execution creditor because, before he had attained that status, he had asserted a right in a different capacity.—*WAIT v. SACER* (1891), 14 P. R. 347.—**CAN.**

g. ——— Injunction to restrain sale—When granted.]—An injunction at the suit of a mtgee. of chattels, against a judgment creditor of the mtgor., to prevent a sale, will not be granted, the rule being universal that the ct. will protect the specific possession of chattels only in case they are of peculiar value.—*GEDDES v. MORLEY* (1846), 1 O. S. 675.—**CAN.**

h. ——— Powers of sheriff—Sale of equity of redemption.]—*Semble*: under an execution against a mtgor., the sheriff may seize goods in the possession of the mtgee., so that he may expose them to view, although he can sell only the equity of redemption.—*SMITH v. COBBOURG & PETERBOROUGH RY. CO.* (1859), 3 P. R. 113.—**CAN.**

k. ——— Liability of sheriff—O. 40, r. 31.]—*GATES v. BENT* (1898), 31 N. S. R. 544.—**CAN.**

l. ——— ———.]—*McKAY v. HARRIS* (1899), 32 N. S. R. 150.—**CAN.**

m. ——— Delay in enforcing—Effect of.]—On July 23, 1868, M. recovered judgment against J. for \$2,023.51, & issued a *fi. fa.* against goods, the execution of which was delayed until the end of the following

SUB-SECT. 5.—OTHER RIGHTS.

824. Insurance money—Bill containing covenant to insure—No provision for application of money.]—Defts. assigned machinery by bill of sale to secure a sum of money advanced by pltf. The deed contained a covenant to insure, but no provision for the application of the policy money in case of fire in liquidation of the mtge. debt. The machinery was burnt, & defts. became bkpts. :—*Held*: pltf. had no claim to the benefit of the policy as against defts.—*LEES v. WHITELEY* (1866),

month by an application to amend. On Oct. 3, 1868, J. gave pltf. a chattel mtge., which was registered Oct. 6, payable a year after date. J., with pltf.'s consent, continued his business, & had sold a large part of the chattels when pltf., in Jan., 1869, came to take possession. Thereupon the sheriff, whose previous action under the *fl. fa.*, if any, did not appear, but who had no authority for the delay, seized & sold the remaining goods, when pltf. brought trover against him, pltf., & deft. In the execution, & another who had joined in indemnifying the sheriff, contending that the delay in executing the *fl. fa.* gave his chattel mtge. priority. The jury gave a verdict for \$1,510 against the sheriff, & in favour of all the other defts. :—*Held*: the verdict being inconsistent with the facts, & exorbitant, should be set aside.—*McGIVERN v. McCAUSLAND* (1869), 19 C. P. 460.—CAN.

n. — Right of mortgagor to sue for.]—In an action against a bailiff for selling under execution a horse which pltf. claimed to be exempt, it appeared that at the time of the seizure & sale the horse was included in a chattel mtge. given by pltf. to M. :—*Held*: deft. could not set up the right of the mtgee. as a defence.—*McMARTIN v. HURLBURT* (1877), 2 A. R. 146.—CAN.

o. — — —.]—In an action by the assignee of the insolvent mtgors., to restrain a sale of the mortgaged goods seized by the sheriff under execution :—*Held*: the sheriff could set up the rights of the mtgee. in answer to the action.—*ANDERSON v. GLASS* (1888), 16 O. R. 592.—CAN.

p. — — —.]—Deft. as sheriff under an execution against A., the father of pltf. seized a horse, which pltf. claimed, & which he also alleged belonged to B. by virtue of a bill of sale to the latter :—*Held*: the bill of sale was an answer to pltf.'s case.—*STEWART v. GATES* (1881), 2 P. E. I. 432.—CAN.

q. — — — Administratrix of first mortgagee.]—Pltf. mortgaged his goods to A., of whom deft. was administratrix. The goods came into the possession of deft., but under what circumstances did not appear. The mtge. contained an agreement that on default the mtgee. might take possession, & a statement that delivery of possession was given at the time of executing the mtge. There was no evidence that the mtge. money had been paid. Pltf. afterwards executed three other mtges. of the same goods to other parties, each containing a similar agreement as to default, & a similar statement as to delivery of possession :—*Held*: pltf. could not recover either in trover or detinue, & deft. might, as against him, set up the right of the other mtgees.—*RUTTAN v. BEAMISH* (1860), 10 C. P. 90.—CAN.

r. — Waiver of claim by mortgagee.]—Where a sheriff seizes goods under writs of execution, & a mtgee. lays claim to them under a chattel mtge., the fact that he subsequently directs the sheriff to sell under the executions does not necessarily amount to a waiver of his claim under the mtge.—*SEGSWORTH v. MERIDEN SILVER*

PLATING CO. (1882), 3 O. R. 413.—CAN.

s. — Subsequent sale—Measure of damages.]—A chattel mtge. to secure a debt was made to a nominee of the creditor, as trustee for him. In an action by an assignee of the mtge. against the assignee for the general benefit of creditors of the mtgor., for conversion of the mortgaged chattels, it appeared that at the time the goods were taken by deft. out of pltf.'s possession, they were in the hands of the bailiff of the latter for sale under the power contained in the mtge., & when deft. intervened & sold as assignee, the same bailiff conducted the sale, & the amount realised was the same as would have resulted from a sale under the power :—*Held*: pltf. was entitled to recover as damages for the conversion no more & no less than was realised by the sale.—*LIGHT v. HAWLEY* (1897), 29 O. R. 25.—CAN.

PART VII. SECT. 2, SUB-SECT. 5.

824 i. Insurance money—Chattel mortgage containing covenant to insure—For benefit of mortgagee.]—Promissory notes for the purchase money of goods were secured by a chattel mtge. given on behalf of the purchasers containing a covenant to insure for the benefit of the mtgee., who discounted the notes with pltf. & assigned the chattel mtge. but did not transfer the insurance to them, the loss under which was payable to himself. The policy was afterwards renewed by the purchasers' firm, but it did not appear that the renewal was assigned to the mtgee., or the loss made payable to him. Subsequently a fire occurred & the purchasers' firm assigned the insurance money to pltf., with whom they kept an account, as security for their general indebtedness, & pltf. received & applied it on the notes above mentioned, but afterwards sought to apply it in payment of other indebtedness of the purchasers :—*Held*: pltf. were bound to apply the insurance money, for the benefit of the mtgee.—*WESTERN BANK v. COURTEMANCHE* (1896), 27 O. R. 213.—CAN.

824 ii. — Covenant to insure in name of mortgagee—Lien on policy.]—F. & G. insured machinery with defts. Subsequently they added new machinery, mortgaged it, & covenanted to insure the whole in the mtgees.' names in other offices. Insurances in other offices were effected in the names of the mtgees., & the insurance with defts. was noticed & kept alive, but remained in the names of F. & G. The latter became bkpt., & after loss, the official assignee transferred defts.' insurance to the mtgees. without any expressed consideration :—*Semble*: the mtgees. had a lien on the policy under their bill of sale.—*HOLMES & BELL v. NATIONAL FIRE & MARINE INSURANCE CO.* (1887), 5 N. Z. L. R. 360.—N.Z.

824 iii. — Amount recoverable—Subsequent advances.]—Where the mtge. was under seal, & the mtgee. insured before default :—*Held*: he was not entitled to recover on his policy more than the amount appearing on the face of his mtge. at the time of insurance, not being allowed to tack subsequent advances by parol.—*OGDEN v. MON-*

L. R. 2
14 W. R. 534.

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Ch.

L. T. 472 ;

—*Reid*. *Sinnott v. Bowden*, [1912] 2 Ch. 414.
Mentd. *Rayner v. Preston* (1881), 18 Ch. D. 1.

825. Proceeds of sale in auctioneer's hands—Direction to grantee to apply money in part payment of his debt—Bankruptcy of grantor.]—Goods comprised in an invalid bill of sale having been sold by the holder, the grantor told him, in the presence of the auctioneer, to apply the purchase-money in part payment of his debt. The

TREAL INSURANCE CO. (1854), 3 C. P. 497.—CAN.

a. Repudiation of mortgage.]—A chattel mtge. cannot be repudiated by the mtgee. without notice to the grantor & without ascribing any reason.—*ADAMS v. HUTCHINGS* (1893), 3 Terr. L. R. 206.—CAN.

b. Application of proceeds of sale—Mortgagor entitled to surplus.]—Where the holder of a bill of sale, after realisation of the security, has admitted that there is a balance due to the mtgor. an action will lie against him for the balance so admitted.—*TURNER v. NEW SOUTH WALES MONT DE PIETE DEPOSIT & INVESTMENT CO., LTD.* (1910), 10 C. L. R. 539.—AUS.

c. — — —.]—D. held a mtge. with a power to sell upon default, the mtgor. still to be responsible for any balance. Upon default he sold & repurchased some of the goods, which he subsequently exchanged for land. Upon an action for the balance over the amount realised by the original sale, deft. contended that pltf. must be considered a trustee for him in the repurchase, & having sold at an advance must account for the balance :—*Held*: to obtain relief, application must be made to equity.—*ANNES v. DORNAN* (1860), 10 C. P. 299.—CAN.

d. — — —.]—*Held*: as pltf.'s claim was more than paid by a sale of part of the chattels replevied, deft. was entitled, upon her counterclaim, to a refund of the excess & to a return of the unsold chattels, but not to damages.—*LAMONT v. OLSON* (1911), 18 W. L. R. 200.—CAN.

f. — Mortgage given by partners—Subsequent mortgage by one partner after dissolution.]—M. & C., while carrying on business as partners, gave a chattel mtge. to pltf. as security for goods supplied to them. Subsequently M. retired, leaving the assets of the firm in the hands of C., who gave a further chattel mtge. to pltf., covering the goods included in the former mtge. as well as goods supplied to C. personally after M.'s retirement.

Pltf. seized & sold the articles comprised in both mtges. & credited the whole of the net proceeds to the separate account of C., instead of applying the proceeds of the sale of the goods covered by the first mtge. to the payment of the indebtedness of the firm :—*Held*: defts. were entitled to have the proceeds of the sale of the goods covered by the first mtge. applied in reduction of the debt for which it was given.—*FISHER v. MCPHER* (1896), 28 N. S. R. 523.—CAN.

g. — Bankruptcy of mortgagor—Proceeds less than amount due to mortgagee.]—M. made a bill of sale of personal property, dated July 5, 1876, conditioned for payment of \$400 on July 5, 1877, & became insolvent on Apr. 24, 1877. On June 8, 1877, to avoid leaving the property on the premises liable to be distrained for rent, which accrued due on June 12, the insolvent's assignee & the holder of the bill of sale, after each advertising a sale of the property to which the other objected, agreed that it should be sold, reserving the proceeds for the

of grantee: Sub-sect. 5. Sect. 3.]

grantor became bkpt., the money remaining in the hands of the auctioneer:—*Held*: the holder of the bill of sale was entitled to the money as against the trustee in bkpcy.—*PARSONS v. DEWBURY & CLARKE* (1887), 3 T. L. R. 354, C. A.

826. Repayment—Execution paid out—By grantee of unregistered bill.]—The goods of debtor having been seized in execution, & a man left in possession, the holder of an unregistered bill of sale over them paid the debt & costs & took possession himself. On the same day, & before he did so, debtor was adjudicated bkpt.:—*Held*: the holder was entitled to be paid out of the proceeds of the goods, the amount of the executions, which were good against the trustee.—*Re COLE, Ex p. MUTTON* (1872), L. R. 14 Eq. 178; 41 L. J. Bcy. 57; 26 L. T. 916; 20 W. R. 882.

Annotations:—*Folld. Re James, Ex p. Harris* (1874), L. R. 19 Eq. 253. *Consd. Re Ayshford, Ex p. Lovering* (1887), 3 T. L. R. 604. *Distd. Re Craig, Ex p. Hinchcliffe*, [1916] 2 K. B. 497. *Reid. Davis v. Petrie* (1905), 93 L. T. 511.

827. — Earlier bills paid off—By grantee of bill executed after act of bankruptcy.]—At the time when a bill of sale was executed, the mtgee. had

adjudication of the ct.:—*Held*: the holder of the bill of sale was entitled to the proceeds, which were less than the amount due him.—*Re O'MULLIN & JOHNSTONE* (1878), R. E. D. 157.—*CAN.*

h. — Right of mortgagor to account—Seizure & sale of property not included in bill.]—*WEBB v. NATIONAL BANK OF NEW ZEALAND*, 3 J. R. N. S. 114.—*N.Z.*

k. Agreement to give mortgage—Enforcement of, against assignee for benefit of creditors.]—An assignee for the general benefit of creditors is, by virtue of 55 Vict. c. 26, s. 2, entitled to take advantage of irregularities or defects in a chattel mtge. made by the assignor in the same extent as an execution creditor, where such mtge. is by reason of such defect "void against creditors." As against an assignee for benefit of creditors an oral agreement, of which he has notice, by the assignor to give to an indorser a chattel mtge. to secure him against liability, will be enforced.—*KERRY v. JAMES* (1894), 21 A. R. 338.—*CAN.*

l. — Mortgage subsequently executed—Right to rely on agreement.]—Where an agreement to give a chattel mtge. is duly made & registered under R. S. O. (c. 148), s. 11, & subsequently a mtge. is made & registered, the giving of such mtge., whereby the legal estate becomes vested in the mtgee., does not revest in debtor the equitable title which the mtgee. had by virtue of the agreement, but it continues to exist as before, & the mtgee. is enabled to rely on it where the legal mtge. is ineffectual for any purpose.—*FISHER v. BRADSHAW* (1902), 22 O. L. T. Occ. N. 281; 4 O. L. R. 162; 1 O. W. R. 282.—*CAN.*

m. Covenant to pay sum found due on settlement—Refusal to come to settlement.]—Deft. executed a chattel mtge. to pltf., reciting that he was indebted to them in a large sum of money, the amount whereof had not been ascertained by settlement of accounts between them. The proviso was, that if deft. should pay to pltf. such sum as should be found due on a settlement between them, the instrument should be void; & deft. covenanted to pay to pltf. the said sum of money so to be found due as aforesaid. In an action on this instrument, pltf. alleged in one count that deft. was at the date of the deed indebted to them in \$1,000, which would have been found due on a settlement, but

that deft., though requested, would not come to a settlement, nor pay the said sum. In another count it was alleged that deft. was indebted to pltf. in \$1,000 for goods sold, etc., & deft. by deed acknowledged such indebtedness; & by reason of the non-payment an action had accrued to pltf. to demand the same:—*Held*: pltf. were entitled to maintain the action.—*GATLAND v. McDONALD* (1877), 41 U. C. R. 573.—*CAN.*

n. Liability for wrongful acts of mortgagor—Mortgagee not in possession.]—A mtgee. who has not taken actual possession, is not liable in trespass for an injury occasioned by the goods mortgaged.

M. & Co. having wrongfully placed a quantity of stone on pltf.'s land, afterwards mortgaged it with other property to deft. Default had been made in payment, but deft. had not taken possession, or interfered in any way with the stone; when asked to remove it, however, he had refused, & forbade pltf. doing so himself:—*Held*: as mtgee. he was not liable to pltf. in trespass for allowing the stone to remain.—*CAMPBELL v. REID* (1857), 14 U. C. R. 305.—*CAN.*

o. Mortgagee in possession adding stock to business—After default—Satisfaction of mortgage—Appointment of receiver.]—Pltf., carrying on the business of a druggist, mortgaged his stock-in-trade to deft., the instrument stipulating that deft. should take possession of the stock & premises, to hold for four months in order to secure repayment of money advanced, & power was given to the mtgee. to add new stock so as to keep up the business. Default was made in payment, & thereafter a large amount of stock was added, some of the money being expended by deft. with the assent of pltf.; other money being part of the profits of the business was thus re-invested in new stock; some of the old stock remaining in specie. The matter was referred to the master at Belleville, to take the accounts of the dealings between the parties. Before the master made his report, pltf. applied on petition for the appointment of a receiver, on the ground that the mtge. had been paid in full:—*Held*: (1) as the new stock belonged to the mtgee. himself & pltf. could therefore have no claim upon it, & as the master had not yet found which party was indebted to the other, his finding would not be anticipated by the appointment of a receiver; (2) although

notice of an act of bkpcy. committed by the mtgor., upon which he was afterwards adjudicated a bkpt. The money secured by the deed consisted in parts of a sum paid by the mtgee. in discharge of the claim of the holder of two prior registered bills of sale executed before the act of bkpcy. was committed. The old bills of sale were not transferred to the new mtgee., & satisfaction of them was entered up. The new bill of sale was registered:—*Held*: the new bill of sale was valid as against the trustee in the bkpcy. to the extent of the sum paid to the prior mtgee.—*Re JAMES, Ex p. HARRIS* (1874), L. R. 19 Eq. 253; 44 L. J. Bcy. 31; 31 L. T. 621; 23 W. R. 536.

See, generally, BANKRUPTCY & INSOLVENCY, Vol. V., p. 905.

828. — Distress paid off—To relieve cattle lent by third party.]—A distress for rent was levied upon certain property, & cattle lent for hire by pltf. to the tenant were seized. Deft., the holder of a bill of sale upon the goods & chattels of the tenant, then paid off the distress, & seized the cattle under his bill of sale. In an action for trover & wrongful conversion:—*Held*: deft. was not entitled to set off & counterclaim the amount

deft.'s right on default was to sell the original stock *en bloc* after notice, still deft. was at liberty to add further capital & stock to the business, but not to the prejudice of the mtgor. so as to improve him out of his estate, & so long as pltf. chose to allow the business to go on under deft.'s control, he had the right so to conduct it, subject to being called on to account.—*FOSTER v. MORDEN* (1881), 29 Gr. 25.—*CAN.*

p. Mortgage over unregistered ferry boat—Boat subsequently registered under new name—Title of mortgagee.]—Deft. being owner of an unregistered ferry boat, gave pltf. a bill of sale of it, by way of mtge. Subsequently deft. from time to time made repairs to the boat, & finally substantially rebuilt her, when he registered her under a new name, declaring himself to be the sole owner:—*Held*: pltf.'s title under the bill of sale was good.—*GIBSON v. GILL* (1880), 19 N. B. R. 565.—*CAN.*

q. Sale under principal security—Whether balance recoverable on collateral mortgage.]—Chattel mtges. were given as collateral to promissory notes given for goods sold by pltf. to deft. Under a condition in the notes pltf. seized & sold the goods & sought to recover upon the mtge. the balance due on the notes:—*Held*: in the absence of any proviso in the notes permitting pltf. to recover from deft. the balance due after a sale, the sale had put an end to the original agreement, & as pltf. had no right to recover on the notes they had no right of action on the collateral security.—*MASSEY-HARRIS v. LOWE* (1905), 6 Torr. L. R. 71; 1 W. L. R. 213.—*CAN.*

r. Recovery of money paid under mistake of fact—Payment by grantee for goods not ordered.]—Deft. sold by a bill of sale to pltf. his goodwill, lease, & certain druggist's stock thereafter to be selected, to the amount of \$5,700. P. selected the stock from the stock list for pltf., who paid the \$5,700, & by some oversight, a lot of lamp cleaners, of the value of \$173, were charged & paid for as part of the \$5,700, which, as the jury found, neither P. nor pltf. had ever chosen or accepted. Deft. having refused on application to take away these lamp cleaners or repay the \$173:—*Held*: notwithstanding the bill of sale, pltf. was entitled to recover back the \$173 as money paid under a mistake of fact, & without consideration.—*MINGAYE v. WHITE* (1873), 34 U. C. R. 82.—*CAN.*

paid by him to relieve the cattle from the distress.
JONES v. SIMMONS (1881), 45 J. P. 666.

SECT. 3.—TRANSFER.

See 1878 Act, s. 10.

829. Of bill executed before 1854 Act.]—In 1852 A. executed to B. a bill of sale of his trade fixtures to secure advances. In 1874 B.'s exors., without A.'s concurrence, executed a deed of transfer to C. In Nov., 1876, C. took possession, & in the following Dec. A. was adjudicated bkpt. :—*Held*: the transfer to C. was not within 1854 Act, & did not require registration.—*Re SHAW, Ex p. SHAW* (1877), 46 L. J. Bcy. 114; 36 L. T. 805; 25 W. R. 686.

830. Whether bill or transfer—Further advance by transferee.]—By an indenture in 1877, after reciting that by a mtge. in 1872, W., the mtgor., had conveyed certain hereditaments to secure £350 lent to him by the mtgees. with a proviso for redemption on payment of the £350, it was witnessed that in consideration of £350 paid by S. to the mtgees. at W.'s request in satisfaction of all money owing upon the recited mtge., the receipt of which £350 the mtgees. acknowledged, & therefrom released S. & W., & also in consideration of £120 paid by S. to W. the mtgees. conveyed & released, & W. released & confirmed to S. in fee, the hereditaments discharged from the proviso for redemption, with a proviso for redemption on payment by W. to S. of the two sums of £350 & £120, making together £470, & a covenant by W. for payment thereof to S. :—*Held*: though there was no formal assignment of the old debt of £350 & though that debt & the old equity of redemption were extinguished, the indenture of 1877 was as to the £350 in substance a "transfer of a mtge." within Stamp Act, 1870 (c. 97), sched., & was liable to be stamped as a transfer, with a further *ad valorem* duty on the fresh advance of £120, & was not liable to be stamped as a "mtge." for £470.—*WALKER v. INLAND REVENUE COMRS.* (1879), 4 Ex. D. 270; 48 L. J. Q. B. 574; 41 L. T. 165; 27 W. R. 916.

Annotations:—*Folld. Humphreys v. I. R. Comrs.* (1899), 81 L. T. 199. *Refd. City of London Brewery Co. v. I. R. Comrs.* (1898), 78 L. T. 39.

831. ——— Debt reduced before transfer.]—A bill of sale of goods, which was duly registered, was given to secure £500 with interest, part of which was at a subsequent date paid off. A deed was afterwards made between the two parties to the bill of sale & pltf., whereby the security was transferred & the goods assigned to him, on his paying off the amount remaining due on the bill of sale & making a further advance to the grantor, the whole amount secured by the deed being £501 15s. 9d., with interest, & the rate of interest & the times of payment being different from those of the former deed :—*Held*: whether or not the deed was an effectual security, without registration, for the fresh advance, it was, as to the amount which remained due on the former bill of sale, a transfer & valid to that extent without registration, so as to entitle pltf. to the goods.—*HORNE v. HUGHES* (1881), 6 Q. B. D. 676; 44 L. T. 678; 45 J. P. 604; 29 W. R. 576, C. A.

Annotation:—*Consd. Cornell v. May* (1915), 112 L. T. 1085.

832. ——— Assignment of debt—& of licence to seize.]—An agreement for the hire, & ultimate purchase by the hirer, of specified articles of fur-

niture, provided that, on payment by the hirer of an agreed price, which was to be paid in a fixed number of periodical instalments, the articles should become his property, but that, until the agreed price had been fully paid, they should remain the property of the lender. It was further provided that, if default should be made in the punctual payment of the hire, the lender might immediately enter upon the dwelling-house of the hirer & take possession of, & remove & sell the goods. During the currency of the agreement the lender assigned all his right & interest under the agreement to a person who had lent him money, as security for the advance, authorising him, if default should be made in repayment of the loan as agreed, to exercise all the powers contained in the hiring agreement, until the balance due to him should have been repaid :—*Held*: (1) the licence to enter & take possession of the goods was not capable of being assigned; (2) the assignment of the instalments which accrued due under the hiring agreement after the commencement of the bkpcy. of the assignor was valid as against the trustee in bkpcy.—*Re DAVIS & Co., Ex p. RAWLINGS* (1888), 22 Q. B. D. 193; 37 W. R. 203; 5 T. L. R. 119, C. A.

Annotation:—*Refd. Wilmot v. Alton*, [1897] 1 Q. B. 17.

833. ——— Securities not expressly assigned.]—P. executed a voluntary settlement, by which he assigned certain personal property, including four debts which were due to him on the security of bills of sale, to trustees, with power to sue for the debts, upon trust to sell & convert into money the trust premises & execute & do such assurances & things as should be expedient, & to apply the proceeds for the benefit of his wife & other relatives. He made no express assignment of the securities for the debts, nor did he give them up to the trustees. The settlor afterwards received payment of the four debts & died intestate. In an action for the administration of his estate & of the trusts of the settlement :—*Held*: the debts were completely assigned by the voluntary settlement, & the trustees were entitled to prove as creditors against the estate of intestate in respect of the debts received by him.—*Re PATRICK, BILLS v. TATHAM*, [1891] 1 Ch. 82; 60 L. J. Ch. 111; 63 L. T. 752; 39 W. R. 113; 7 T. L. R. 124, C. A.

Annotation:—*Mentd. Re Griffin, Griffin v. Griffin*, [1899] 1 Ch. 408.

Choses in action as subject-matter of bills of sale, see Part IV., Sect. 3, *ante*.

834. Of registered bill—Equitable sub-mortgage by transferee.]—A memorandum by way of equitable sub-mtge. given by the transferee of a registered bill of sale, accompanied by a deposit of the registered bill of sale & the transfer, does not require registration as a bill of sale, even though, after the mtge., the transferee acquires by assignment the equity of redemption of the original grantor.—*Re PARKER, Ex p. TURQUAND* (1885), 14 Q. B. D. 636; 54 L. J. Q. B. 242; 53 L. T. 579; 33 W. R. 437; 1 T. L. R. 284, C. A.

Annotations:—*Mentd. Moutt v. Halliday* (1897), 46 W. R. 318; *Re James, Ex p. Swansea Mercantile Bank* (1907), 24 T. L. R. 15; *Chappell v. Harrison* (1910), 103 L. T. 594; *Re Tabor, Ex p. Cork*, [1920] 1 K. B. 808.

835. Of unregistered bill.]—C., on July 18, advanced W. £150, which was employed partly in paying out an execution. An inventory was made of W.'s furniture, & at the foot of it W. signed a receipt for the £150, as "for the absolute sale" to C. "of the above-mentioned articles." On the

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834 l. Transfer of registered bill—Registration unnecessary.]—When a bill

of sale has been duly filed, it is unnecessary to file or register a memorandum of transfer of the security

from the grantee to another.—*MARR v. MAYGER* (1878), 4 V. L. R. 494.—*AUS.*

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same day a written agreement was entered into between C. & W. for the letting of the same furniture, specified in a schedule, by C. to W. for two months for £170, to be paid by W. to C. on Sept. 18, or such other time as might be agreed on. In Aug. W. repaid C. £50, part of the £170. The balance of £120 was not paid when it became due on Sept. 18, & C. sent H. to take possession of the goods. Possession was taken, & it was then arranged that H. should pay the £120 to C. C. signed a receipt, indorsed on the hiring agreement of July 18 & dated Sept. 22, for the £120 as "for the absolute sale" to H. of "the goods therein specified," & on the same day an agreement, similar to that of July 18, was entered into between H. & W. for the letting of the furniture to W. for three months at a rent of £145, to be paid in three instalments in Oct., Nov., & Dec. The Oct. instalment was not paid when it became due, & on Nov. 6 H. took formal possession of the goods. The goods remained in the apparent possession of W. until after he had committed an act of bkpcy., on which he was ultimately adjudicated a bkpt. None of the documents were registered:—*Held*: whether the transaction in Sept. was a transfer to H. of C.'s interest as a mtgee. or an entirely new transaction, H. could stand in no better position than C. did, & the trustee in the bkpcy. was entitled to the goods.—*Re WALDEN, Ex p. ODELL* (1878), 10 Ch. D. 76; 48 L. J. Bey. 1; 39 L. T. 333; 27 W. R. 274, C. A.

Annotations:—*Mentd. Re Baum, Ex p. Cooper* (1878), 10 Ch. D. 313; *Cochrane v. Matthews* (1878), 10 Ch. D. 80, n.; *Lincoln Waggon & Engine Co. v. Mumford* (1879), 41 L. T. 655; *Woodgate v. Godfrey* (1879), 4 Ex. D. 59; *Marsden v. Meadows* (1881), 7 Q. B. D. 80; *Re Cunningham, Attenborough's Case* (1885), 28 Ch. D. 682; *Simpson v. Charing Cross Bank* (1886), 34 W. R. 568; *Sharp v. McHenry, Sharp v. Brown* (1887), 38 Ch. D. 427; *French v. Bombardier* (1888), 60 L. T. 48; *Haydon v. Brown* (1888), 59 L. T. 330; *M. S. & L. Ry. Co. v. North Central Wagon Co.* (1888), 13 App. Cas. 554; *Redhead v. Westwood* (1888), 59 L. T. 293; *Jones v. Tower Furnishing Co.* (1889), 61 L. T. 84; *Re Watson, Ex p. Official Receiver in Bkpcy.* (1890), 25 Q. B. D. 27; *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 1; *United Forty Pound Loan Club v. Bexton*, [1891] 1 Q. B. 28, n.

836. Title through holder of unregistered bill.]

—The goods of an execution debtor were assigned by the sheriff by inventory & receipt to O., who assigned them in trust for the separate use of the execution debtor's wife, with power to the trustee to sell. Both assignments were unregistered. The wife granted a bill of sale in her own name,

836 i. Title through holder of unregistered bill.]—An execution debtor made a post-nuptial settlement of chattel property, with a trust for sale on his own request. The trustee of the settlement, by the direction of the execution debtor & his wife, assigned the property included in the settlement to pltf. for valuable consideration. Neither the settlement nor the subsequent assignment was registered under Bills of Sale Registration Act, 1856. The execution debtor was at the time of seizure under the *fi. facias* issued by the judgment creditor, in apparent possession of the goods, but the trustee of the settlement was in actual possession, as agent for the assignee for valuable consideration:—*Held*: (1) the execution debtor was the person "by whom or of whose goods" the settlement was executed; (2) were it not for the intermediate assignment the execution creditor could have seized the goods as the goods of debtor for non-registration of the settlement; (3) the assignment for value did not defeat the execution creditor's right, as the assignee's title depended upon the settlement, & that even if the settlement was a sham, the settlement

was good as against the settlor & not defeasible by a subsequent sale by him. —*WALKER v. CLEVE, Mac.* 107.—**N.Z.**

a. Necessity for notice of assignment—Before demand by assignee.]—A. gave B. a bill of sale of a pair of oxen to secure a debt, with a condition that A. should keep possession of the oxen, but if he undertook to sell them, or allowed them to be taken in execution, the bill of sale was to be absolute. A. afterwards sold the oxen to deft., & B. assigned his interest under the bill of sale to pltf., who demanded the oxen of deft. without informing him of the assignment of the bill of sale:—*Held*: deft.'s refusal to give up the oxen was no conversion as against pltf.—*SHARP v. LAWRENCE* (1865), N. B. Dig. 768 (23).—**CAN.**

b. Assignment subject to equities.]—Pltf. gave a chattel mtge. to H. to secure certain money, with a proviso enabling the mtgee. to take possession & sell in case the goods should be taken in execution by any creditor of the mtgor. The goods were so taken, & deft., to whom the mtge. had been assigned by H., took possession & sold under it, for which pltf. sued, alleging

which was duly registered by the grantee. The goods remained throughout in the possession of the execution creditor:—*Held* (*GROVE, J., LOPES, J., diss.*): the want of registration of the two first assignments invalidated the title of the grantee of the third assignment, the holder of the registered bill of sale.—*CHAPMAN v. KNIGHT* (1880), 5 C. P. D. 308; 49 L. J. Q. B. 425; 42 L. T. 538; 44 J. P. 491; 28 W. R. 919.

Annotations:—*Consd. Swire v. Cookson* (1883), 48 L. T. 877. *Distd. Walrond v. Goldmann* (1885), 16 Q. B. D. 121. *Mentd. Bright v. Rogers*, [1917] 1 K. B. 917.

837. — No person entitled to avoid bill when title acquired—Absolute sale—Bill by purchaser registered.]—In 1873 S. executed a bill of sale of furniture to resp. to secure a loan, with an absolute unconditional power to take possession & sell in case of default of payment upon demand. The bill was duly registered, but never re-registered. In 1883 resp., in order to protect the furniture from S.'s creditors, demanded payment, & on default took possession of the furniture & sold it to C., giving him a receipt for the purchase-money though no money actually passed. At the same time C., not being able to pay, executed a bill of sale of the furniture to resp. to secure the purchase-money. The bill was duly registered, but the receipt was not registered. The transaction with C. was found by the jury to be a *bona fide* one. The furniture having been afterwards seized under a *fi. fa.* against S.:—*Held*: the sale to C. being an absolute & *bona fide* transfer of the property, the bill of 1873 was spent & satisfied, & 1854, 1866, 1878, & 1882 Acts had no application whatever to it at the time of the execution, whether the furniture was or was not at that time in the apparent possession of S., & resp. was entitled to the furniture.—*COOKSON v. SWIRE* (1884), 9 App. Cas. 653; 54 L. J. Q. B. 249; 52 L. T. 30; 33 W. R. 181, H. L.; *affg. S. C. sub nom. SWIRE v. COOKSON* (1883), 49 L. T. 736, C. A.

Annotations:—*Fold. Antoniadi v. Smith*, [1901] 2 K. B. 589. *Consd. Hopkins v. Gudgeon*, [1906] 1 K. B. 690. *Refd. Hall v. Smith* (1887), 3 T. L. R. 805; *Withers v. Berry* (1895), 39 Sol. Jo. 559.

838. — Assignment by original grantee registered.]—The grantee of goods under an absolute bill of sale assigned the goods by a duly registered bill of sale. At the date of the second bill of sale the first was unregistered:—*Held*: the second bill of sale conveyed a title valid against all who became execution creditors of the grantor of the first bill of sale after the date of the second.—

that H. verbally agreed to pay these executions, which were made part of the money secured:—*Held*: deft., as assignee, took subject to such agreement, though without notice of it.—*MARTIN v. BEARMAN* (1880), 45 U. C. R. 205.—**CAN.**

c. Assignment after default—Liability of grantee to deliver possession.]—By a bill of sale certain chattels were expressed to be bargained, sold, & delivered to the grantee, subject to a proviso for redemption, but without any stipulation that the grantor might retain possession until default. The grantee after default assigned this security to pltf. by a deed which, reciting that the grantor had bargained, sold, & delivered the chattels to the grantee, assigned to pltf. the chattels comprised in the bill of sale, to hold them for his own benefit as fully as the grantee himself might have held them, subject to the proviso for redemption:—*Held*: the assignment constituted a sale of the chattels, absolute on default being made by the grantor of the bill of sale, & after such default the grantee was liable to deliver actual possession of the chattels to pltf.

ANTONIADI v. SMITH, [1901] 2 K. B. 589; 70 L. J. K. B. 869; 85 L. T. 200; 49 W. R. 693; 17 T. L. R. 643; 45 Sol. Jo. 638; 8 Mans. 335, C.A. Annotations:—*Distd.* Hopkins v. Gudgeon, [1906] 1 K. B. 690. *Mentd.* Rogers, Eungblut v. Martin (1910), 103 L. T. 527.

839. — Bill by original grantee not registered.]—In 1903 G., the owner of furniture in a house occupied by him, sold the furniture to a limited co. by an agreement which was not registered as a bill of sale. In 1904 the co. sold the furniture to G.'s mother by a document which was not registered. In 1905 the furniture, which had during the whole time remained in the apparent possession of G., was seized in execution under a judgment obtained against him. His mother having claimed the furniture:—*Held*: as claimant could show neither a registered title, nor that she had taken possession so as to render registration unnecessary, her title could not prevail against that of the execution creditor.—HOPKINS v. GUDGEON, [1906] 1 K. B. 690; 75 L. J. K. B. 452; 94 L. T. 578; 54 W. R. 419; 50 Sol. Jo. 311; 13 Mans. 363, D. C.

840. Assignment by holder of one bill—Assignor paid off—Goods claimed by holder of another bill.]—A. mortgaged furniture to B. with power of sale on default, & after that mortgaged the same furniture to C. by a second bill of sale. B. entered into possession of the goods on A.'s default in payment, & left his servant in possession. D., without notice of the second bill of sale, agreed with A. to purchase the goods, & B.'s servant delivered possession of them to D. D. then paid the balance due to B., & B. then delivered to D. his bill of sale, & gave him a receipt which purported to sell & assign the goods to D.:—*Held*: D. had no title to the goods as against C. *Semble*: if a purchaser buys of the grantor of goods his rights, if any, & then pays off the grantee & takes an assignment of the grantee's interest, he thereby acquires no right to the goods even to the extent of the money paid by him to the grantee, but the whole transaction enures to the benefit of a subsequent incumbrancer.—COOPER v. BRAHAM (1867), 15 L. T. 610.

841. Bill registered at date of transfer—Failure to re-register after five years.]—Held: 1866 Act, s. 4, which required the registration of a bill of sale under 1854 Act to be renewed every five years, in default of which the registration ceased to have

though he had never had it himself.—PERTIT v. WALKER (1882), 8 V. L. R. 72.—AUS.

d. Transfer to bank—Liability for balance due—Mortgage given before insolvency.]—Shortly before G.'s assignment for benefit of his creditors, his bookkeeper transferred to the bank a chattel mtge. given him by G. to secure payment of \$800. The assignee in bkpy. was ordered to pay the bank the balance due on the mtge.:—*Held*: (1) the assignee was not liable to repay the money; (2) the mtge. was not given to secure advances & did not give the bank a first lien on the property; (3) the bank was in the same position as if it had received the mtge. directly from G. when he was notoriously insolvent.—HOUSTON v. MERCHANTS BANK OF HALIFAX (1901), 31 S. C. R. 361.—CAN.

PART VII. SECT. 4.

842 i. Entry of satisfaction—Jurisdiction of court.]—The jurisdiction to enter a memorandum of satisfaction upon a bill of sale, under 17 & 18 Vict. c. 55, s. 6, is peculiar to the Ct. of Q. B., & a judge of another ct., sitting in the Consolidated Chamber, cannot exercise it.—MARCHBANKS v. FLEMING

(1858), 8 I. C. L. R. App. XXIX.—IR.

842 ii. — Form & contents of affidavit.]—To obtain a judge's order to enter up a memorandum of satisfaction of a bill of sale, the affidavit should conclusively show that the debt has been discharged, & the words of the statute should be followed.—*Ex p.* CAVE (1857), 9 Ir. Jur. 310.—IR.

843 i. Failure to enter satisfaction—Though bill satisfied—Rights of subsequent mortgagee.]—A grantor had given a prior registered bill of sale to another grantee, which had been paid off, but no memorandum of satisfaction had been entered:—*Held*: the outstanding bill of sale could not be set up as against claimant.—SMITH v. WHITE (1869), 5 I. L. T. 74.—IR.

1. Release remaining in hands of mortgagee—Effect of.]—When a release of a bill of sale remains in the hands of the mtgee., the jury may infer that it was not intended to become operative.—HURREY v. BANK OF NEW SOUTH WALES (1882), 1 N. Z. L. R. C. A. 115.—N.Z.

844 i. What amounts to satisfaction—Discharge of bankrupt grantor—Release in deed of assignment—Grantee party to deed.]—On Apr. 2, 1891, M. gave a leasehold mtge. to debt., & a bill of

any effect, was equally imperative when the grantee, before the period for renewal, assigned his interest under the bill of sale to a third person, & the assignee, if the registration was not renewed, had no title as against an execution creditor.—KARET v. KOSHER MEAT SUPPLY ASSOCN. (1877), 2 Q. B. D. 361; 46 L. J. Q. B. 548; 36 L. T. 694; 25 W. R. 691.

Annotations:—*Consd.* Antoniadi v. Smith, [1901] 2 K. B. 589. *Refd.* Hopkins v. Gudgeon, [1906] 1 K. B. 690.

SECT. 4.—SATISFACTION AND SURRENDER.

See 1878 Act, s. 15.

842. Entry of satisfaction—Affidavit verifying consent—Whether necessary to be made by solicitor.]—The affidavit verifying the signature & consent of the person entitled to the benefit of a bill of sale to the entry of satisfaction of the bill of sale need not be made by a solr.—*Re* BILL OF SALE, WHITE TO RUBERY, [1894] 2 Q. B. 923; 64 L. J. Q. B. 137; 71 L. T. 614; 1 Mans. 378; 10 R. 429, D. C.

843. Failure to enter satisfaction—Though bill satisfied—Rights of execution creditor.]—The goods of debtor being seized under an execution, A. set up a claim to them under a bill of sale to secure repayment to him of a sum of money lent to debtor. Under the power given to A. by the bill of sale to sell the goods, & out of the proceeds to reimburse himself and pay the surplus to debtor, A. had sold sufficient to repay the amount of his original loan, & the amount of a distress levied on the farm of debtor & of rent due by him, but A. had not been repaid a further sum advanced by him subsequent to the execution to pay a quarter's rent of the farm falling due on the day after the date of the execution:—*Held*: A. had paid the last-mentioned sum of his own wrong, and could not, after the bill of sale had been actually satisfied, set up the bare legal property vested in him by it, as against the execution creditor.—WATERTON v. BAKER (1868), 17 L. T. 494.

Annotation:—*Distd.* Williams v. Rymer (1895), 39 Sol. Jo. 641.

844. What amounts to satisfaction—Discharge of bankrupt grantor—Security operating as—Actual assignment.]—Declaration for breaking & entering the house & shop of pltf., & for seizing & taking pltf.'s goods. Pleas, not guilty, leave & licence,

sale of personal property to secure the payment of \$500 & \$1,500 respectively. On May 18 following, M. executed a deed of assignment to debt., as party thereto of the second part, for the benefit of her creditors, being parties of the third part. A condition in the deed stipulated that the parties of the second & third parts, in consideration of the sum of one dollar to each of them paid, "did severally remise, release, & discharge the party of the first part from & against all debts, dues claims & demands, actions, suits, damages, & causes & rights of action which they then had or might thereafter have against the party of the first part, for or by reason of any other matter or thing from the beginning of the world up to that date." Debt. & a number of creditors executed the deed. The assignor was not indebted to debt. in any other amount than that secured by the mtge. & bill of sale. In his evidence debt. stated that he executed the deed solely as trustee:—*Held*: debt. had discharged the mtge. & bill of sale, & it was immaterial that he had no intention of doing so, or that he was ignorant of the legal effect of his act.—MAY v. SLEEVWRIGHT (1893), N. B. Dig. 314 (36).—CAN.

Sect. 4.—Satisfaction and surrender.]

& that the goods were not pltf.'s. By deed of Aug. 18, 1868, executed between pltf. & H., pltf., in consideration of a loan of £200, & for securing payment thereof & interest, assigned to H. all & singular the household furniture, stock-in-trade, goods, chattels, effects, & things which were then or which might during the continuance of the security, by substitution or otherwise, be in & about or belonging to the messuage & premises then occupied by pltf., or in or about any other place or places that same might then or at any future time or times be removed to or placed or deposited in, to hold to H., his exors., administrators, & assigns, as their own property, subject to the proviso for redemption hereinafter contained. The deed provided that in certain events it should be lawful for H. to enter upon any messuage, etc., upon which the property thereinbefore mentioned & thereby assigned, or any part thereof, should be placed or deposited, & to take & remove & sell same, provided that until default should be made upon demand, or until any event as aforesaid should happen, it should be lawful for pltf. to hold possession & enjoy the effects thereinbefore assigned, & pltf. covenanted & agreed that he would, on demand as aforesaid, well & truly pay unto H. the £200 together with interest at 8 per cent. *per annum*. In Apr., 1869, deft. offered to advance pltf. the £200 at 5 per cent., & deft. paid H. off, & by a deed between H. & deft. of Apr. 26, 1869, in consideration of £200 & interest advanced by deft. H. assigned the premises assigned by the deed of Aug. 18, 1868, & all securities for same, with power to deft. in the name of H. to sue for, receive & give receipts for the premises, subject to the existing equity of redemption under the deed of 1868. By an agreement, in writing of the same date, between pltf. & deft., reciting the deed of 1868, & the deed of Apr., 1869, pltf. agreed to hire the goods, etc., of deft. & to pay deft. £6 5s. per month "until the £200 interest & expenses are paid, or to pay it off whenever he finds he can do so, with the interest then due, & at which time deft. agrees to give up all claim to the goods, chattels, & effects, etc., & that same shall then become the property of pltf.; but upon default being made in payment of the £6 5s., or any part thereof, [def.] agrees that in case of any default to give pltf. a fortnight's notice of his instalment then due, & [pltf.] agrees that all money paid before such default shall be applied by deft. in part payment of the £200 & interest then due, & to the goods, etc., & to which from such default deft. shall have power to sell same without hindrance, & to pay himself the balance with interest and expenses which shall then be due, and hand over the balance, & that pltf. to keep up the stock, & that [pltf.] will not remove the goods, etc., from off his present dwelling without the consent of deft., as [pltf.] hereby declares that the goods, etc., shall remain the property of deft.

*g. — Chattels sold on default—Mortgagor in possession.]—*B., the customer of a bank, executed a chattel mtge. on his household effects, by way of collateral security, in favour of the bank, which was allowed to run into default, whereupon the mtgees. proceeded to a sale, & appointed W. their bailiff for that purpose, who sold it to pltf., a creditor of B., by private sale for \$900; & executed a bill of sale thereof. Pltf. swore that B. owed him about \$1,000, & he thought there was ample security for the \$900 & also additional security for B.'s indebtedness to himself, & that the

goods seemed to be worth about \$5,000; & pltf. without disturbing in any way the possession of B., rented the property to him, & remained, as he had been, in possession. In order effectually to carry out the proposed arrangement with B., the bank appointed their local agent to accept the chattel mtge., & as such agent to make the affidavits required to be made by mtgees.:—*Held*: the chattel mtge. was satisfied quoad the goods.—*CARLISLE v. TAIT* (1882), 7 A. R. 10.—*CAN.*

h. Second mortgage given while

until the £200 with interest shall be fully paid & satisfied. On May 8, 1869, pltf. was adjudged bkpt. under Bkpcy. Act, 1861 (c. 134), deft. some days prior having taken possession of all the goods, etc., on the premises under the bill of sale. Pltf. received his discharge in bkpcy. on July 19; in the meantime deft. after fourteen days possession had withdrawn, leaving everything in pltf.'s possession. Subsequently differences arose, & in Mar. deft. broke open pltf.'s house, seized all the goods on the premises, & sold them. At the trial the judge directed the jury that deft. had no right, under his bill of sale, to seize any property acquired by pltf. since his order of discharge, & the jury found a verdict for pltf. for the value of the after-acquired goods:—*Held*: a rule for a new trial, on the ground of misdirection, must be discharged.—*COLE v. KERNOT* (1872), L. R. 7 Q. B. 534, n.; 41 L. J. Q. B. 221.

Annotations:—*Consd.* Collyer v. Isaacs (1881), 19 Ch. D. 342; *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345. *Refd.* Thompson v. Cohen (1872), L. R. 7 Q. B. 527.

845.

Agreement to assign.]

Pltf. sued deft. for breaking & entering his premises & converting his goods. Deft. pleaded a deed whereby in consideration for money advanced, pltf. assigned all the furniture & goods upon his premises to deft., provided that upon repayment of the money advanced the deed should be void. It was agreed that deft. might enter & seize, & dispose of the goods assigned upon default of payment by pltf. It was further agreed & declared that if pltf. should at any time thereafter during the continuance of the security become possessed of furniture or goods other than or in addition to the property assigned, same should be in all respects subject to the deed, & might be seized, sold, & disposed of in the same manner to all intents & purposes as if same were then possessed by pltf., & were duly assigned by the deed. The plea proceeded to aver that pltf.'s premises & goods mentioned in the deed were the same as those mentioned in the declaration, that pltf. was in default, & that deft. entered & seized under the deed, which were the alleged trespass & conversion. Pltf. replied, on equitable grounds, that after the execution of the deed, & before the alleged grievances, pltf.'s affairs were liquidated by arrangement under Bankruptcy Act, 1869 (c. 71), & that all conditions were fulfilled to render the liquidation binding upon deft., & that before the alleged grievance the trustee under the liquidation sold the goods to friends of pltf., who thereupon gave pltf. possession thereof, & pltf. then held same freed & discharged from all claims of deft. thereon:—*Held*: the licence in the deed to seize after-acquired property was merely accessory to the debt secured, & was barred by the liquidation, & the replication was a good answer to the plea.—*THOMPSON v. COHEN* (1872), L. R. 7 Q. B. 527; 41 L. J. Q. B. 221; 26 L. T. 693; 36 J. P. 822.

Annotations:—*Consd.* Collyer v. Isaacs (1881), 19 Ch. D.

*sheriff in possession—First mortgage satisfied after seizure.]—*On Jan. 9 M. mortgaged goods to R., which on the 19th the sheriff seized under a *fi. fa.* On Feb. 22, while the sheriff was in possession, M. made a bill of sale to pltf. The mtge. to R. was satisfied after the seizure, & before the sale by the sheriff, but whether before or after the execution of the bill of sale to pltf. did not appear:—*Held*: the *fi. fa.* was entitled to prevail over pltf.'s claim.—*TAYLOR v. JARVIS* (1857), 15 U. C. R. 21.—*CAN.*

342; *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345.

846. ————.]—Debtor by bill of sale assigned for value to a creditor certain specified chattels at his place of business, “& all other chattels which might be or at any time thereafter be brought thereon in addition to or in substitution thereof.” Debtor became bkpt., & after his order of discharge brought other chattels upon the premises. The creditor did not prove for his debt in bkpcy.:—*Held*: the assignment of the after-acquired chattels, although absolute in form, amounted merely to a contract to assign, for the breach of which the assignor incurred a liability provable in his bkpcy., & from which he was released by the order of discharge, & the goods brought on the premises after the order of discharge could not be seized by the creditor under his bill of sale.—*COLLYER v. ISAACS* (1881), 19 Ch. D. 342; 51 L. J. Ch. 14; 30 W. R. 70, C. A.

Annotations:—*Distd.* *Re Lind, Industrials Financial Syndicate v. Lind*, [1915] 2 Ch. 345. *Reid.* *Joseph v. Lyons* (1884), 15 Q. B. D. 280; *Aberdare & Plymouth Co. v. Hankey* (1887), 3 T. L. R. 493. *Mentd.* *Clements v. Mathews* (1882), 47 L. T. 251; *Robinson v. Ommanney* (1882), 21 Ch. D. 780; *Re Bastable, Ex p. Trustee*, [1901] 2 K. B.

518; *Re Lawley, Zaiser v. Lawley* (1902), 71 L. J. Ch. 895; *Re Dallas*, [1904] 2 Ch. 385; *Re Reis, Ex p. Clough*, [1904] 2 K. B. 769; *Pullan v. Koe*, [1913] 1 Ch. 9.

Inclusion of after-acquired property in bills of sale generally, *see* Part V., Sect. 2, sub-sect. 4, & Part VI., Sect. 3, sub-sect. 2, A, *ante*.

847. Surrender of bill—On payment—Stipulation against—Validity of.]—A bill of sale, given as security for payment of money, contained a stipulation that, as soon as the sums secured were satisfied, the grantee would give a receipt in full of all demands & indorse a copy of same on the bill of sale, but the bill of sale & any documents signed by the grantor or any other person in relation to the loan should remain in the custody & be the property of the grantee:—*Held*: the stipulation was a deviation from the statutory form. & the bill of sale was void.—*WATSON v. STRICKLAND* (1887), 19 Q. B. D. 391; 56 L. J. Q. B. 594; 35 W. R. 769; 3 T. L. R. 815, C. A.

Statutory form of bill generally, *see* Part V., Sect. 2, sub-sects. 6, 8, *ante*.

——— **When ordered.**]—*See* Nos. 746, 747, 751, 754, 755, *ante*.

BIRDS.

See ANIMALS; GAME.

BIRTH.

Concealment of.—*See* CRIMINAL LAW AND PROCEDURE.

Notification and Registration of.—*See* REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS.

Proof of.—*See* EVIDENCE.

BISHOPS.

See ECCLESIASTICAL LAW.

BLACKMAIL.

See CRIMINAL LAW AND PROCEDURE.

BLASPHEMY.

See CRIMINAL LAW AND PROCEDURE.

BLOCKADE.

See CONSTITUTIONAL LAW; PRIZE LAW AND JURISDICTION.

BOARD OF AGRICULTURE AND FISHERIES.

See AGRICULTURE ; COMMONS ; CONSTITUTIONAL LAW ; FISHERIES ; LAND IMPROVEMENT ; SMALL HOLDINGS AND SMALL DWELLINGS.

BOARD OF EDUCATION.

See CONSTITUTIONAL LAW ; EDUCATION.

BOARD OF GUARDIANS.

See ELECTIONS ; POOR LAW.

BOARD OF HEALTH.

See PUBLIC HEALTH AND LOCAL ADMINISTRATION.

BOARD OF TRADE.

See BANKRUPTCY AND INSOLVENCY ; COMPANIES ; CONSTITUTIONAL LAW ; ELECTRIC LIGHTING AND POWER ; GAS ; RAILWAYS AND CANALS ; SHIPPING AND NAVIGATION ; TRADE AND TRADE UNIONS ; TRAMWAYS AND LIGHT RAILWAYS ; WEIGHTS AND MEASURES ; WORK AND LABOUR.

BOARDING HOUSE.

See INNS AND INNKEEPERS ; LANDLORD AND TENANT.

BOILERS.

See FACTORIES AND WORKSHOPS.

BONA VACANTIA.

See CONSTITUTIONAL LAW ; DESCENT AND DISTRIBUTION.

BONDED WAREHOUSE.

See REVENUE.

BONDS.

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<i>Annuities</i>	„ RENTCHARGES & ANNUITIES.	<i>Custom or Excise Bonds</i>	„ REVENUE.
<i>Bail Bonds</i>	„ ADMIRALTY ; EXECUTION ; SHERIFFS & BAILIFFS ; SHIPPING & NAVIGATION.	<i>Fidelity, Guarantee, & Indemnity Bonds</i> .	„ GUARANTEE ; & SPECIFIC TITLES.
<i>Bonds given as Security for Costs</i>	„ PRACTICE & PROCEDURE.	<i>Foreign Government Bonds</i>	„ BILLS OF EXCHANGE, PROMISSORY NOTES, & NEGOTIABLE INSTRUMENTS.
<i>Bonds secured by Mortgage of Land</i>	„ MORTGAGE.	<i>Foreign Railway Bonds</i>	„ BILLS OF EXCHANGE, PROMISSORY NOTES, & NEGOTIABLE INSTRUMENTS.
<i>Bonds under Companies Clauses Act, 1845 (c. 16)</i>	COMPANIES.	<i>Guarantees</i> .	„ GUARANTEE.
<i>Bottomry & Respondentia Bonds</i>	ADMIRALTY ; SHIPPING & NAVIGATION.	<i>Replevin Bonds</i> .	„ DISTRESS.
		<i>Restraint of Trade</i>	„ TRADE & TRADE UNIONS.
		<i>Voluntary Bonds.</i>	„ GIFTS.

SECT. 1.—NATURE AND FORM OF BONDS.

Annotations:—*Reidd.* Cromwell v. Grimsden (1698), 1 Ld. Raym. 335; *Holman v. Burrow* (1702), 2 Ld. Raym. 794.

SECT. 2.—DIFFERENT KINDS OF BONDS.

4. **Simple bond — Characteristics.]** — Where a bond, which, on the face of it, appears to be a simple money bond, is given to secure a sum certain with interest, it must be construed, so far at least as regards the surety, as given to secure the debt then existing, and not to cover floating balances.

The fact that a bond is payable on demand, &

Annotation :—**Reid.** *Re Fidgeon, Ex p. Fidgeon* (1840),
4 Deac. 217.

6. .]—A bond taken to the king, his heirs & successors:—*Held*: good, the words, *solvend. eidem domino regi, haered. vel executoribus suis*, in the above Act being only directory. —*YALE v. R.* (1721), 6 Bro. Parl. Cas. 27; 2 E. R. 10. H. L.

Annotation :—Consd. R. v. Ellis (1849), 4 Exch. 652.

7. ———.]—*Held*: a bond to the Crown was within the above Act, though made payable to "the King, his heirs & successors," & being a record could be looked at by the ct., although not set out in the pleadings.—*R. v. ELLIS* (1849), 4 Exch. 652; 19 L. J. Ex. 77; 154 E. R. 1376; *affd.* on other grounds, *sub nom. ELLIS v. R.* (1851), 6 Exch. 921, Ex. Ch.

Arbitration bond.—See Part III., Sect. 3, sub-sect. 9, *post*; ARBITRATION, Vol. II., p. 313.

Lloyd's bond.—See RAILWAYS & CANALS.

SECT. 1.—CAPACITY OF PARTIES.

not inserted. The obligee showed A. the condition & his name & seal, demanded payment, & threatened to sue him, unless he would give fresh security, which A. agreed to, but after finding the mistake, refused, not being bound by law :—*Held* : equity would compel him.—CROSBY v. MIDDLETON (1710), Prec. Ch. 309 ; 3 Rep. Ch. 99 ; 2 Eq. Cas. Abr. 188 ; 24 E. R. 146.

Annotation :—**Distd.** *Squire v. Whitton* (1848), 1 H. L. Cas. 333.

11. Wrong name.]—Where a man binds himself by a wrong name, the action should be against him, as named in the bond *alias dict* his right name.—HYCKMAN v. SHOTBOLT (1569), 3 Dyer, 279 b; 73 E. R. 626.

Annotations:—*Reid. Maby v. Shepherd* (1622), Cro. Jac. 640; *Clarke v. Istead* (1685), 1 Lut. 894; *Williams v. Bryant* (1839), 7 Dowl. 502. **Mentd.** *Evans v. King* (1744), Willes, 554; *R. v. Wooldale* (1844), 6 Q. B. 549.

12. —.]—If a person binds himself in a bond by a wrong name, he is estopped from saying it is not his name.—*LINCH v. HOOKE* (1704), 1 Salk. 7 ; 6 Mod. Rep. 225, 311 ; 91 E. R. 7.

Annotation :—*Mentd. Hatchett v. Baddeley* (1776), 2 Wm. Bl. 1079.

13. Wrong Christian name.]—Held: "Joaem" H. for the name of the obligor of a bond might be

or illegal.—TAYLOR v. R. (1884), 2
N. Z. L. R. C. A. 251.—N.Z.

d. Bond to crown—A recognisance.]—A crown bond is in the nature of a recognisance, & is to be considered as if it were a recognisance.—*R. v. DENNIS* (1833), *Hayes & Jo.* 194.—*IR.*

PART II. SECT. 2, SUB-SECT. 1.

81. Misnomer.]—KETCHUM v. BRADY
(1840), 2 Ont. Dig. 4230.—CAN.

See, also, Part XII., Sect. 1, sub-
sect. 2.

SECT. 2.—DESCRIPTION OF PARTIES.

SUB-SECT. 1.—OBLIGOR.

8. Misnomer—General rule.]—In equity no advantage is allowed to be taken of a misnomer in a bond.—*COLSTON v. CARR* (1591), Toth. 27; 21 E. R. 113.

9. Full name not in body.]—The name of the obligor subscribed to a bond is sufficient, though there be a blank or blot for his Christian name in the bond.—**DOBSON v. KEYS** (1610), Cro. Jac. 261; 79 E. R. 224.

Annotations:—*Mentd.* *Cromwell v. Grumsdale* (1698), 12 Mod. Rep. 193; *Holman v. Burrow* (1702), 2 Ld. Raym. 794.

10. — **Relief in equity.**]—A. agreed to be bound in a bond as surety to B., & signed & sealed it, but by the neglect of the clerk, A.'s name was

PART I. SECT. 1.

a. In general.]—A bond is, *ex vi termini*, taken to be a deed.—PROVINCIAL INSURANCE CO. v. WALTON (1865), 16 C. P. 62.—CAN.

b. *Whether bond operative before happening of contingency.*—An instrument in the nature of a bond is not the less a bond because it does not come into operation until the hundi with respect to which it is passed has been dishonoured.—**LAKSHMANDAS RAGHUNATHDAS v. RAMBHAU MAN-**

SARAM (1895), I. L. R. 20 Bom. 791.—
IND.

PART I. SECT. 2.

c. Single bond.—A bond without a penalty may be good as a covenant or agreement.—**MEWBURN v. MACKELCAN** (1892), 19 A. R. 729.—**CAN.**

3 i. — Impossible or illegal condition.]—A bond is single where one of two conditions is impossible

read as "Johannem" H. abbreviated.—**DOWNS v. HATHWAIT** (1635), Cro. Car. 418; W. Jo. 366; 79 E. R. 963.

Annotation:—**Reid**. **Cromwell v. Grunsden** (1698), 2 Salk. 462.

14. —.]—If a person enter into a bond by a wrong Christian name, & be sued on such bond, he should be sued by such name.—**GOULD v. BARNES** (1811), 3 Taunt. 504; 128 E. R. 200.

Annotation:—**Consd.** **Williams v. Bryant** (1839), 5 M. & W. 447.

15. **Not executed in full name.**]—In an action on a bond pltf. declared against deft. as W. F. B. sued as W. B. At the trial it was proved that the bond was executed by the deft., by the name of W. B., by which name he was well known:—**Held**: there was no variance, & the bond was not void.—**WILLIAMS v. BRYANT** (1839), 5 M. & W. 447; 7 Dowl. 502; 9 L. J. Ex. 47; 3 Jur. 632; 151 E. R. 189.

Annotation:—**Mentd.** **R. v. Wooldale** (1844), 6 Q. B. 549.

SUB-SECT. 2.—OBLIGEE.

16. **Misnomer — Immaterial variance.**] — The King incorporated a borough by the name of the mayor & burgesses of his borough of Lynne Regis, commonly called King's Lynne. One became bound to the corporation in a bond by the name of the mayor & burgesses of Lynne Regis:—**Held**: the bond was good, & the variance immaterial.—**LYNNE REGIS CORPN. CASE** (1612), 10 Co. Rep. 122 b; 77 E. R. 1111.

Annotations:—**Reid**. **Croydon Hospital v. Farley** (1816), 6 Taunt. 467; **R. v. Haughley** (1833), 4 B. & Ad. 650.

Mentd. **Ayray's Case** (1614), 11 Co. Rep. 18 b; **Stafford Corpn. v. Bolton** (1797), 1 Bos. & P. 40; **A.-G. v. Rye Corpn.** (1817), 7 Taunt. 546.

17. **Name uncertain.**]—A bond in which the name of the obligee was not certain:—**Held**: void.—**NOEL v. COOPER** (1623), Palm. 378; 81 E. R. 1132.

18. **Attorney of obligee or assigns.**]—A bond by which the obligor acknowledges himself to be bound to the obligee in a sum to be paid to the lawful attorney of the obligee, or his assigns, may

be described as a bond by which he acknowledged himself to be bound to the obligee in a sum to be paid to him.—**ROBERTS v. HARNAGE** (1704), 2 Salk. 659; 2 Ld. Raym. 1043; 6 Mod. Rep. 228; 92 E. R. 192.

Annotations:—**Consd.** **White v. Hancock** (1846), 2 C. B. 830. **Reid**. **Waugh v. Bussell** (1814), 5 Taunt. 707. **Mentd.** **Mostyn v. Fabrigas** (1774), 1 Cowp. 161.

19. **Omission of surname.**]—A bond is good, although the surname of the obligee is omitted.—**BISHOP v. MORGAN** (1710), 11 Mod. Rep. 275; 88 E. R. 1037.

20. **Name omitted—Intention of condition.**]—Obligation not said to whom, made good by the intent of the condition.—**LANGDON v. GOOLE** (1681), 3 Lev. 21; 83 E. R. 556.

Annotation:—**Folld.** **Lambert v. Branthwaite** (1733), 2 Stra. 945.

21. —.]—The *solvendum* in a bond:—**Held**: a sufficient description of the obligee.—**LAMBERT v. BRANTHWAITE** (1733), 2 Stra. 945; 93 E. R. 958.

22. —. **Whether enforceable in equity.**]—An instrument, purporting to be a bond, executed by the obligor, with blanks for the name of the obligee, & consequently void in law, is inoperative in equity as an agreement, there being no second contracting party.—**SQUIRE v. WHITTON** (1848), 1 H. L. Cas. 333; 12 Jur. 125; 9 E. R. 785, H. L. *Annotation*:—**Mentd.** **Hambro v. Hull & London Fire Insce.** (1858), 28 L. J. Ex. 62.

23. —. **Issue by public company.**]—*Qu.*: whether bonds issued by a public co., in which the names of the obligees are left in blank, are valid.—**Re STRAND MUSIC HALL CO., LTD., Ex p. EUROPEAN & AMERICAN FINANCE CO., LTD.** (1865), 35 Beav. 153; 55 E. R. 853; *affd.* without touching this point, 3 De G. J. & Sm. 147, L. J.J.

Annotations:—**Mentd.** **Ross v. Army & Navy Hotel Co.** (1886), 34 Ch. D. 43; **Re Queensland Land & Coal Co., Davis v. Martin**, [1894] 3 Ch. 181; **Brown, Shipley v. I. R. Comrs.** (1895), 64 L. J. M. C. 241; **Re Johnston Foreign Patents Co., Re Johnston Die Press Co., Re Johnstonia Engraving Co., J. P. Trust v. The Cos.** (1901), 91 L. T. 124; **Re Tasker, Hoare v. Tasker**, [1905] 2 Ch. 587; **Re Perth Electric Trams., Lyons v. Trams. Syndicate & Perth Electric Trams.**, [1906] 2 Ch. 216; **Re Fireproof Doors, Umney v. The Co.**, [1916] 2 Ch. 142.

Part III.—Validity.

SECT. 1.—TERMS CREATING OBLIGATION.

24. **What words sufficient**—"I am content to give."—The words of an obligation were: "I am content to give to W. £10 at Michaelmas & £10 at our Lady Day":—**Held**: a good obligation, amounting to a promise to pay.—**ANON.** (1585), 3 Leon. 119; 74 E. R. 579.

25. —. "I bind myself."—The following words: "I bind myself to save A. harmless, etc. in £200 *solvend. cum requisit.*," written in a book, & there sealed:—**Held**: a good bond.—**FOX v. WRIGHT** (1598), Cro. Eliz. 613; 78 E. R. 855.

26. —. "I confess to have received & to repay again."—A deed in the following words: "This bill witnesses that I have received of P.

£40 to the use of R. & J., his sister, children of S., deceased, equally to be divided between them, which sum I confess to have received to the uses above said & same to repay again, at such time as shall be thought best for the profit of R. & J.":—**Held**: to be a good bill obligatory, & to create a several debt of £20 to each.—**SHAW v. SHERWOOD** (1599), Cro. Eliz. 729; 78 E. R. 962.

Annotations:—**Mentd.** **Gilby v. Copley** (1683), 3 Lev. 139; **Fisher v. Wigg** (1699), 1 Ld. Raym. 622.

27. —. "I do hereby acknowledge I owe you."—Debt on bond, on a writing under seal in the following words: "These are to authorise you to sell my goods to the amount of £9, which I do hereby acknowledge I owe you":—**Held**: good.—

PART III. SECT. 1.

1. **What words sufficient**—"Shall repay" without taking objection on demand.]—Deft. passed a document to this effect: "I have this day taken from you in cash R.48 (forty-eight). I have received this amount. I shall repay this money without taking any objection, when you should demand [it.]" **Held**: the document was a bond.—**VENKU v. SITARAM** (1905), 1 L. R. 29 Bom. 82.—**IND.**

PART II. SECT. 2, SUB-SECT. 2.

16 i. **Misnomer—Immaterial variance.**]—The obligors contracted with the obligees under the name of "Estevan School Board of Estevan": the contract provided for a bond to be given to the obligees. A bond was given, but the obligees were named as "the Estevan School Board of Estevan," while their proper name was "the Board of trustees for the Estevan School District No. 257 of the N. W.

T.":—**Held**: the irregularity of describing the obligees by the name of "the Estevan School Board of Estevan" did not invalidate the bond. **GREENWOOD v. ESTEVAN SCHOOL TRUSTEES** (1910), 15 W. L. R. 568.—**CAN.**

e. **Successors in office—No individual named.**]—A bond to the "treasurer of a town & his successors in office":—**Held**: valid, without naming any individual therein.—**JUDD v. READ** (1857), 6 C. P. 362.—**CAN.**

Sect. 1.—Terms creating obligation. Sect. 2: Sub-sects. 1, 2, 3 & 4.]

SAWYER v. MAWGRIDGE (1709), 11 Mod. Rep. 218; 88 E. R. 999.

28. Words following solvendum.]—In a bill obligatory, that which comes after the *solvendum* is no part of the obligation.—WOODWARD v. PARRY (1596), Cro. Eliz. 537; 78 E. R. 784.

29. Bond to stranger.]—A man may bind himself to a stranger to make an annual payment to his wife.—SMITH v. WATSON (1616), 1 Roll. Rep. 334; 81 E. R. 525.

Nature of obligation.]—See Part VI., Sect. 1, *post*.

SECT. 2.—CONDITION OR DEFEASANCE.

SUB-SECT. 1.—REPUGNANCY.

30. Repugnant condition—Obligation to be void.]—If the condition of a bond be in the following form: "the condition of this obligation is such, that if, etc. then the condition of this obligation to be void," the last words are void, & the condition is good without them.—MAULEVERER v. HAWXBY (1670), 2 Saund. 78; 85 E. R. 748; *sub nom.* MALEVERER v. HAWKSBY, 1 Sid. 456; 2 Keb. 625; *sub nom.* MALEVERER v. REDSHAW, 1 Vent. 39; 1 Mod. Rep. 35.

*Annotations:—*Refd. Collins v. Blantern (1767), 2 Wils. 341; Payne v. Brecon Corpn. (1858), 3 H. & N. 572. *Mentd.* Pickering v. Ilfracombe Ry. Co. (1868), L. R. 3 C. P. 235.

31. — Bond single.]—If the condition of a bond be repugnant, the bond is single.—WELLS v. FERGUSON (1708), 11 Mod. Rep. 191, 199; 2 Salk. 463; 88 E. R. 982, 987.

SUB-SECT. 2.—IMPOSSIBILITY OF PERFORMANCE.

See Part VII., Sect. 4, sub-sect. 2,

SUB-SECT. 3.—ILLEGALITY.

32. At origin.]—Where the condition is originally illegal, the bond is void.—ANON. (1489), Y. B. 4 Hen. 7, fo. 3, pl. 7; 5 Nev. & M. K. B. 378, n.

33. Entire condition.]—The condition of a bond was if deft. should procure J. to make reasonable recompense to pltf. for certain beasts which he wrongfully took from pltf. Deft. said that J. had in fact stolen the beasts from pltf., & thereof he was indicted, & so the condition being against the law the obligation was void:—*Held*: where the condition of an obligation should be said against the law, & the obligation void, the same ought to be intended where the condition was against the law in express words, & not for matter out of the condition, as in the present case, & judgment should be for pltf.—BROOK v. KING (1587), 1 Leon. 73; 74 E. R. 68.

*Annotations:—*Refd. Andrews v. Eaton (1729), Fitz-G. 73; Collins v. Blantern (1767), 2 Wils. 341.

34. —.]—Where the condition of a bond is entire & the whole unlawful, it is in most cases void.—YALE v. R. (1721), 6 Bro. Parl. Cas. 27; 2 E. R. 910, H. L.

*Annotation:—*Mentd. R. v. Ellis (1849), 4 Exch. 652.

35. —.]—If the condition of a bond, or the consideration for which it is given, is unlawful, the bond is void *ab initio* by the common law.—

COLLINS v. BLANTERN (1767), 2 Wils. 347; 95 E. R. 850.

*Annotations:—*Consd. Paxton v. Popham (1808), 9 East, 408; Prole v. Wiggins (1836), 3 Bing. N. C. 230. *Refd.* Pole v. Harrobin (1782), 9 East, 418, n.; Fletcher v. Sondes (1827), 1 Bl. N. S. 185; Greville v. Atkins (1829), 4 Man. & Ry. K. B. 372; Edwards v. Brown (1831), 1 Cr. & J. 307; Hill v. Manchester & Salford Waterworks Co. (1831), 2 B. & Ad. 544; Royal British Bank v. Turquand (1855), 5 E. & B. 248. *Mentd.* Master v. Miller (1791), 4 Term Rep. 320; Drage v. Ibberson (1798), 1 Esp. 643; Edgcombe v. Rodd (1804), 5 East, 294; Kerrison v. Cole (1807), 8 East, 231; Morgan v. Horseman (1810), 3 Taunt. 241; Gas Light & Coke Co. v. Turner (1839), 5 Bing. N. C. 666; Kirwan v. Goodman (1841), 9 Dowl. 330; Ward v. Lloyd (1843), 6 Man. & G. 785; Keir v. Leeman (1846), 9 Q. B. 371; Higgins v. Pitt (1849), 4 Exch. 312; Benyon v. Nettlefold (1850), 3 Mac. & G. 94; Reynell v. Sprye (1852), 1 De G. M. & G. 660; Myers v. Sarl (1860), 9 W. R. 96; Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan (1866), 10 Moo. Ind. App. 540; Pickering v. Ilfracombe Ry. Co. (1868), L. R. 3 C. P. 235; Taylor v. Chester (1869), L. R. 4 Q. B. 309; Waugh v. Morris (1873), 42 L. J. Q. B. 57; Rawlings v. Coal Consumers Assocn. (1874), 43 L. J. M. C. 111; Re Coltman, Coltman v. Coltman (1881), 45 L. T. 392; Yorkshire Ry. Waggon Co. v. Maclure & Cornwall Minerals Ry. Co. (1881), 45 L. T. 747; Relohel v. Oxford (1887), 35 Ch. D. 48; Kearley v. Thomson (1890), 24 Q. B. D. 742; Barclay v. Pearson, [1893] 2 Ch. 154; Hermann v. Charlesworth (1905), 74 L. J. K. B. 620; Re Robinson's Settlement, Gant v. Hobbs (1912), 106 L. T. 443; Re Worthington, Ex p. Pathé Frères, [1914] 2 K. B. 299.

36. Several conditions—Part illegal—General rule.]—Where the condition of a bond consists of different parts, some of which are lawful, & others not, it is good for so much as is lawful, & void for the rest.—YALE v. R. (1721), 6 Bro. Parl. Cas. 27; 2 E. R. 910, H. L.

*Annotation:—*Mentd. R. v. Ellis (1849), 4 Exch. 652.

37. — By statute.]—An obligation containing covenants, some of which are against the provisions of a statute, & others good, is void for the whole.—LEE v. COLESHILL (1596), Cro. Eliz. 529; 2 And. 107; 78 E. R. 776.

*Annotations:—*Consd. Twyne's Case (1602), 3 Co. Rep. 80 b. *Fold.* Norton v. Syms (1613), Moore, K. B. 856. *Refd.* Chester v. Freeland (1655), Ley. 71; Layng v. Paine (1745), Willes, 571. *Mentd.* Hutchins v. Player (1663), O. Bridg. 272.

38. — — —.]—A bond void in part by statute, is void *in toto*.—TWYNE'S CASE (1602), 3 Co. Rep. 80 b; 76 E. R. 809.

*Annotations:—*Refd. Norton v. Syms (1613), Moore, K. B. 856. *Mentd.* Hutchins v. Player (1663), O. Bridg. 272; Freeman v. Barnes (1669), 1 Vent. 55; Teynham v. Mullins (1674), 1 Mod. Rep. 119; Unwin v. Grosvenor (1739), West temp. Hard. 647; Kinaston v. Clark (1741), 2 Atk. 204; Taylor v. Jones (1743), 2 Atk. 600; Brown v. Heathcote (1746), 1 Atk. 160; Ryall v. Rolle (1749), 1 Atk. 165; Bennet v. Musgrove (1750), 2 Ves. Sen. 51; Clavey v. How (1750), 2 Ves. Sen. 19; Worseley v. Demattos (1758), 1 Burr. 467; Wilson v. Day (1759), 2 Burr. 827; Mace v. Cadell (1774), 1 Cowp. 232; Law v. Skinner (1775), 2 Wm. Bl. 996; Devon v. Watts (1779), 1 Doug. K. B. 86; Estwick v. Caillaud (1793), 5 Term Rep. 420; Holbird v. Anderson (1793), 5 Term Rep. 235; Manton v. Moore (1796), 7 Term Rep. 67; Kidd v. Rawlinson (1800), 2 Bos. & P. 59; Arundell v. Phipps, Arundell v. Taunton (1804), 10 Ves. 139; Ex p. Williams (1805), 11 Ves. 3; Dawson v. Wood (1810), 3 Taunt. 256; Dutton v. Morrison (1810), 17 Ves. 193; Reed v. Blades (1813), 5 Taunt. 212; Ex p. Martin (1815), 19 Ves. 491; Dearle v. Hall (1823), 3 Russ. 1; Cramphorne v. — (1827), 6 L. J. O. S. Ch. 91; Re Acraman, Ex p. Castle (1842), 3 Mont. D. & De G. 117; Lindon v. Sharp (1843), 6 Man. & G. 895; Ward v. Audland (1847), 16 M. & W. 862; Muttyloll Seal v. O'Dowda (1848), 4 Moo. Ind. App. 382; Doe d. Richards v. Lewis, Richards v. Lewis (1852), 11 C. B. 1035; Kelson v. Kelson (1853), 1 W. R. 143; Stone v. Van Heythuysen, Barton v. Van Heythuysen (1853), 18 Jur. 344; Graham v. Furber (1854), 14 C. B. 410; Cook v. Walker (1855), 3 W. R. 357; Holmes v. Penney (1856), 3 K. & J. 90; Martyn v. Williams (1857), 5 W. R. 351; Stansfeld v. Cubitt (1858), 2 De G. & J. 222; Corlett v. Radcliffe (1860), 14 Moo. P. C. C. 121; Dickenson v. Wright (1860), 5 H. & N. 401; The Heart of Oak (1869), 39 L. J. Adm. 15; Re Mortimer, Ex p. Pearson (1873), 42 L. J. Boy. 44; Re Wilson, Ex p. Wilson (1874), 29 L. T. 860; Re Bamford, Ex p. Gaines

(1879), 12 Ch. D. 314; *M'Bain v. Wallace* (1881), 6 App. Cas. 588; *Cookson v. Swire* (1884), 9 App. Cas. 653; *Re Sinclair, Ex p. Chaplin* (1884), 28 Ch. D. 319; *Re Wise, Ex p. Mercer* (1886), 54 L. T. 720; *Re Telescriptor Syndicate*, [1903] 2 Ch. 174; *Murgatroyd v. Wright* (1907), 76 L. J. K. B. 747; *Glegg v. Bromley* (1911), 81 L. J. K. B. 334.

39. —Where in a deed some covenants are void by statute, & others are good, the obligation to perform all covenants will be entirely void as to all covenants.—*NORTON v. SYMS* (1613), Moore, K. B. 856; Hob. 12; 72 E. R. 952.

Annotations:—*Reid*. *Chesman v. Nainby* (1727), 2 Stra. 739; *Layng v. Paine* (1745), Willes, 571; *Short v. Hubbard* (1824), 9 Moore, C. P. 667; *Collins v. Gwynne* (1831), 5 Moo. & P. 276. *Mentd.* *Hutchins v. Player* (1663), O. Bridg. 272; *Lane v. Cotton* (1701), 12 Mod. Rep. 472; *Parker v. Kett* (1701), 1 Ld. Raym. 658; *Mitchel v. Reynolds* (1711), 1 P. Wms. 181; *Samuel v. Evans* (1788), 2 Term Rep. 569; *Camden v. Anderson* (1798), 1 Bos. & P. 272; *Kerrison v. Cole* (1807), 8 East, 231; *Wallis v. Day* (1837), 6 L. J. Ex. 92; *Hooper v. Lane* (1857), 6 H. L. Cas. 443.

40. —By 43 Geo. 3, c. 99, the bond given to the comrs. by a collector of taxes was to be conditioned for demanding the taxes, enforcing the Act, & paying the sums collected to the receiver-general. Deft. was sued on a bond which contained those conditions, & also a condition for accounting & paying to the comrs.:—*Held*: the latter condition might be rejected as surplusage & did not vitiate the bond.—*COLLINS v. GWYNNE* (1831), 7 Bing. 423; 5 Moo. & P. 276; 9 L. J. O. S. C. P. 130; 131 E. R. 163; *subsequent proceedings* (1833), 9 Bing. 544; *sub nom.* *GWYNNE v. BURNELL* (1835), 2 Bing. N. C. 7, Ex. Ch.; (1840), 7 Cl. & Fin. 572, H. L.
Annotation:—*Mentd.* *Kepp v. Wiggott* (1848), 6 C. B. 280.

41. —At common law.]—Where in a deed some covenants are void by common law, & others are good, the obligation to perform all covenants will hold good as to those which are not void.—*NORTON v. SYMS* (1613), Moore, K. B. 856; Hob. 12; 72 E. R. 952.

Annotations:—*Consd.* *Chesman v. Nainby* (1727), 2 Stra. 739. *Reid*. *Mitchel v. Reynolds* (1711), 1 P. Wms. 181; *Kerrison v. Cole* (1807), 8 East, 231; *Short v. Hubbard* (1824), 9 Moore, C. P. 667; *Collins v. Gwynne* (1831), 5 Moo. & P. 276. *Mentd.* *Hutchins v. Player* (1663), O. Bridg. 272; *Lane v. Cotton* (1701), 12 Mod. Rep. 472; *Parker v. Kett* (1701), 1 Ld. Raym. 658; *Layng v. Paine* (1745), Willes, 571; *Samuel v. Evans* (1788), 2 Term Rep. 569; *Camden v. Anderson* (1798), 1 Bos. & P. 272; *Wallis v. Day* (1837), 6 L. J. Ex. 92; *Hooper v. Lane* (1857), 6 H. L. Cas. 443.

42. —In debt on bond, conditioned for the performance of several things, if one of them be void at common law, yet the bond may be good for the others.

Where it was conditioned to pay money to the obligee upon the conveyance of an estate to the obligor, & to present the obligee's son to the next avoidance of a church, the advowson of which belonged to the estate, if he were then of age to take it, or if not, to procure the person who should be presented to resign, upon notice of the son's being qualified to take it, & to present him:—*Held*: admitting that part of the condition for the presentation of the obligee's son to be simoniacal, yet the bond was good for the payment of the money.—*NEWMAN v. NEWMAN* (1815), 4 M. & S. 66; 105 E. R. 759.

Annotations:—*Consd.* *Collins v. Gwynne* (1831), 7 Bing. 423. *Reid*. *Short v. Hubbard* (1824), 2 Bing. 349. *Mentd.* *Fletcher v. Sondes* (1827), 1 Bl. N. S. 144; *Shackell v. Rosier* (1836), 2 Bing. N. C. 634; *Howden v. Simpson* (1839), 1 Ry. & Can. Cas. 347; *Mosse v. Killick* (1881), 44 L. T. 149.

PART III. SECT. 2, SUB-SECT. 4.

43 i. *Omission of words of avoidance.*
—The condition of a bond wanted

the formal conclusion—"then this obligation to be void," etc. Deft. pleaded non-performance of a condition precedent by pltf.:—*Held*:

Particular instances of illegal or void bonds.—*See Sect. 3, post.*

43. *Pleading—Notice by court.*—The illegality of the condition of a bond may be shown by pltf. in stating the bond itself, with the condition, in his declaration, or, if he omit to state the condition, it may be shown by deft. in his plea, & the ct. will equally take notice of the illegality in either case.—*DUVERGIER v. FELLOWES* (1832), 1 Cl. & Fin. 39; 6 Bl. N. S. 87; 6 E. R. 831, H. L.

Annotations:—*Mentd.* *Blundell v. Winsor* (1837), 8 Sim. 600; *London Grand Junction Ry. Co. v. Freeman* (1841), 2 Man. & G. 606; *Garrard v. Hardey* (1843), 5 Man. & G. 471; *Harrison v. Heathorn* (1843), 6 Man. & G. 81; *Solarte v. Palmer* (1843), 2 Cl. & Fin. 93; *Sheppard v. Oxenford* (1855), 1 K. & J. 491; *Re Mexican & South American Co.* (1859), 27 Beav. 474.

SUB-SECT. 4.—OTHER CASES.

44. *Condition written after testimonium.*—A bond was made as follows:—"Memorandum that I, A. do owe & am indebted unto B. in the sum of £10 for the payment whereof I bind myself, etc. In witness," etc., & after those words, "Memorandum that A. be not compelled to pay the £10 until he recovers £30 upon an obligation against C," etc.:—*Held*: a good condition or defeasance.—*HAMOND v. JETHRO* (1611), 2 Brownl. 97; 123 E. R. 836.

Annotation:—*Mentd.* *Buckley v. Barber* (1851), 20 L. J. Ex. 114.

45. *Defeasance made subsequent to bond.*—A defeasance, though made subsequent to the bond to which it relates, may be pleaded in bar to debt on the bond.—*HODGES v. SMITH* (1598), Cro. Eliz. 623; 78 E. R. 864.

Annotations:—*Reid*. *Andrews v. Eaton* (1729), Fitz-G. 73; *Greig v. Talbot* (1823), 2 B. & C. 179; *R. v. Fauntleroy* (1824), 2 Bing. 413.

46. —In debt on bond deft. pleaded a defeasance made after:—*Held*: the plea was ill, because it should have been made at the same time.—*FOWELL v. FORREST* (1670), 2 Saund. 47; 85 E. R. 645.

Annotations:—*Reid*. *Ford v. Beech* (1848), 11 Q. B. 852; *Belshaw v. Bush* (1851), 11 C. B. 191. *Mentd.* *Bottomley v. Nuttall* (1858), 28 L. J. C. P. 110.

47. —Connection between deed & bond.]—Where a bond was conditioned for payment of money on Dec. 25, & a subsequent deed was made between the same parties, by which the obligee covenanted that if the obligor should pay on Dec. 25 5s. in the pound etc., such payment should be accepted in full discharge & satisfaction of all sums due etc., & might be pleaded & given in evidence etc., & the obligor, to an action on the bond, pleaded a tender & refusal of the 5s. in the pound on Dec. 25:—*Held*: one deed might amount to a defeasance to another without express words of relation, & the plea was good.—*TREVERT v. AGGAS* (1738), Willes, 107; 2 Com. 568; 125 E. R. 1079.

48. *Omission of words of avoidance.*—The condition of a bond for payment of money, though the words of avoidance are omitted, is a good defeasance.—*EVERY v. WHITE* (1695), 1 Ld. Raym. 38; 91 E. R. 921.

49. *Void condition—Must be pleaded.*—Deft. cannot take advantage of a void condition in a bond, without praying over & pleading it.—*COLTON v. GOODRIDGE* (1776), 2 Wm. Bl. 1108; 96 E. R. 655.

Annotations:—*Reid*. *Harmer v. Rowe* (1817), 6 M. & S. 146; *Edwards v. Brown* (1831), 1 Cr. & J. 307.

such plea was a good bar to the action, notwithstanding the omission in concluding the condition.—*DAY v. SPAFFORD* (1836), 5 O. S. 57.—CAN.

SECT. 3.—WHAT BONDS ARE ILLEGAL OR VOID.

SUB-SECT. 1.—BONDS FOR ILLICIT COHABITATION.

See, generally, CONTRACT.

50. Given during cohabitation—Whether relief in equity—Voluntary gift.]—Equity will not relieve against a bond given to a mistress, where on the pleadings it is a free & voluntary gift, without anything of *turpis contractus*. There is a difference in such a case between a contract executed & executory.—*WHALEY v. NORTON* (1687), 1 Vern. 483; 1 Eq. Cas. Abr. 87, pl. 5; 23 E. R. 608.

Annotations:—Consd. Clarke v. Periam (1741), 2 Atk. 333; *Hill v. Spencer* (1767), Amb. 836. *Refd. Ayerst v. Jenkins* (1873), L. R. 16 Eq. 275. *Mentd. Giles v. Roe* (1780), Dick. 570.

51. ———.]—Where a bond was given to a housekeeper for secret service, relief against it was refused in equity.—*BAINHAM v. MANNING* (1691), 2 Vern. 242; 1 Eq. Cas. Abr. 87, pl. 4; 23 E. R. 756.

52. ———.]—Testator gave a voluntary bond during cohabitation to a woman, previously of a very loose character. A bill by the exor. to have the bond delivered up was dismissed with costs, the bond being considered unimpeached.—*GRAY v. MATHIAS* (1800), 5 Ves. 286; 31 E. R. 591.

Annotations:—Consd. Simpson v. Howden (1837), 3 My. & Cr. 97; *Hall v. Palmer* (1844), 3 Hare, 532; *Re Vallance, Vallance v. Blagden* (1884), 26 Ch. D. 353; *Re Wootton Isaacson, Sanders v. Smiles* (1904), 21 T. L. R. 89. *Refd. Re Henderson, Henderson v. Bird* (1889), 5 T. L. R. 374.

53. In consideration of present cohabitation.]—A bill was filed by an exor. to avoid bonds given by testator on suggestion that they were gained by threats & undue means. The obligee was a common harlot, & testator had had unlawful conversation with her. The bonds were allowed as a security only for money & debts actually lent & due.—*MATTHEW v. HANBURY* (1690), 2 Vern. 187; 1 Eq. Cas. Abr. 87, pl. 5; 23 E. R. 723.

Annotations:—Dbtd. Ayerst v. Jenkins (1873), L. R. 16 Eq. 275. *Refd. Hill v. Spencer* (1767), Amb. 836; *Giles v. Roe* (1780), Dick. 570.

54. ———.]—Equity will relieve against a bond given to a common strumpet.—*BAINHAM v. MANNING* (1691), 2 Vern. 242; 1 Eq. Cas. Abr. 87, pl. 4; 23 E. R. 756.

55. ———.]—A bill was filed for payment of a sum of money & an annuity secured by a bond. Pltf., a young woman of good character, had come to live in the family of deft. as companion to his sister, & she had been seduced by him, & by continuing to live with him occasioned a separation between him & his wife:—*Held*: the bill ought to be dismissed, but without costs on account of her previous good character.—*PRIEST v. PARROT* (1751), 2 Ves. Sen. 160; 28 E. R. 103, L. C.

Annotations:—Consd. — v. Moseley (1822), 1 L. J. O. S. Ch. 18; *Knye v. Moore* (1825), 2 Sim. & St. 260; *Nye v. Moseley* (1826), 6 B. & C. 133; *Skarff v. Soulby* (1848), 18 L. J. Ch. 8. *Refd. Giles v. Roe* (1780), Dick. 570; *Matthews v. L—e* (1816), 1 Mad. 558.

56. ——— Payment postponed.]—A. having a wife who lived separate from him, afterwards married another woman, who knew nothing of the former wife's being alive, but it being discovered to the second wife, that the former was alive, A. in order to prevail with the second wife to stay with him, some years afterwards gave a bond to a trustee of the second wife, to leave her £1000 at his death, & died, not leaving assets to pay his simple contract debts:—*Held*: if the bond had been given immediately on the discovery, and they had parted thereupon, it would have been good, but being given in trust for the second wife, after such time as she knew the first wife was living, & to induce her to continue with A. that

was worse than a voluntary bond, & the bond must be postponed to all the simple contract debts.—*COX'S (LADY) CASE* (1734), 3 P. Wms. 339; 2 Eq. Cas. Abr. 182, pl. 6; 24 E. R. 1091. *Annotations:—Refd. Hill v. Spencer* (1767), Amb. 836; *Whitaker v. Wright* (1843), 2 Hare, 310.

57. In consideration of future cohabitation.]—A bond in consideration of future cohabitation with a woman seduced by the obligor, & for her maintenance after his death, is void in law.—*WALKER v. PERKINS* (1764), 1 Wm. Bl. 517; 3 Burr. 1568; 96 E. R. 299.

Annotations:—Refd. Hegarty v. Shine (1878), 14 Cox, C. C. 124. *Mentd. Beaumont v. Reeve* (1846), 8 Q. B. 483.

58. ———.]—After verdict against pltf., the obligor of a bond, the consideration for which is alleged to have been an agreement by deft. to cohabit with pltf. as his wife, no relief will be granted in equity, a bond in consideration of future cohabitation being void at law.—*FRANCO v. BOLTON* (1797), 3 Ves. 368; 30 E. R. 1058, L. C.

Annotations:—Expld. Benyon v. Nettlefold (1850), 3 Mac. & G. 94. *Refd. Simpson v. Howden* (1837), 3 My. & Cr. 97. *Mentd. Bromley v. Holland* (1802), Coop. G. 9.

59. ———.]—Testator gave a voluntary bond during cohabitation to a woman, previously of a very loose life. Soon afterwards he gave her another bond, expressly securing a continuance of the connection by an annuity in case of separation:—*Held*: the second bond was void at law, as *pro turpi causa*.—*GRAY v. MATHIAS* (1800), 5 Ves. 286; 31 E. R. 591.

Annotations:—Consd. Simpson v. Howden (1837), 3 My. & Cr. 97. *Fold. Hall v. Palmer* (1844), 3 Hare, 532. *Consd. Re Vallance, Vallance v. Blagden* (1884), 26 Ch. D. 353; *Re Wootton Isaacson, Sanders v. Smiles* (1904), 21 T. L. R. 89. *Refd. Re Henderson, Henderson v. Bird* (1889), 5 T. L. R. 374.

60. ———.]—In an action on an annuity bond given by a man to a woman with whom he cohabits, the question for the consideration of the jury is, whether at the time when it was given there was or was not an intention & agreement to continue the connection in future; for if there was such intention, & the bond was given in furtherance of such arrangement, pltf. cannot recover.—*FRIEND v. HARRISON* (1827), 2 C. & P. 584, N. P.

Annotations:—Refd. Re Vallance, Vallance v. Blagden (1884), 26 Ch. D. 353; *Re Henderson, Henderson v. Bird* (1889), 5 T. L. R. 374.

61. ———.]—By deed, made in contemplation of future continuing cohabitation, S. granted to M., with whom he then cohabited, an annuity for life, to commence after his death or marriage, or after he should have withdrawn his protection from M., & another annuity to B., the daughter of M., to commence as therein provided, & he covenanted that, whenever he should be possessed of any sufficient landed property, he would charge same with both annuities. S. at the same time gave a bond, with a warrant of attorney to enter up judgment thereon, conditioned to be void on payment of the annuities according to the trusts of the deed. S. continued to cohabit with M. for some time, & then married. To a bill filed by S. stating the above facts, & that the deed was in the possession of M., & that the pltf. could only set forth its contents from the memorial thereof registered in Ireland, that judgment had been entered up on the bond, & an action brought thereon by M. against S., & praying an injunction & delivery up of the instruments to be cancelled, a general demurrer for want of equity was allowed.—*SMYTH v. GRIFFIN* (1844), 14 L. J. Ch. 28; 4 L. T. O. S. 189; 8 Jur. 1131, L. C.

62. In consideration of past cohabitation.]—A man having debauched a young woman, & intending afterwards to put a trick upon her,

settled an annuity upon her of £30 *per annum* for life, out of an estate which he had nothing to do with:—*Held*: he must make it good out of an estate which he had of his own.—ANON. (1725), 1 Eq. Cas. Abr. 31, pl. 4; 21 E. R. 852; *sub nom.* CARY v. STAFFORD, Amb. 520, 831; *sub nom.* CAREY v. STAFFORD, 3 Swan. 427, n.

Annotations:—*Consd.* Thurkettle v. Howorth (1727), Bunb. 241. *Distd.* Binnington v. Wallis (1821), 4 B. & Ald. 650. *Refd.* Annandale v. Harris (1727), 2 P. Wms. 432; Knye v. Moore (1822), 1 Sim. & St. 61.

63. —.]—A man having seduced an innocent woman, & having had a bastard by her, gave her a deed, obliging himself to pay £2000 after his death for the purchase of an annuity for the woman & child for their lives. The man having died:—*Held*: equity would compel specific performance of the agreement.—ANNANDALE (MARCHIONESS) v. HARRIS (1727), 2 P. Wms. 432; 1 Eq. Cas. Abr. 87, pl. 6; 24 E. R. 801, L. C.; *affd.* (1728), 1 Bro. Parl. Cas. 250, H. L.

Annotations:—*Expld.* Robinson v. Cox (1741), 9 Mod. Rep. 263. *Consd.* Priest v. Parrot (1751), 2 Ves. Sen. 160. *Distd.* Binnington v. Wallis (1821), 4 B. & Ald. 650. *Expld.* Knye v. Moore (1822), 1 Sim. & St. 61. *Consd.* Knye v. Moore (1825), 2 Sim. & St. 260. *Expld.* Fisher v. Bridges (1854), 1 Jur. N. S. 157. *Refd.* Giles v. Roe (1780), Dick. 570; Beaumont v. Reeve (1846), 15 L. J. Q. B. 141.

64. —.]—A bond given to a kept mistress for the maintenance of her & provision for a child she had by deceased, shall not be set aside in favour of his legitimate children or heir, if not obtained by fraud, but shall not be paid out of the personal estate until after simple contracts, but shall be paid out of the real estate, if there be one, in case the personal estate falls short.—CRAY v. ROOKE (1735), Cas. temp. Talb. 153; 25 E. R. 713.

Annotation:—*Mentd.* Lomas v. Wright (1833), 3 L. J. Ch. 68.

65. —.]—A bond to a woman in consideration of past cohabitation is good in law.—TURNER v. VAUGHAN (1767), 2 Wils. 339; 95 E. R. 845.

Annotations:—*Distd.* Binnington v. Wallis (1821), 4 B. & Ald. 650. *Fold.* Beaumont v. Reeve (1846), 6 L. T. O. S. 346. *Expld.* Fisher v. Bridges (1854), 1 Jur. N. S. 157. *Refd.* Hyams v. Stuart-King, [1908] 2 K. B. 696.

66. —.]—Testator gave a bond to a prostitute, with whom he had cohabited for two years, conditioned to pay her £50 a year for her life. Upon a bill filed by the exor. for an injunction to prevent the obligee from proceeding at law & to have the bond delivered up:—*Held*: the bond not being in consideration of future cohabitation, no relief could be granted.—HILL v. SPENCER (1767), Amb. 641, 836; 27 E. R. 416, 524, L. C.

Annotations:—*Consd.* Gray v. Mathias (1800), 5 Ves. 286; *Re Vallance, Vallance v. Blagden* (1884), 26 Ch. D. 353. *Refd.* Giles v. Roe (1780), Dick. 570.

67. —.]—A married man, living in the same house with his wife, cohabited for six years with another woman, who knew that he was married, but until that time had conducted herself with propriety & morality. At the expiration of that time he ceased to cohabit with her, & gave her a bond to secure an annuity to her for her life, & the payment of a sum of money as a provision for her children, which she had borne to him during such cohabitation:—*Held*: an action at law might be maintained upon the bond.—NYE v. MOSELEY (1826), 6 B. & C. 133; 9 Dow. & Ry. K. B. 165; 4 L. J. O. S. K. B. 178; 108 E. R. 402; *earlier proceedings, sub nom.* KNYE v. MOORE (1825), 2 Sim. & St. 260; *sub nom.* KNYE v. MOSELEY (1825), 3 L. J. O. S. Ch. 136; *subsequent proceedings* (1828), 2 Sim. 161.

PART III. SECT. 3, SUB-SECT. 3.
h. For effecting elopement & marriage—*Vold.*—A bond given as a remuneration to obligee for having

assisted obligor in effecting an elopement & a marriage, without the consent of the friends of the wife, declared void, though given volun-

Annotation:—*Refd.* Hyams v. Stuart-King, [1908] 2 K. B. 696.

68. — Custody of children.]—B. bound himself to trustees in the penal sum of £8000 to pay an annuity of £200 to them for C., a single woman, with whom he had cohabited, & by whom he had five children, in order to make a provision for her, & also in consideration of her giving up to him the sole custody of the children. The bond was to become void on due payment of the annuity during the life of C., or until she should claim the children:—*Held*: there was a sufficiently valuable consideration given for the bond to constitute it a specialty debt.—*Re PLASKETT'S ESTATE, BRYANT v. KNYVETT* (1861), 30 L. J. Ch. 606; 4 L. T. 544; 9 W. R. 628.

69. — Continuance of cohabitation—*Evidence of continuance.*]—Where a bond was given for past cohabitation to a woman who continued to be maintained & visited by the obligor, but there was no evidence of subsequent cohabitation:—*Held*: the bond was valid.—HALI v. PALMER (1844), 3 Hare, 532; 13 L. J. Ch. 352; 3 L. T. O. S. 200; 8 Jur. 459; 67 E. R. 491.

Annotations:—*Refd.* Reade v. Adams (1857), 28 L. T. O. S. 8; *Re Wootton Isaacson, Sanders v. Smiles* (1904), 21 T. L. R. 89. *Mentd.* Hunter v. Young (1879), 4 Ex. D. 256.

70. —.]—Testator six months before his death gave a bond to a woman with whom he had cohabited for more than thirty years, conditioned for the payment to her at the expiration of two years of a sum of money & interest, and he continued to cohabit with her until his death. There was nothing on the face of the bond with reference to the cohabitation, & there was no evidence that it was in fact given to secure the continuance of the cohabitation:—*Held*: the mere continuance of the cohabitation was not enough to raise the presumption that the bond was given in consideration of future cohabitation, & the bond was good.—*Re VALLANCE, VALLANCE v. BLAGDEN* (1884), 26 Ch. D. 353; 50 L. T. 171; 48 J. P. 598; 32 W. R. 918.

Annotation:—*Refd.* *Re Henderson, Henderson v. Bird* (1889), 5 T. L. R. 374.

71. — Molestation.]—A., who had for some years been cohabiting with B. as his wife, executed a deed by which, after reciting that he was desirous of making provision by way of annuity for B. & upon the terms & conditions thereafter expressed, covenanted to pay her an annuity of £150 during her lifetime, but with the proviso that if A. should cease to be on terms of intimacy with B. as therein mentioned, & after such determination she should molest or annoy him by any act or proceeding whatever, the yearly sum should be absolutely forfeited & cease to be payable:—*Held*: since the true construction of the proviso was that the annuity was to be forfeited not because cohabitation had ceased, but because of the molestation, the deed was good.—*Re WOOTTON-ISAACSON, SANDERS v. SMILES* (1901), 21 T. L. R. 89; 49 Sol. Jo. 100.

SUB-SECT. 2.—BONDS IN RESTRAINT OF TRADE.
See TRADE & TRADE UNIONS.

SUB-SECT. 3.—BONDS RELATING TO MARRIAGE.

72. Marriage bond—*Grounds for injunction.*]—Bond to marry a woman or pay a sum of money established at law. Injunction till the hearing on grounds of public policy, being an engagement,

tarily, after the marriage, & without a previous agreement for same.—*WILLIAMSON v. GIBON* (1805), 2 Sch. & Lef. 357—IR.

Sect. 3.—What bonds are illegal or void: Sub-sects. 3, 4, 5 & 6.]

founded upon expectations under the will of a third person, though not a relation, from whom it was kept secret, to marry at his death, and no mutual obligation.—*COCK v. RICHARDS* (1805), 10 Ves. 429; 32 E. R. 911, L. C.

73. Marriage brocage.]—Bonds for procuring of marriages are void.—*HALL v. POTTER* (1695), Show. Parl. Cas. 76; 3 Lev. 411; 1 Eq. Cas. Abr. 89; 1 E. R. 52, H. L.

Annotations:—Consd. Cole v. Gibson (1750), 1 Ves. Sen. 503. *Refd. Roberts v. Roberts* (1730), 3 P. Wms. 66; *Fletcher v. Sondes* (1827), 1 Bl. N. S. 144; *Hermann v. Charlesworth*, [1905] 2 K. B. 123.

74. — Cancellation.]—Bonds entered into for procuring a marriage, cancelled.—*ARLESTON v. KENT* (1620), Toth. 27; 1 Eq. Cas. Abr. 89, pl. 1; 21 E. R. 113.

75. — — —.]—A bond given in consideration of effecting a marriage, decreed to be cancelled, the ct. utterly disliking the consideration.—*ARUNDEL v. TREVILLIAN* (1635), 1 Rep. Ch. 87; 21 E. R. 515.

Annotations:—Consd. Cole v. Gibson (1750), 1 Ves. Sen. 503. *Refd. Hermann v. Charlesworth*, [1905] 2 K. B. 123.

76. — — —.]—A marriage was arranged by a broker, who took bonds from both husband & wife, representing to each that the other had a fortune. That was true of the wife, but untrue of the husband:—*Held*: the husband's bond was good, but the wife's bond must be delivered up.—*GLANVILL v. JENNINGS* (1669), 3 Rep. Ch. 31; Nels. 129; 21 E. R. 807.

77. — — —.]—Under a marriage brocage arrangement, whereby a girl of about fifteen, living with her uncle, & entitled to a good fortune, was induced to marry his journeyman, fifty guineas was paid, & a bond given to secure fifty guineas more. Judgment having been obtained on the bond:—*Held*: in equity the bond should be given up & satisfaction acknowledged on the judgment, & the fifty guineas received be repaid.—*GOLDSMITH v. BRUNING* (1700), 1 Eq. Cas. Abr. 89, pl. 4; 21 E. R. 901; *sub nom. SMITH v. BRUNING*, 2 Vern. 392.

Annotations:—Consd. Osborne v. Williams (1811), 18 Ves. 379. *Refd. Hermann v. Charlesworth*, [1905] 2 K. B. 123.

78. — — —.]—A bond was given to the wife's father, in order to obtain his consent to the marriage of his daughter, to repay part of the portion if the daughter died without issue. The daughter's portion was given to her not by her father, but by an aunt:—*Held*: the bond being in the nature of a marriage brocage bond, should be delivered up to be cancelled.—*KEAT v. ALLEN* (1707), 2 Vern. 588; 1 Eq. Cas. Abr. 90, pl. 5; 23 E. R. 983; *sub nom. ANON.* (1708), Prec. Ch. 267; 2 Eq. Cas. Abr. 187, pl. 1.

79. — — —.]—On the marriage of A., B., her mother & guardian, insisted on a covenant from the husband in the penalty of £10,000 to give her within a specified time a release in respect of all the mesne profits of A.'s estate:—*Held*: the covenant was on the same footing as a marriage brocage bond, & must be set aside.—*HAMILTON (DUKE) v. MOHUN (LORD)* (1710), 1 P. Wms. 118; 1 Salk. 158; 2 Vern. 652; 1 Eq. Cas. Abr. 90, pl. 6; 24 E. R. 319, L. C.

Annotations:—Refd. Law v. Law (1735), Cas. temp. Talb. 140; *Hermann v. Charlesworth* (1905), 74 L. J. K. B. 620. *Mentd. R. v. Northweald Bassett* (1824), 2 B. & C. 724.

80. — Action restrained.]—X., about sixty years of age, gave a bond to Y. conditioned to pay Y. a sum of money if X. married A., a young woman with £2,000 portion. Y. procured the

marriage, & put the bond in suit:—*Held*: he should be restrained in equity at the instance of X.—*DRURY v. HOOKE* (1686), 2 Cas. in Ch. 176; 1 Vern. 412; 1 Eq. Cas. Abr. 89, pl. 2; 22 E. R. 900, L. C.

Annotation:—Consd. Hermann v. Charlesworth, [1905] 2 K. B. 123.

81. In restraint of marriage—To marry specified person—Cancellation.]—A bond drawn in common form, for payment of money, was in fact made on an agreement, that pltf. should either marry her servant, or should by way of forfeiture pay him the sum of money mentioned in the condition of the bond:—*Held*: the bond must be delivered up to be cancelled, it being contrary to the nature & design of marriage, which ought to proceed from a free choice, & not from any compulsion.—*KEY v. BRADSHAW* (1689), 2 Vern. 102; 1 Eq. Cas. Abr. 89, pl. 4; 23 E. R. 675.

Annotations:—Consd. Atkins v. Far (1739), West temp. Hard. 589. *Expld. Woodhouse v. Shepley* (1742), 2 Atk. 535.

82. — — —.]—A young woman gave to a man a bond in a penalty of £600 conditioned for her marriage with him, if he were willing, within thirteen months after the decease of her father, or if she were to marry some other person for payment to him of £500. The man gave her a bond of a similar character but in rather different terms. The woman's father was averse to the match, & the bonds were executed in an alehouse, nobody being present except the witnesses, who were two strangers called in for the purpose. Both bonds remained in the custody of the man. The woman's father having died & the thirteen months having expired, she filed a bill to be relieved against her bond:—*Held*: all the circumstances being taken together, but particularly the encouragement such a transaction might give to disobedience & the fraud on parents, the bond ought to be delivered up to be cancelled.—*WOODHOUSE v. SHEPLEY* (1743), 2 Atk. 535; 26 E. R. 721, L. C.

Annotations:—Consd. Welles v. Middleton (1785), 1 Cox, Eq. Cas. 112; *Cock v. Richards* (1805), 10 Ves. 429. *Refd. Low v. Peers* (1770), Wilms. 364; *Hall v. Wright* (1859), E. R. & E. 765; *Davis v. Bonfore* (1860), 3 L. T. 279. *Mentd. Heap v. Marris* (1877), 46 L. J. Q. B. 761.

83. In fraud of marriage—Cancellation.]—Upon a treaty of marriage between A. & the daughter of B., B. would not consent to the marriage, as A. owed £200 to C. To remove the objection, the brother of A. proposed to get up A.'s bond & to give his own in place of it, but privately A. gave a counter-bond to his brother, the daughter of B. being privy thereto & encouraging it. A. died, & his wife took administration:—*Held*: (1) the wife should avoid the counter-bond, though party to the fraud; (2) A. himself might have been relieved against the bond.—*REDMAN v. REDMAN* (1685), 1 Vern. 348; 23 E. R. 514, L. C.

Annotation:—Refd. Lamlee v. Hanman (1705), 2 Vern. 499.

84. — — —.]—A. on the treaty of marriage of his sister with B. let her have £160 secretly, in order that her fortune might appear to be as much as was insisted on by B., and took her bond to repay it. The exor. of A. put the bond in suit against the exor. of the sister, who survived her husband. Upon a bill to be relieved:—*Held*: the bond must be delivered up as fraudulent.—*GALE v. LINDO* (1687), 1 Vern. 475; 23 E. R. 601; *sub nom. GAY v. WENDOW*, Freem. Ch. 101; *sub nom. ANON.*, 2 Eq. Cas. Abr. 478, pl. 1, L. C.

Annotations:—Consd. Neville v. Wilkinson (1782), 1 Bro. C. C. 543; *Jorden v. Money* (1854), 5 H. L. Cas. 185. *Refd. Lamlee v. Hanman* (1705), 2 Vern. 499; *Pitcairn v. Ogbourne* (1751), 2 Ves. Sen. 375. *Mentd. Mills v. Fox* (1887), 37 Ch. D. 153.

85. —.]—A. treated for the marriage of his son, & in the settlement on the son there was a power reserved to the father, to jointure any wife whom he should marry in £200 *per annum*, paying £1000 to the son. The father treating about marrying a second wife, the son agreed with the second wife's relations to release the £1,000, & did release it, but took a private bond from the father for the payment of such £1,000:—*Held*: equity would not set aside the bond, because it would be injurious to the first marriage, which being prior in time, was to be preferred.—**ROBERTS v. ROBERTS** (1730), 3 P. Wms. 66; 24 E. R. 971.
Annotation:—**Refd.** *Herman v. Charlesworth*, [1905] 2 K. B. 123.

SUB-SECT. 4.—RESIGNATION BONDS.

86. To resign benefice.—A bond by an incumbent, conditioned to resign the benefice upon request, when the patron's son shall be of canonical age, is not simoniacal.—**LAWRENCE v. JOHNS** (1611), Cro. Jac. 274; 79 E. R. 235; *sub nom.* **JOHNS v. LAWRENCE** (1610), Cro. Jac. 248, Ex. Ch.

Annotations:—**Consd.** *Babington v. Wood* (1630), Cro. Car. 180; *Newman v. Newman* (1815), 4 M. & S. 66; *Fletcher v. Sondes* (1826), 3 Bing. 501. **Mentd.** *General Estates Co. v. Beaver*, [1914] 3 K. B. 918.

87. —.]—A bond given in consideration of being promoted to a benefice, conditioned to resign it on request, is not simony.—**BABINGTON v. WOOD** (1630), Cro. Car. 180; 79 E. R. 757; *sub. nom.* **BABBINGTON v. WOOD**, Hut. 111.

Annotations:—**Consd.** *Fletcher v. Sondes* (1827), 1 Bli. N. S. 144. **Refd.** *Peele v. Com Carliol* (1719), 1 Stra. 227. **Mentd.** *A.-G. v. Sands* (1670), Nels. 130.

88. — **Whether relief in equity.**—A. presented B. to a vicarage, & took a bond of £500, conditioned to resign after ten years, upon request. The vicarage was £50 *per annum*. The ten years expired, & the request was made. B. prepared a resignation, & tendered it to the bishop, who refused to accept it, saying such bonds were against conscience, & void, but as that would be no plea in an action brought on the bond, B., having undertaken for a third person, who, as was suggested, was a man of good conversation, exhibited his bill to be relieved against the bond, & to have an injunction:—*Held*: the ct. would not relieve, unless the patron had made some ill use of the bond, for the law allowed such bonds to be good.—**STEEPER v. CARVER** (1708), 2 Eq. Cas. Abr. 183, pl. 1; 22 E. R. 157.

89. —.]—Deft., a parson, entered into a bond for £500 to pltf., the patron of a church, upon condition that after induction he should at any time on request of pltf. resign the rectory into the hands of the bishop:—*Held*: such bonds, though to resign generally, were good, & had been so allowed constantly.—**TURNER v. HAWKINS** (1719), Fortes. Rep. 351; 92 E. R. 886; *sub nom.* **HAWKINS v. TURNER**, Prec. Ch. 513.

90. — **31 Eliz. c. 6.**—A bond recited that the patron of a rectory had, by an instrument of the same date, presented an incumbent, & that he had agreed to resign upon request of the patron, or the owners of the advowson for the time being, for the purpose of enabling him or them to present one of the two younger brothers of the patron, when capable of holding.—*Held*: (1) such a bond was simoniacal & void, on the ground that such an agreement was a benefit to the patron, &

contrary to the above Act, & *semble* to the common law; (2) from the recitals of such bond, it must be intended that such presentation was made in consideration of the agreement to resign, & it was not necessary to allege that fact in pleading.—**FLETCHER v. SONDES** (1827), 1 Bli. N. S. 144; 3 Bing. 501; 4 E. R. 826, II. L.

Annotations:—**Refd.** *Doe d. Watson v. Fletcher* (1828), 2 Man. & Ry. K. B. 206; *Robertson v. Macdougall* (1828), 3 C. & P. 259. **Mentd.** *R. v. Smith O'Brien* (1848), 7 State Tr. N. S. 1; *Egerton v. Brownlow* (1853), 4 H. L. Cas. 1.

91. —.]—Deft. was inducted into a rectory upon the presentation of S., to whom he gave a bond conditioned to resign the rectory into the hands of the ordinary upon such request as therein mentioned, so as the rectory might thereby again become vacant for the intent that S. might be enabled to present therein:—*Held*: the bond was simoniacal & void.—**DOE d. WATSON v. FLETCHER** (1828), 8 B. & C. 25; 2 Man. & Ry. K. B. 206; 6 L. J. O. S. K. B. 282; 108 E. R. 952.

See, further, ECCLESIASTICAL LAW.

92. To resign position as schoolmaster—Whether relief in equity.—A bond given by a schoolmaster of an ancient public school, who had a freehold in his office, to resign at the request of his patron, is good at law, but equity will restrain any improper use of it by the patron.—**LEGH v. LEWIS** (1801), 1 East, 391; 102 E. R. 151; *subsequent proceedings, sub nom.* **LEWIS v. LEGH** (1802), 3 Bos. & P. 231, Ex. Ch.

Annotations:—**Consd.** *Kircudbright v. Kircudbright* (1802), 8 Ves. 51; *Fletcher v. Sondes* (1826), 3 Bing. 501. **Mentd.** *Harnett v. Bates* (1847), 8 L. T. O. S. 345.

SUB-SECT. 5.—BONDS IN RESPECT OF GAMING.

See GAMING & WAGERING.

SUB-SECT. 6.—BONDS AFFECTING ADMINISTRATION OF JUSTICE.

93. To sheriff—Contrary to 23 Hen. 6, c. 10.—A bond for payment of a sum of money upon condition, if given to the sheriff or gaoler contrary to the above Act, the fact that it has been so given may be pleaded against such bond.—**ANON.** (1458), Jenk. 108; 145 E. R. 76.

Annotation:—**Mentd.** *Cochrane v. Moore* (1890), 25 Q. B. D. 57.

94. — **Against return—Appearance of obligor.**—A sheriff brought debt on an obligation taken by him of deft. in his custody, that he would appear at the day, & also save him harmless of the return:—*Held*: the obligation was void by reason of the statute 23 Hen. 6.—**ANON.** (1572), Ben. & D. 76 (4); 123 E. R. 286.

95. — **Against false return to writ of *fi. facias*.**—A bond to indemnify the obligee of a false return to a writ of *fi. fa.* is legal & good.—**KNIFE v. HOBART** (1698), 1 Lut. 593; 125 E. R. 312.

Possession quitted.—*Semble*: bond to a sheriff, the condition of which was that the sheriff, by virtue of a *fi. fa.*, had seized & taken in execution, of the goods & chattels of R., divers goods & chattels, & that the sheriff, at the request of the obligor, had quitted possession, & agreed to return *nulla bona*, & then for indemnifying the sheriff for so doing, is illegal.—**WRIGHT**

PART III. SECT. 3, SUB-SECT. 6.

k. To sheriff—Against non-execution of writ.—A bond by an execution debtor indemnifying the sheriff

“against any loss, damage or liability, which may be incurred by reason of the non-execution of the writ” would be void at common law, as being an

indemnity to the sheriff for disobeying the command of the writ.—**CORBERT v. HOPKIRK** (1852), 9 U. C. R. 479.—**CAN.**

Sect. 3.—What bonds are illegal or void: Sub-sects.

v. VERNEY (LORD) (1783), 3 Doug. K. B. 240; 99 E. R. 633.

97. To gaoler—For ease & favour.]—LENT-HALL *v.* COOKE, No. 99, *post*.

98. ———.]—A bond given to the warden of the Fleet by a prisoner in his custody for debt for ease and favour of the obligor, is void at common law.—OKE'S CASE (1674), 1 Freem. K. B. 375; 89 E. R. 279; *sub nom.* OKY *v.* SELL, 2 Lev. 103; *sub nom.* OAKS *v.* CELL, 3 Keb. 320.

99. ——— To be a true prisoner—& not to escape.]—A bond from one in execution "to be a true prisoner and not to escape," is good, if not for ease & favour.—LENTHALL *v.* COOKE (1668), 1 Saund. 161; 1 Sid. 383; 2 Keb. 422; 1 Lev. 254; 85 E. R. 165.

*Annotations:—*Reid. Anon. (1697), 2 Salk. 438. *Mentd.* Palmer *v.* Mallet (1887), 36 Ch. D. 411.

100. ——— Gaoler not profiting.]—The marshal may take a bond to be a true prisoner, but not to receive or take anything of advantage or profit to himself. Such a bond is void at common law.—ANON. (1697), 2 Salk. 438; 91 E. R. 381.

101. ——— Against escape.]—A condition on a bond to save the gaoler harmless from an escape is unlawful, & makes the bond void.—MARTYN *v.* BLITHMAN (1610), Yelv. 197; 80 E. R. 130; *sub nom.* BLITHMAN *v.* MARTIN (1614), 2 Bulst. 213; Godb. 250.

*Annotations:—*Apld. Nerot *v.* Wallace (1789), 3 Term Rep. 17. *Consd.* Shackell *v.* Rosier (1836), 2 Bing. N. C. 634. *Reid.* Camden *v.* Anderson (1798), 1 Bos. & P. 272; Burrows *v.* Rhodes, [1899] 1 Q. B. 816. *Mentd.* Weld-Blundell *v.* Stephens, [1920] A. C. 956.

102. ——— Past & future.]—A bond given to save a gaoler harmless against past escapes is good, but not against future escapes.—FOX *v.* TILLY (1704), 6 Mod. Rep. 225; 87 E. R. 976.

103. ——— "All escapes."]—If a gaoler takes a bond from a servant to save him harmless from all escapes to be suffered by the servant, it is good.—HACKER *v.* TILLY (1706), 11 Mod. Rep. 93; 2 Ld. Raym. 1207; Holt, K. B. 201; 88 E. R. 917.

104. Compounding felony.]—A plea in bar of an obligation, that it was given for compounding a felony, is good, & the illegal consideration obviates the bond, for it is *malum in se*.—ANDREWS *v.* EATON (1720), Fitz-G. 73; 94 E. R. 659.

105. Stifling prosecution.]—A bond given in consideration of stifling a criminal prosecution is illegal.—COLLINS *v.* BLANTERN (1767), 2 Wils. 347; 95 E. R. 850.

*Annotations:—*Consd. Edgcombe *v.* Rodd (1804), 5 East, 294; Paxton *v.* Popham (1808), 9 East, 408; Prole *v.* Wiggins (1836), 3 Bing. N. C. 230; Waugh *v.* Morris (1873), 42 L. J. Q. B. 57. *Reid.* Pole *v.* Harrobin (1782), 23 9 East, 416, n.; Drage *v.* Ibberson (1798), 1 Esp. 643; 267 Fletcher *v.* Soudes (1826), 3 Bing. 501; Edwards *v.* Brown (1831), 1 Cr. & J. 307; Hill *v.* Manchester & Salford Waterworks Co. (1831), 2 B. & Ad. 544; Ward *v.* Lloyd (1843), 6 Man. & G. 785; Higgins *v.* Pitt (1849), 4 Exch. 110; Royal British Bank *v.* Turquand (1855), 5 E. & B. 110. *Mentd.* Master *v.* Miller (1791), 4 Term Rep. 320; Kerrison *v.* Cole (1807), 8 East, 231; Morgan *v.* Horseman (1810), 3 Taunt. 241; Greville *v.* Atkins (1829), 4 Man. & Ry. K. B. 372; Gas Light & Coke Co. *v.* Turner (1839), 5 Bing. N. C. 666; Kirwan *v.* Goodman (1841), 9 Dowl. 220. *Keir v.* Leeman (1846), 9 Q. B. 371; Benyon *v.*

105 i. Stifling prosecution.]—J. executed a bond to secure a debt of L. to a bank, L. was agent of the bank, & having embezzled the bank funds, the bond was given in consideration of an agreement not to prosecute.—*Held:* the consideration for the bond was illegal & J. was not liable thereon.—PEOPLES' BANK OF HALIFAX *v.* JOHNSON (1892), 20 S. C. R. 541;

23 N. S. R. 302.—CAN.

105 ii. ——— Sufficiency of evidence.]—T. had become indebted to pltf. in circumstances exposing him to a criminal prosecution in respect of the debt, & pltf.'s solr. told T. that he was liable to a criminal prosecution; but, outside of this, there was no evidence of a promise or agreement not to

prosecute. To induce debts. to give the bond in question, T. told them he was threatened with arrest but for a different offence.—*Held:* there was not sufficient evidence to warrant a finding that the bond had been given for an agreement not to prosecute.—PEASE *v.* RANDOLPH (1911), 19 W. L. R. 625; 21 Man. L. R. 368.—CAN.

106. Removal of public nuisance.]—A bond given to an individual, conditioned to be void if the obligor, on the obligee's agreeing not to prosecute him, should remove certain public nuisances & not erect any others of the same kind, is good in law.—FALLOWES *v.* TAYLOR (1798), 7 Term Rep. 475; Peake, Add. Cas. 155; 101 E. R. 1085.

*Annotations:—*Dbtd. Keir *v.* Leeman (1846), 9 Q. B. 371. *Consd.* Windhill L. B. of Health *v.* Vint (1890), 45 Ch. D. 351. *Reid.* Drage *v.* Ibberson (1798), 1 Esp. 643.

107. ——— Equitable defence.] —Pltfs., trustees of a friendly society, sued deft. on a bond given to them by him to secure the debt due to them by S. Deft. pleaded (1) that S. had been treasurer of the society, that there was a deficiency in his accounts, that pltfs. had caused a warrant to be issued for his arrest with a view to criminal proceedings for an alleged felony in respect of the missing money, that it was agreed between pltfs. & deft. that instead of proceeding criminally against S. pltfs. should accept payment in cash for part of the deficiency & take deft.'s bond as security for the remainder, & that the bond sued on was delivered & accepted by pltfs. in pursuance of that illegal agreement & for no other consideration; (2) on equitable grounds that the prosecution of S. did not cease but continued at the instance of two members of the society, when S. was tried & acquitted, & that deft. was entitled to an injunction to restrain pltfs. as such trustees from suing on the bond:—*Held:* the pleas were good as showing an illegal agreement to stifle prosecution.—CANNON *v.* RANDES (1870), 23 L. T. 817; 11 Cox, C. C. 631.

108. Suppression of name in criminal proceedings.]—A. gave B. a bond to secure £3000, the consideration for which was that A. should be free from any legal proceedings or other consequences for having introduced B. to X., through whom B. had lost money, and A. also gave B. a mtge. as a collateral security for the bond. A. afterwards brought an action against B. to set aside the securities, alleging that he had executed them under duress from threats of criminal proceedings, & that the true consideration for them was an illegal one, i.e. the abandonment of such criminal proceedings. B. denied the threat of criminal proceedings, & contended that the consideration was the compromise of a civil liability. The evidence showed that the securities were not executed under threats of criminal proceedings or under undue pressure, but that the consideration for them included stipulations that certain criminal

prosecute. To induce debts. to give the bond in question, T. told them he was threatened with arrest but for a different offence.—*Held:* there was not sufficient evidence to warrant a finding that the bond had been given for an agreement not to prosecute.—PEASE *v.* RANDOLPH (1911), 19 W. L. R. 625; 21 Man. L. R. 368.—CAN.

proceedings pending against X. should be conducted in such a way either that A.'s name should not be mentioned, or that if mentioned A. should be exonerated from all blame in connection with the transaction:—*Held*: the consideration was partly illegal, as containing stipulations with reference to the conduct of the pending criminal proceedings, by which the course of such proceedings might have been affected, & the bond & mtge. were obtained without good & sufficient consideration.—*LOUND v. GRIMWADE* (1888), 39 Ch. D. 605; 57 L. J. Ch. 725; 59 L. T. 168; 4 T. L. R. 555.

Annotation:—*Reid*. *Prince v. Haworth*, [1905] 2 K. B. 687. See, also, Nos. 36 *et seq.*, *ante*.

109. Maintenance—Assignment of bond debts.—A bond conditioned to perform the articles of an indenture, whereby deft. agreed to assign certain obligations to pltf. & covenanted that the money should be paid on or within eight days after the several days limited by the bonds, is void for maintenance.—*HODSON v. INGRAM* (1648), *Aleyn*, 60; 82 E. R. 915.

110. — Payment of costs—Obligor stranger to suit.—In debt on a bond with condition to pay pltf. all money which he had spent or should spend in a suit *inter alios*, wherein he was attorney:—*Held*: (1) judgment ought to be given for pltf., because deft. demurring generally, it could not appear whether the maintenance was lawful or unlawful, & it might be the persons were relatives that might lawfully maintain; (2) performance should be pleaded to the first part of the condition, for it was lawful for an attorney to take security from a stranger for past expenses.—*PIERSON v. HUGHES* (1672), 1 Freem. K. B. 71, 81; 89 E. R. 53, 60; *sub nom.* *PEARSON v. HUMES*, *Cart.* 229; *sub nom.* *PARSON v. HUME*, 3 Keb. 140; *sub nom.* *PERCE v. HUME*, 3 Keb. 153.

Annotations:—*Consd.* *Wallis v. Portland* (1797), 3 Ves. 494; *Booth v. Creswicke* (1844), 13 L. J. Ch. 217. *Reid*. *Wild v. Simpson*, [1919] 2 K. B. 544.

111. Champerty—Actual expenses recoverable.—Pltf. being entitled to succeed to certain copyhold property as customary heir, applied to counsel, who undertook to recover the lands for pltf., but would not proceed unless pltf. would give him a bond in a penalty of £1,000 conditioned to surrender a moiety to him when recovered. A bond having been drawn by the counsel & executed by pltf. accordingly:—*Held*: the bond ought to secure no more than what the counsel had actually laid out in recovering the estate, & on payment of what should appear due the bond should be delivered up.—*SKAPHOLME v. HART* (1680), *Cas. temp. Finch*, 477; 1 Eq. Cas. Abr. 86, pl. 1; 23 E. R. 257.

Annotation:—*Mentd.* *Wild v. Simpson*, [1919] 2 K. B. 544.

See, generally, ACTION, Vol. I., pp. 66 *et seq.*

112. Part profits of suits—Given by attorney to unqualified person.—A bond given by an attorney conditioned for securing a part of the profits from suits, for the benefit of an unqualified person, is illegal.—*CUSSE v. CORFE* (1828), 6 L. J. O. S. K. B. 140.

113. Appearance at court—Bond to sheriff.—The sheriff on an attachment took a bond that deft. should appear in the Star Chamber, & then

& there should answer:—*Held*: good.—*ANON.* (1580), 3 Dyer, 364 a.; 73 E. R. 817.

114. — — ——Pltf., a sheriff, brought an action of debt upon an obligation, the condition of which was that deft. should appear personally in the King's Bench. Deft. had been taken by a latitat by pltf., who had taken the obligation upon his deliverance:—*Held*: a personal appearance was necessary in the case of a latitat, and the bond was good.—*LASSEL'S CASE* (1587), *Gouldsb.* 54, 61; *Owen*, 90; 3 Dyer, 364, n.; 75 E. R. 990, 995.

Annotation:—*Mentd.* *Giles v. Grover* (1832), 9 Bing. 128.

115. — Bond by servant for master—Duress.—If a suit be instituted in an inferior ct. against a barge-master, & the bailiff, by process from the ct., attach one of deft.'s barges while his servant is navigating it, & the servant, to release the barge & its cargo, give the bailiff a bond conditioned for his master's appearance at the next ct., it is a legal bond, & cannot be avoided by a plea that the bailiff had no right to take it, or that it was taken by duress.—*SUMNER v. FERRYMAN* (1709), 11 Mod. Rep. 201; 88 E. R. 989.

116. To take possession of effects of intestate—Delivery of proceeds to administrator.—A bond was given by a servant of the A. co. conditioned to take possession of the effects of persons dying intestate in one of their settlements on the coast of Africa, & sell same & remit the produce to the co. in Europe, to be by them delivered to the lawful administrator:—*Held*: since it was not intended that the obligor should detain the effects of any person against the rightful administrators but merely that they should be deposited in a place of safe custody until claimed by those who were legally entitled to them, it was a legal bond.—*AFRICAN CO. v. TORRANE* (1796), 6 Term Rep. 588; 101 E. R. 718.

117. Against costs—To Inclosure Act commissioners.—A bond taken by the comrs., appointed under an inclosure Act to indemnify themselves against the expenses of a suit brought to try the right to an allotment made by them, & in which they are, according to the directions of the Act, made defendants, is not void, though there be a fund provided out of which such expenses may in some cases be satisfied, at least if the comrs. doubt whether the case in question be one of those cases.—*ILES v. BOXALL* (1800), 2 Bos. & P. 89; 126 E. R. 1173.

SUB-SECT. 7.—BONDS FOR SALE OF PUBLIC OFFICES.

118. Whether within 5 & 6 Edw. 6, c. 16—Sum certain—Auditor.—G. being auditor of Wales appointed A. to exercise the office during his good behaviour, & it was agreed that A. should have the fees & in consideration thereof pay G. £200 *per annum*, & A. gave a bond for performance of the agreement:—*Held*: the case was within the above Act, & the bond, being not for payment of a share of the fees but of a sum certain in all events, was void.—*GODOLPHIN v. TUDOR* (1703), 6 Mod. Rep. 234; 2 Salk. 468;

109 i. Maintenance.—Money was advanced on the security of a bond. The money was applied to carry on a suit by a person claiming a wife's share of her deceased alleged husband's property. The bond was also to stand as security for further money advances for the same purpose: *Held*: illegal, on the ground of main-

tenance.—*CLARKE v. M'NALLY* (1856), 8 Ir. Jur. 225.—IR.

o. To put law in force.—A bond, not required by law, is illegal & void when given in order that a law, which ought to be acted upon without it, may be put in force.—*ST. THOMAS CITY CORPN. v. YEARSLEY* (1895), 22 A. R. 340.—CAN.

PART III. SECT. 3, SUB-SECT. 7.

p. Political influence—Government employment.—An obligation which has as its ground the influence of a person with a deputy or his friends to obtain employment under govt. is void.—*RAYMOND v. FRASER* (1892), Q. R. 1

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affd. 3 Salk. 251; Willes, 575, n.; 87 E. R. 984; (1704), 1 Bro. Parl. Cas. 135, H. L.

Annotations :—*Distd.* Layng v. Paine (1745), Willes, 571.

Consd. Garforth v. Fearon (1787), 1 Hy. Bl. 327.

119. ——— Bailiff.]—Qu. : whether a bond, conditioned to pay pltf. £5 yearly for executing for deft. the office of bailiff in the Duchy of Lancaster, was void by the above Act.—*HORNBY v. CORNSWORTH* (1728), 1 Barn. K. B. 104; Fitz-G. 45; 94 E. R. 72.

Compare, No. 124, *post*.

120. ——— All profits—Register of archdeaconry.]

—A bond given by any of the officers mentioned in the above Act, for securing all the profits of the office to the person appointing, is void by that Act. So is a bond given by such an officer to surrender whenever the person appointing chose.

The office of register of an archdeaconry is an office within the Act.—*LAYNG v. PAINE* (1745), Willes, 571; 125 E. R. 1326.

Annotations :—*Distd.* Legh v. Lewis (1801), 1 East, 391.

Refd. Fletcher v. Sondes (1827), 1 Bl. N. S. 144.

121. ——— Half profits—Deputy official.]—The condition of a bond was that whereas deft. was made deputy to pltf. in his office if he paid pltf. half the profits, then etc.:—*Held* : the bond was not void within the above Act, because the condition was not to pay him so much in gross but half the profits, which must be sued for in the principal's name, for they belonged to him, though out of them a share was to be allowed to the deputy for his service.—*GULLIFORD v. DE CARDONELL* (1697), 2 Salk. 466; 91 E. R. 402; *sub nom.* *CULLIFORD v. CARDONELL* 1 Com. 1; Holt, K. B. 566; 12 Mod. Rep. 90.

Annotation :—*Distd.* Layng v. Paine (1745), Willes, 571.

122. ——— Payment during appointment—Excise officer.]—A. by his interest with the comrs. of excise got an office in that branch of the revenue for B., who, in consideration thereof, gave a bond to A. to pay him £10 *per annum*, as long as B. enjoyed the place:—*Held* : equity would relieve against the bond, as being either contrary to the above Act or contrary to public policy, & order it to be delivered up to be cancelled.—*LAW v. LAW* (1735), Cas. temp. Talb. 140; 3 P. Wms. 391; 24 E. R. 1114, L. C.

Annotations :—*Refd.* Garforth v. Fearon (1787), 1 Hy. Bl. 327; Whittingham v. Burgoyne (1797), 3 Anst. 900; Hermann v. Charlesworth, [1905] 2 K. B. 123. *Mentd.* Simpson v. Howden (1837), 3 My. & Cr. 97; Hopkins v. Prescott (1847), 4 C. B. 578.

123. ——— Recommendation for office—Royal page.]—Pltf.'s testator in consideration of R. recommending him for the office of page of the presence upon the next vacancy gave, at request, a bond conditioned for the payment of an annuity of £100 to S., who had been R.'s tutor, & who being a foreigner was ineligible for the appointment himself:—*Held* : a perpetual injunction must be granted against putting the bond in suit as being void on grounds of public policy although not within the above Act.—*HANINGTON v. DU-CHATEL* (1783), 1 Bro. C. C. 124; 2 Swan. 159, n.; 28 E. R. 1028; *sub nom.* *HARRINGTON v. CHASTEL*, Dick. 581.

Annotations :—*Refd.* Whittingham v. Burgoyne (1797), 3 Anst. 900; Graeme v. Wroughton (1855), 11 Exch. 146. *Mentd.* Bromley v. Holland (1802), 7 Ves. 3; Simpson v. Howden (1837), 3 My. & Cr. 97; Hopkins v. Prescott (1847), 4 C. B. 578; Egerton v. Brownlow (1853), 4 H. L. Cas. 1; Saville v. Langman (1898), 79 L. T. 44.

124. Whether within 49 Geo. 3, c. 126, s. 4—Colonial secretary.]—Where a bond, after reciting that A. was Colonial Secretary of Tobago, & had appointed C. to be his deputy, to execute the

office & receive the fees, in consideration of his paying thereout to A. the annual sum of £450 by equal half yearly payments, was conditioned for the punctual payment of that sum, without saying "out of the fees," & deft. pleaded that the bond was given in pursuance of an agreement to pay that sum at all events, upon which issue was taken, & found for deft.:—*Held* : even supposing the agreement to be inconsistent with the language of the bond, it was competent to deft. to plead & prove it, in order to shew that the bond was given upon an illegal consideration, & the fact found by the jury shewed that the bond was illegal & void by virtue of the above Act.—*GREVILLE v. ATTKINS* (1829), 9 B. & C. 462; 4 Man. & Ry. K. B. 372; 109 E. R. 172.

125. ——— Resignation from army—Major in Indian regiment.]—The resignation for a pecuniary consideration of the position of major in a regiment in the East India Co.'s service:—*Held* : illegal by the above sect., & a bond for payment of the money void.—*GRAEME v. WROUGHTON* (1855), 11 Exch. 146; 24 L. J. Ex. 265; 25 L. T. O. S. 183; 3 W. R. 509; 3 C. L. R. 1321; 156 E. R. 780.

126. Conditional on annuity to another—Commander of government packet.]—A bond was given to secure an annuity of £100 to the obligor's mother for life, the condition reciting, that by the recommendation of friends he had been appointed to succeed his father in the command of a government packet, but on the express condition of his making an allowance for the support of his mother, etc. Upon the obligor's death his mother filed a bill against his extrix. to have the annuity established against his assets. *ARDEN, M.R.*, though inclined to dismiss the bill, on the ground that the bond was contrary to public policy, gave pltf. leave to bring an action at law.—*HARTWELL v. HARTWELL* (1799), 4 Ves. 811; 31 E. R. 420.

Annotations :—*Refd.* Osborne v. Williams (1811), 18 Ves. 379. *Mentd.* Saville v. Langman (1898), 79 L. T. 44.

127. Resignation of office—Appointment of obligor—Magistrates' clerk.]—Pltf. in Sept., 1843, being then about to be called to the Bar, proposed to deft. that, in the event of his resigning his office as chief clerk to the magistrates at Guildhall & two other appointments he held in favour of deft., & if deft. should be appointed thereto, he should give his bond for payment of £200 a year for a term of five years. Deft. assented, & an agreement was entered into. Pltf. resigned, & deft. was appointed to the vacant situations, & in June, 1844, gave his bond for payment of the £200 a year. In May, 1846, considerable arrears being due, pltf. commenced an action to recover arrears, & deft. consented to an order for judgment, upon which he was taken in execution, & whilst in custody in 1846 he paid £100 & gave a warrant of attorney for the remainder, & obtained his discharge. Subsequently he was arrested by pltf., upon a judgment signed by the warrant of attorney:—*Held* : the bond was given solely in respect to deft.'s resigning his practice as an attorney & solicitor & not for the sale of a public office, & there was no ground for deft.'s application to set aside the warrant of attorney.—*PAYNE v. TEAGUE* (1848), 11 L. T. O. S. 363.

128. ——— Consul.]—Pltf. gave to deft. a bond in the penalty of £5,000, reciting that pltf. had been appointed consul to the State of Tunis on the resignation of C., & conditioned for payment to deft. out of the salary of £200 *per annum* in trust for C. for his life & for payment of certain other sums:—*Held* : the ct. would

not restrain an action at law on the bond, but it ought to be pleaded in order to bring the question whether the consideration was corrupt.—*THRALE v. Ross* (1790), 3 Bro. C. C. 57; 29 E. R. 406, L. C.

SUB-SECT. 8.—POST OBIT BONDS.

129. By expectant heir.]—A *post obit* bond given by an expectant heir is a security of a doubtful nature, which has often been disputed with success.—*LUSHINGTON v. WALLER* (1788), 1 Hy. Bl. 94; 126 E. R. 58.

130. — Unreasonable terms—Relief on payment with interest.]—V., a young man, in consideration of £100 given him in the lifetime of his father, gave a bond for £600, to be paid within a year after the death of his father, to whom he was heir. The bond being sued, he preferred his bill to be relieved, & was relieved, repaying the £100 & interest.—*VARNEES' CASE* (1680), Freem. Ch. 63; 22 E. R. 1060, L. C.

—A *post obit* bond, though not on reasonable terms, may be valid, but on grounds of public policy it is strictly examined.—*CURLING v. TOWNSHEND (MARQUIS)* (1816), 19 Ves. 628; 34 E. R. 649, L. C.

*Annotations:—*Refd. *Free v. Hinde* (1827), 2 Sim. 7. *Mentd.* *Greenwood v. Atkinson* (1830), 4 Sim. 54.

132. — — —.]—W., formerly a captain in the militia, was entitled expectant on the death of his father to an estate of considerable value in Wales, & being in prison for debt applied to debt., a captain in the army, who was also in prison for debt, for a loan. Debt. made an advance of £300 on a *post obit* bond conditioned for payment of £600 upon the event of W. surviving his father, but was in any other case to be void. W., who survived his father by the space of about six months only, never disputed the fairness of the transaction, but pltf., his brother & heir, filed a bill for relief against the bond:—*Held*: the bond ought to be considered only as a security for the money actually advanced with interest at 5 per cent.—*EVANS v. CHESSHIRE* (1806), Belt's Sup. 300; 28 E. R. 532, L. C.

*Annotation:—*Refd. *Chesterfield v. Janssen* (1750), 2 Ves. Sen. 125.

133. — Subsequent confirmation.]—In May, 1738, debt. paid £5,000 to S., then thirty years old, & the same day took a bond from him in the penalty of £20,000 conditioned for payment of £10,000 to debt., at or within some short time after the death of his grandmother, D., then seventy-eight years old, in case S. should survive her, but not otherwise. D. died in Oct., 1744, & in Dec. following, on debt.'s delivering to S. the bond to be cancelled, he executed a new one in the penalty of £20,000 conditioned for payment to debt. of £10,000 with lawful interest, in the following Apr. next, & at the same time executed a warrant of attorney to empower judgment to be recorded against him for the £20,000. In Dec. 1745, S. paid debt. £1,000 in part, & in Mar. £1,000 more. In June 1746, S. died, & a bill was brought by his exors., to be relieved against the latter bond:—*Held*: the acts of S. after the death of D. amounted to a confirmation of the original transaction, & relief ought only to be granted against the penalty of the last bond.—*CHESTERFIELD (EARL) v. JANSSEN* (1750), 1 Atk. 301; 1 Wils. 286; 2 Ves. Sen. 125; 26 E. R. 191.

*Annotations:—*Distd. *Carpenter v. Heriot* (1759), 1 Eden, 338. *Refd.* *Baugh v. Price* (1752), 1 Wils. 320; *Murray v. Harding* (1773), 2 Wm. Bl. 859; *Gwynne v. Heaton* (1778), 1 Bro. C. C. 1; *Bowes v. Heaps* (1814), 3 Ves. & B. 117; *King v. Hamlet* (1833), Coop. temp. Brough. 281;

Downes v. Green (1844), 12 M. & W. 481; *Ayleford v. Morris* (1873), 8 Ch. App. 484; *Kempson v. Ashbee* (1874), 39 J. P. 164; *Beynon v. Cook* (1875), 10 Ch. App. 391, n.; *Nevill v. Snelling* (1880), 15 Ch. D. 679. *Mentd.* *Taylor v. Rochfort* (1751), 2 Ves. Sen. 281; *Cockshott v. Bennett* (1788), 2 Term Rep. 763; *Fox v. Mackreth* (1791), 2 Cox, Eq. Cas. 320; *Fawcett v. Gee* (1797), 3 Anst. 910; *Whittingham v. Burgoyne* (1797), 3 Anst. 900; *Fullagar v. Clark* (1812), 18 Ves. 481; *The Cognac* (1832), 2 Hag. Adm. 377; *Sloman v. Kelly* (1840), 4 Y. & C. Ex. 169; *Doe d. Houghton v. King* (1843), 7 Jur. 517; *O'Brien v. Kenyon* (1851), 6 Exch. 382; *Cockell v. Taylor, Preston v. Collett, Collett v. Preston* (1852), 21 L. J. Ch. 545; *Egerton v. Brownlow* (1853), 4 H. L. Cas. 1; *Archer v. James* (1859), 2 B. & S. 67; *Heap v. Marris* (1877), 46 L. J. Q. B. 761; *Bull Coal Mining Co. v. Osborne*, [1899] A. C. 351; *Nocton v. Ashburton*, [1914] A. C. 932.

134. — — —.]—In a case of singular & complicated fraud a number of *post obit* bonds given by a young man with great expectations, though upon terms of gross inequality, were established on the ground of confirmation, but were ordered to stand only as security for the sums found due upon taking an account between the parties.—*WHARTON v. MAY* (1799), 5 Ves. 27; 31 E. R. 454, L. C.

*Annotations:—*Refd. *Curling v. Townshend* (1816), 19 Ves. 628; *Bernal v. Donegal* (1827), 1 Bli. N. S. 594. *Mentd.* *Portarlington v. Souby* (1834), 3 My. & K. 104.

135. — — —.]—A. an expectant heir being indebted to B., his friend & father-in-law, & B. being indebted to C., A. gave C. *post obit* bonds in discharge of his debt to B., & C. gave B. credit in account for half the amount of the bonds. After the death of A.'s father, when the bonds had become payable, A. & B. by deeds deliberately executed acknowledged the fairness of the transaction. A. then filed a bill against C. & B. to set the bonds aside on the ground of imposition & want of consideration, & afterwards dismissed his bill as against B. & examined him as a witness, so that no relief could be had by any party against B. in that cause:—*Held*: (1) in the above circumstances of acknowledgment, dismissal, & examination of B. as a witness, A. had debarred himself from impeaching the consideration for the bonds, & he could not impeach the securities for fraud or imposition; (2) from the confidential situation of B. with regard to A., & the knowledge which C. had of all their transactions, the bonds ought not to be available as *post obit* bonds, but only for the sums actually allowed by C. as the consideration for them, with interest from their dates.—*BERNAL v. DONEGAL (MARQUIS)* (1815), 3 Dow. 133; 3 E. R. 1014, H. L.; *subsequent proceedings* (1827), 1 Bli. N. S. 594, H. L.

*Annotations:—*Mentd. *Tamlyn v. Reynolds* (1842), 7 Jur. 166; *Champion v. Champion* (1846), 15 Sim. 101; *A.-G. v. Dew* (1849), 13 Jur. 1066; *Rowland v. Witherden* (1851), 3 Mac. & G. 568; *Robinson v. Briggs* (1853), 22 L. J. Ch. 1056.

136. — Suspicious circumstances—No proof of imposition.]—A *post obit* bond was given by A. in 1720 for payment in six months after his father's death, if he survived, otherwise to be void. The father who was then seventy years old, died in 1731, & A. in 1734. The ct. refused relief against the penalty, there being no proof of imposition although there were suspicious circumstances in it.—*HILL v. CAILLOVEL* (1748), 1 Ves. Sen. 122; 27 E. R. 931, L. C.

*Annotation:—*Refd. *Hawker v. Wood* (1853), 1 W. R. 316.

137. — Purchased at auction—Relief on payment into court with interest.]—A young man about to raise £40,000 upon *post obit* bonds payable at the death of his father, put the bonds up for sale by auction without reserve. The particulars of sale disclosed the facts. Debt. purchased a bond at the auction. On a bill for relief:—*Held*: an injunction ought to be granted until the hearing upon the terms of pltf. bringing into ct. the auction

Sect. 3.—What bonds are illegal or void: Sub-sects. 8, 9, 10, 11, 12 & 13.]

price with interest at 5 per cent. from the time of payment.—*FOX v. WRIGHT* (1821), 6 Madd. 111; 56 E. R. 1031.

138. Obtained by undue influence—Suppression of facts.]—L. requested her nephew, J. to reside with her, while so doing she altered her will in his favour; she subsequently made several other alterations, & by the last, the greater portion of the property she had power to dispose of was given to J. & his two brothers. The alterations were made by her own solr. After the last of the alterations, she executed a *post obit* bond for £15,000 in favour of J. & his two brothers. This was done by a solr. unknown to her, who was employed at her request by J. Differences afterwards arose between L. & J., who left her house. L. then sent for her own solr., & without taking any notice of the bond altered her will, & disposed of the whole of her property among other persons, & died leaving insufficient to pay the bond. Her solr., who was one of her exors., upon communicating the decease of testatrix to J., was, for the first time, informed of her having executed the bond. Upon a bill by the exors. to set it aside:—*Held*: the bond was obtained by undue influence & upon a suppression of facts, & was void, & it must be delivered up to be cancelled, with costs to be paid by J.—*COOKE v. LAMOTTE* (1851), 15 Beav. 234; 21 L. J. Ch. 371; 51 E. R. 527.

Annotations:—*Refd.* *Hoghton v. Hoghton* (1852), 15 Beav. 278; *Cobbett v. Brock* (1855), 20 Beav. 524; *Henry v. Armstrong* (1881), 18 Ch. D. 668; *Berry v. Glazebrook* (1891), 7 T. L. R. 574; *Bischoff's Trustee v. Frank* (1903), 89 L. T. 188. *Mentd.* *Beanland v. Bradley* (1854), 2 W. R. 602; *James v. Holmes* (1862), 31 L. J. Ch. 567; *Coutts v. Acworth* (1869), 38 L. J. Ch. 694; *Turner v. Collins* (1871), 7 Ch. App. 334, n.; *Carnegie v. Carnegie* (1874), 30 L. T. 460; *Mitchell v. Homfray* (1881), 8 Q. B. D. 587.

139. Payable on death of obligor.]—A voluntary bond for payment of a sum of money after the death of the obligor in the nature of a legatory disposition, is a valid bond.—*RAMSDEN v. JACKSON* (1737), 1 Atk. 292; 26 E. R. 187, L. C.

Annotations:—*Mentd.* *Erving v. Peters* (1790), 3 Term Rep. 685; *Jowsbury v. Mummery* (1872), L. R. 8 C. P. 56; *Humphries v. Humphries*, [1910] 1 K. B. 796.

140. Payable on death of named person—Sale of reversionary interest.]—B., for the purposes of a society of which he was the solr., borrowed £600 on the security of a joint bond entered into by himself & C. The bond was conditioned to be void if the obligors, their heirs, exors., or administrators, should within one month after the death of such one as should first depart this life of three persons, named in the bond, pay to the obligee £2,000. The bond also charged the interests to which the obligors might become entitled in any personal estate under the wills of the three persons, with payment of the £2,000. On the death of the last survivor of the three persons the obligors sought to be relieved of their obligation under the bond, on the ground that it had been entered into in circumstances which were inequitable, & that the whole transaction amounted, in fact, to a sale of a reversionary interest for an insufficient consideration:—*Held*: the bond was good.—*GARDINER v. COWPER* (1868), 18 L. T. 627.

141. Action to set aside bond—Injunction—On payment into court.]—In a suit to set aside *post obit* securities, when an injunction is granted upon pltf. paying into ct. the sum advanced by deft. with interest, such sum will be not paid to deft. until the suit is determined.—*MARSACK v. FARLOW* (1822), Jac. 572; 37 E. R. 966, L. C.

SUB-SECT. 9.—ARBITRATION BONDS.

See, generally, ARBITRATION, Vol. II., pp. 312–316, 386–398, 471 *et seq.*

142. Void award.]—A bond to perform an award is void, if the award is void.—*ANON.* (1582), Godb. 12; 78 E. R. 8.

143. —.]—A bond to perform a void award is void.—*STONE v. KNIGHT* (1627), Lat. 207; Noy, 93; 82 E. R. 348.

Annotations:—*Mentd.* *Rudston & Yates' Case* (1641), March, 141; *Holt v. Clarencieux* (1732), 2 Stra. 937; *Warwick v. Bruce* (1813), 2 M. & S. 205.

144. Revocation—Arbitrator's authority.]—Debt upon bond conditioned to stand to, abide by & perform an award. Deft. pleaded no award made, & pltf. replied that deft. before the time for making the award revoked the arbitration authority:—*Held*: by the countermand, the bond was forfeited.—*VYNION'S CASE* (1609), 8 Co. Rep. 81 b; 77 E. R. 597; *sub nom.* *WILDE v. VINOR*, 1 Brownl. 62; *sub nom.* *VIVION v. WILDE*, 2 Brownl. 290.

Annotations:—*Consd.* *Warburton v. Storr* (1825), 4 B. & C. 103. *Mentd.* *Lyn v. Wyn* (1665), O. Bridg. 122; *Londre v. Mohun* (1672), Freem. K. B. 42; *Thomas v. Sorrell* (1673), Freem. K. B. 85; *Charneley v. Winstanley* (1804), 1 Smith, K. B. 435; *Marsh v. Bulteel* (1822), 5 B. & Ald. 507; *Brown v. Tanner* (1825), 1 C. & P. 651; *Smart v. Sanders* (1848), 5 C. B. 895; *Livingston v. Ralli* (1855), 5 E. & B. 132; *Toppin v. Healey* (1863), 11 W. R. 466; *Pestonjee Nussurwanjee v. Manockjee* (1868), 12 Moo. Ind. App. 112; *Re Rouse & Meier* (1871), L. R. 6 C. P. 212; *Randell v. Thompson* (1876), 1 Q. B. D. 748; *Frasor v. Ehrensperger* (1883), 12 Q. B. D. 310; *In the Estate of Heys, Walker v. Gaskill*, [1914] P. 192.

145. Submission—By infant—Bond by person of full age.]—A bond given by a person of full age, reciting that an infant has submitted himself to an award, & conditioned for performance of the award by the infant, is void, as an infant cannot bind himself by a submission to arbn., & the submission is wholly void, though the other party be of full age.—*RUDSTON & YATES' CASE* (1641), March, 111, 141; 82 E. R. 434, 448.

Annotation:—*Refd.* *R. v. Grant* (1849), 14 Q. B. 43.

146. — To be made rule of court.]—Upon a motion to make a submission to arbn. a rule of ct. pursuant to Arbn. Act, 1698 (c. 157), it was objected that the agreement to make the submission a rule of ct. was no part of the condition of the bond, but was written beneath it & not signed, but it appearing by affidavit that the subscription was made before the execution of the bond, it was taken by the ct. to be part of the submission as an indorsement by way of defeasance was part of the deed, & the submission was made a rule of ct.—*CARTER v. MANSBRIDGE* (1736), Barnes, 55; 94 E. R. 803.

SUB-SECT. 10.—BONDS IN RESPECT OF VOID INSTRUMENTS.

147. Promissory note—Illegal consideration—Bond to holder—Without notice.]—If A. for an usurious consideration give his promissory note to B., who transfers it to C. for a valuable consideration without notice of the usury, & afterwards A. gives a bond to C. for the amount, the bond is good.—*CUTHBERT v. HAILEY* (1799), 8 Term Rep. 390; 3 Esp. 22; 101 E. R. 1450.

Annotations:—*Distd.* *Chapman v. Black* (1819), 2 B. & Ald. 588. *Consd.* *Amory v. Meryweather* (1824), 2 B. & C. 573; *Flight v. Reed* (1863), 1 H. & C. 703. *Refd.* *Marsh v. Martindale* (1802), 3 Bos. & P. 154.

148. — — — With notice.]—Deft. employed W. to job for him in the funds; the speculations were unfortunate, & W. took a promissory note for the differences from deft., who was unable to pay the losses. W., after the note became due, indorsed it to pltf. Pltf.

were not then informed of the illegal consideration for which the note was given, but afterwards they were told so, & then they took a bond from debt. for the amount:—*Held*: the bond was void in law.—*AMORY v. MERYWEATHER* (1824), 2 B. & C. 573; 4 Dow. & Ry. K. B. 86; 2 L. J. O. S. K. B. 111; 107 E. R. 496.

Annotation:—*Mentd.* *M'Callan v. Mortimer* (1842), 11 L. J. Ex. 429.

149. Usurious bond—Counter bond given.]—On an usurious bond, if a counter bond be given to save a surety harmless, & he is damnified, the usury cannot be pleaded in bar to it.—*ROBINSON v. MAY* (1597), Cro. Eliz. 588; 78 E. R. 831.

150. Bond executed under undue influence—Second bond given.]—A girl, under age, gave a promissory note as surety for her stepfather. Soon after coming of age she executed, under his influence, as the obligee knew, but with knowledge of the invalidity of the promissory note, a bond to secure payment of the same debt six years after date. Shortly after the expiration of the period of six years, & at the age of twenty-nine, she executed another bond to secure the same debt, under threat of legal proceedings. She was afterwards sued on that bond, & thereupon filed a bill to avoid the bonds & to restrain the action:—*Held*: she was entitled to the relief prayed, although the bill was not filed until nearly seven years after the last bond was executed.—*KEMPSON v. ASHBEE* (1874), 10 Ch. App. 15; 44 L. J. Ch. 195; 31 L. T. 525; 39 J. P. 164; 23 W. R. 38, L. C. & L. JJ.

Annotations:—*Refd.* *Bainbridge v. Browne* (1881), 18 Ch. D. 188; *London & Westminster Loan & Discount Co. v. Bilton* (1911), 27 T. L. R. 184.

SUB-SECT. 11.—BONDS WITHOUT CONSIDERATION.

151. Whether relief in equity—Subsequent judgment at law.]—Several persons were in debt to A. B. bought the debts from A., & upon that B. entered into an obligation of £1,000 to pay £500 at a certain day. B. sued A. in Ch. to be discharged from his bond, because the debts assigned to him could only be released by A. & only be sued in A.'s name, being things in action, & so the bond was given without any valuable consideration:—*Held*: (1) the bond should be discharged; (2) if after such decree, A. sued B. upon the bond in the Ct. of C. P., & B. pleaded the decree, the ct. would reject such plea; for the common law proceeded upon certain fixed & invariable rules, while equity proceeded at the discretion of a good man.—*ANON.* (1458), Jenk. 108; 145 E. R. 76.

Annotation:—*Mentd.* *Cochrane v. Moore* (1890), 25 Q. B. D. 57.

152. —.]—A bond for £1,000 entered into for no consideration, cancelled.—*WRIGHT v. MOORE* (1632), Toth. 27; 21 E. R. 113.

153. — After judgment at law.]—Equity will

not relieve against a bond given without consideration, after judgment at law has been obtained thereon.—*WRIGHT v. MOOR* (1646), 1 Rep. Ch. 157; 21 E. R. 536.

154. — Release of part.]—A. bequeathed to B. £700, part of £1,200 which B. owed him on bond. A. afterwards revoked the bequest, but made an indorsement on the bond, by which he forgave B. the £700. A.'s exors. brought an action against B. for the £1,200. B. filed a bill to restrain the action, offering to pay to the exors. the balance of £500:—*Held*: the injunction must be refused, because B. had given no consideration for the indorsement on the bond.—*TUFNELL v. CONSTABLE* (1836), 8 Sim. 69; 59 E. R. 28.

See, generally, EQUITY.

155. Proof of consideration—When required.]—In the proof of a bond debt, before the master, it is not the practice to require an affidavit of the consideration, unless a case of suspicion against the bond is raised.—*WHITAKER v. WRIGHT* (1843), 2 Hare, 310; 12 L. J. Ch. 241; 7 Jur. 320; 67 E. R. 128; *subsequent proceedings* (1844), 3 Hare, 412.

Annotations:—*Apprvd.* *Hartwell v. Colvin* (1852), 16 Beav. 140. *Mentd.* *Cardell v. Hawke* (1868), L. R. 6 Eq. 464.

SUB-SECT. 12.—BONDS BY BANKRUPTS.

See Case, infra, & BANKRUPTCY & INSOLVENCY, Vol. IV., p. 590, No. 5393; Vol. V., p. 1143, Nos. 9278–9280.

SUB-SECT. 13.—MISCELLANEOUS BONDS.

156. Against sale of wife's clothing.]—Debt on bond conditioned that debt. should not sell his wife's clothing. *Semble*: a lawful condition.—*SMITH v. WATSON* (1616), 1 Roll. Rep. 334; 81 E. R. 525.

157. Exclusion of mother from house.]—An heir having had some difference with his mother, the jointress, about the repairs of the mansion house settled the estate on his brother, but first took a bond from him in his sister's name, that the brother should not permit his mother to come into the house:—*Held*: the bond must be delivered up to be cancelled, it being against the law of nature to prohibit a son to cherish his mother.—*TRAITON v. TRAITON* (1686), 1 Vern. 413; 23 E. R. 554.

158. Against barring entail—Lands settled upon son in tail.]—A father settled lands on his son in tail, & took a bond from him that he should not dock the entail. On bill to be relieved against the bond:—*Held*: the bond was good, since if the son would not have given the bond, the father might have made him only tenant for life.—*FREEMAN v. FREEMAN* (1691), 2 Vern. 233; Proc. Ch. 28; 1 Eq. Cas. Abr. 87, pl. 9; 23 E. R. 751.

Annotation:—*Refd.* *Worthing Corpn. v. Heather*, [1906] 2 Ch. 532.

PART III. SECT. 3, SUB-SECT. 11.

155 i. Proof of consideration—When required.]—In a suspension of a charge on a bond, on the ground that it had been granted for a gambling debt, the judge merely "recommended" the jury to find for the charger, unless it had been proved that the bond had been granted for a gambling debt:—*Held*: direction was sufficient.—*AINSLIE v. SUTTON* (1851), 14 Dunl. (Ct. of Sess.) 184; 1 Stu. M. & P. 702.—*SCOT.*

PART III. SECT. 3, SUB-SECT. 12.

a. To creditor To withdraw opposition to discharge.]—A bond given

to a creditor by an insolvent in consideration of the continuance by the creditor of a threatened opposition to the discharge of such insolvent, being in contravention of the policy of the insolvent code, is invalid.—*DILLON v. STEPHENSON* (1860), 12 I. C. L. R. 81; 13 Ir. Jur. 258.—*IR.*

PART III. SECT. 3, SUB-SECT. 13.

r. Against general policy of law.]—A. suspected of stealing a horse was brought before a magistrate, who dismissed the charge. A. pretended no right to the horse, which was restored to the prosecutor, upon his giving a bond of indemnity:—*Held*:

such bond was not necessarily void as contrary to the general policy of the law.—*BALLARD v. POPE* (1847), 3 U. C. R. 317.—*CAN.*

s. — Against leaving employment—Exorbitant interest on default.]—The obligor bound himself down to daily attendance & manual labour until money was repaid in a certain month, & the bond penalised default with overwhelming interest:—*Held*: not enforceable, being opposed to public policy.—*RAM SARUP BHAGAT v. BANSI MANDAR* (1915), I. L. R. 42 Calc. 742.—*IND.*

t. Against publishing letters.]—A. granted a bond in favour of B. an

Sect. 3.—What bonds are illegal or void: Sub-sect. 13. Part IV. Sect. 1.]

159. Against waste—Settled land.]—A father settled land on his daughter in tail, & took a bond from her not to commit waste:—*Held*: the bond was not binding in equity.—*JERVIS v. BRUTON* (1691), 2 Vern. 251; 1 Eq. Cas. Abr. 87, pl. 8; 23 E. R. 762.

Annotation:—*Consd.* *Worthing Corpn. v. Heather*, [1906] 2 Ch. 532.

160. Removal from particular parish—Prohibition against returning.]—A bond conditioned that the obligor shall remove himself & his family from a particular parish, & not return to live therein as an inhabitant without permission from the obligee, is good.—*SHELTON v. SIRE* (1719), 11 Mod. Rep. 310; 88 E. R. 1058.

161. — New settlement.]—A bond with condition that if deft. shall hire C. so as to gain him a settlement in S. or anywhere out of the parish of T. is a good bond, the object not being illegal.—*WHITING v. PUNCHARD* (1770), 3 Wils. 50; 95 E. R. 927.

162. Influence with testator—To dispose of his estate.]—A bond was given as a reward for using influence over testator to induce him to dispose of his estate for the benefit of the obligor:—*Held*: the bond must be delivered up, but without costs.—*DEBENHAM v. OX* (1749), 1 Ves. Sen. 276; 27 E. R. 1029.

Annotation:—*Distd.* *Higgins v. Hill* (1887), 56 L. T. 426.

163. Obtained by parental influence—Sums advanced during infancy.]—A father having advanced a child in his infancy, upon his coming of age, took a bond from him to a greater amount than the sums advanced:—*Held*: (1) the bond was obtained by parental influence, & should not stand as a security for the sums advanced, but must be set aside altogether; (2) loose expressions in a letter from the son were not a confirmation.—*CARPENTER v. HERIOT* (1759), 1 Eden, 338; 2 Keny. 533; 28 E. R. 715.

Annotations:—*Consd.* *Wycherley v. Wycherley* (1763), 2 Eden, 175. *Refd.* *Hoghton v. Hoghton* (1852), 15 Beav. 278; *Baker v. Bradley* (1854), 2 Sm. & G. 531.

164. Removal of public nuisance—Bond to private person.]—A private person cannot take a bond conditioned to remove a public nuisance.

The nuisance to the public was not such an injury to a private person as would entitle him to take a bond for its removal. It was a criminal offence, for which the party was answerable to the public & not to the individual (*LORD KENYON, C.J.*).—*FALLOWES v. TAYLOR* (1798), 7 Term Rep. 475; *Peake, Add. Cas.*, 155; 101 E. R. 1085.

Annotations:—*Consd.* *Keir v. Leeman* (1846), 9 Q. B. 371; *Windhill L. B. of Health v. Vint* (1890), 45 Ch. D. 351. *Refd.* *Drage v. Ibberson* (1798), 1 Esp. 643.

165. Annuity to son—On taking Holy Orders—Until possessed of living.]—Bond by a father to secure an annuity to his son, until he should be in possession of a living of a certain value, & an agreement of the same date, reciting the bond,

declaring that the son would forthwith enter into Holy Orders & accept such living. *Semble*: on grounds of public policy by the effect of the agreement the transaction was illegal.—*KIRCUDBRIGHT (LORD) v. KIRCUDBRIGHT (LADY)* (1802), 8 Ves. 51; 32 E. R. 269, L. C.

Annotations:—*Consd.* *Fletcher v. Sondes* (1827), 1 Bli. N. S. 144. *Mentd.* *O'Grady v. Blust* (1852), 19 L. T. O. S. 147.

166. Substituted bond—On surrender of voluntary bond.]—A voluntary bond, though void against creditors, being valid as between the parties, its surrender is a consideration that will sustain a substituted bond against creditors, unless with a fraudulent design, as by an insolvent to substitute a valid for an invalid security against creditors.—*Ex p. BERRY* (1812), 19 Ves. 218; 34 E. R. 499, L. C.

Annotations:—*Consd.* *Re Gundry, Ex p. Hookins* (1849), 3 De G. & Sm. 549. *Refd.* *Carter v. Hungerford*, [1917] 1 Ch. 260.

Maintenance of bastard child—To overseers of parish.]—*See* *BASTARDY*, Vol. III., pp. 384, 385, Nos. 233–235.

167. Contrary to letters patent—Knowledge of grantee.]—No action can be maintained on a bond given to a person in consideration of his doing something contrary to the terms of letters patent, & he is equally incapable of recovering, whether he knew or did not know the terms of the letters patent.—*DUVERGIER v. FELLOWES* (1832), 1 Cl. & Fin. 39; 6 Bli. N. S. 87; 6 E. R. 831, H. L.

Annotations:—*Mentd.* *Solarte v. Palmer* (1834), 2 Cl. & Fin. 93; *Blundell v. Winsor* (1837), 8 Sim. 601; *London Grand Junction Ry. Co. v. Freeman* (1841), 2 Man. & G. 606; *Garrard v. Hardey* (1843), 5 Man. & G. 471; *Harrison v. Heathorn* (1843), 6 Man. & G. 81; *Sheppard v. Oxenford* (1855), 1 K. & J. 491; *Re Mexican & South American Co.* (1859), 27 Beav. 474.

168. Given under corrupt agreement—Fraudulent date in apprenticeship articles.]—In an action on a bond by the administrators of the obligee, it was pleaded that the bond was given in pursuance of a corrupt agreement that the obligee should take the son of the obligor, as his apprentice to learn the profession of surgeon, apothecary, & man-midwife, for two years only, & that the agreement should be antedated so as to make it appear that the apprentice was articulated for five years, in order that by such corrupt contrivance the parties might fraudulently & illegally procure the apprentice to be admitted for the purpose of practising as an apothecary upon serving two years instead of five years, as required by Apothecaries Act, 1815 (c. 194), s. 15. After verdict for deft., it was moved to enter judgment for pltf. *non obstante veredicto*, upon the ground that no apprenticeship for five years was required for the business of a surgeon, & that deft. could not object to the legality of his own bond:—*Held*: (1) a rule should be refused; (2) pltf. were not entitled to be relieved from payment of costs under Civil Procedure Act, 1833 (c. 43), s. 31.—*PROLE v. WIGGINS* (1836), 3 Bing. N. C. 230; 2 Hodg. 204; 3 Scott, 601; 6 L. J. C. P. 2; 132 E. R. 398.

unmarried woman, bearing to be for money lent. Six months afterwards, A. bought a reduction of the bond, alleging that the bond had been fraudulently obtained from him by threats of publishing letters written by him to her:—*Held*: prevention of publicity by buying the letters was not an illegal matter of bargain.—*LISTON v. COWAN* (1865), 3 Macph. (Ct. of Sess.) 1041.—*SCOT.*

*a. Duress.]—*A bond, to secure the payment of the cost of maintaining at an industrial school a young boy who came within Industrial Schools Act, s. 7, is void, for duress, when

given to prevent the boy being sent to a reformatory.—*ST. THOMAS CITY CORPN. v. YEARSLEY* (1895), 22 A. R. 340.—*CAN.*

*b. — & fraud.]—*Pltf. sued deft. on a bond. Deft. contended that he did not execute the bond with free consent & that it was obtained from him under pressure of criminal proceedings:—*Held*: deft. was entitled to resist the claim made against him.—*RANGNATH SAKHARAM v. GOVIND NARSING* (1904), 1 L. R. 28 Bom. 639.—*IND.*

*c. For purpose of illegal association.]—*More than twenty persons

paid each a sum monthly to a stakeholder. The sum total of the subscriptions was then paid over as a loan free of interest to one of the subscribers chosen by lot, & he was thereupon required to execute a bond obliging him to continue his monthly subscriptions to the end of the period for which the arrangement was agreed to hold good. The bonds were executed in favour of the stakeholder & the subscribers. The business was not registered:—*Held*: the obligees carried on a business which had for its object the acquisition of gain within Companies Act, 1882, s. 4, & the bond was illegal.—*RAMASAMI*

169. Indemnity to co-trustee—Against breach of trust—Misappropriation by co-trustee.]—A. being trustee with B. of a legacy of £10,000, applied to B. to be allowed to employ it in his private business, & B. gave his consent, on receiving from A. a bond of indemnity with a condition, that if A., his heirs, executors, etc., should, at all times, save, defend, & keep harmless & indemnified B., his heirs, etc., from all manner of actions, suits, causes of action & suit, proceedings, claims, demands, loss, costs, charges, damages, & expenses whatsoever, which should or might be brought, commenced, prosecuted, or made against them, or which they should bear, pay, suffer, sustain, expend, or be put unto by reason of the legacy, or the interest thereof, or on account of A.'s being permitted to hold same, the obligation was to be void. The legacy not having been accounted for or paid by A. to the *cestuis que trust*, the latter filed a bill against the exors. of A. & B., & obtained a decree, which declared that A. & B. had become jointly & severally liable to make good the legacy, & ordered them to do so. A charge had been carried in against the estate of B., but no sum had been paid with the exception of £10 for costs of suit:—*Held*: the bond was not illegal.—**WARWICK v. RICHARDSON** (1842), 10 M. & W. 284; 11 L. J. Ex. 351; 152 E. R. 477.

Annotations:—**Mentd.** *Smith v. Howell* (1851), 6 Exch. 730; *Gorsuch v. Cree* (1860), 8 C. B. N. S. 574; *Re British Provident Life & Fire Assce. Soc.* (1862), 7 L. T. 234; *Re British Provident Life & Fire Assce., Anglo-Australian Assce. Co.'s Case, Teete's Case, & Runney's Case* (1864), 4 New Rep. 48; *Taylor v. Chichester & Midhurst Ry. Co.* (1867), L. R. 2 Exch. 356.

170. Executed in France—Formalities not observed.]—To debt on bond deft. pleaded that the bond was executed by him in France, where he was then domiciled, that it was not taken or

passed by any public officer authorised by the laws of that kingdom, nor was it written throughout by the hand of deft., that, though deft. signed the bond with his own hand, he did not write thereon with his proper hand the formula styled in the French tongue a "bon" or "approuvé," bearing in words at length the sum secured, nor was deft. at the time a merchant or tradesman, etc., concluding that, "by reason of the premises, the bond, by the laws of France, never was obligatory or binding on deft., but always was of no force, effect, or validity:—"*Held*: the plea was bad, as being a mere argumentative & inferential statement of the French law, which, being pleadable only as matter of fact, ought to have been distinctly & affirmatively alleged.—**BENHAM v. MORNINGTON (EARL)** (1846), 3 C. B. 133; 15 L. J. C. P. 221; 7 L. T. O. S. 184; 10 Jur. 618; 136 E. R. 54.

171. To satisfy registered judgment—Purchase of mortgaged property—By discharged insolvent mortgagor.]—An insolvent mtgor., after his discharge from a mtge. debt of £1,000, agreed with the assignees of the mtgee. to give them £200 & a bond for payment of £800, the assignees agreeing to enter satisfaction of a registered judgment, to enable insolvent to dispose of other property. The bond was given & satisfaction entered. In an action on the bond, the jury having found that the arrangement was, that insolvent should purchase pltf.'s interest in the mortgaged premises & so get rid of the registered judgment:—*Held*: the bond was not void as being a new contract or security for payment of the original debt, within Judgments Act, 1838 (c. 110), s. 91.—**AMBROSE v. COOK** (1857), 2 H. & N. 73; 26 L. J. Ex. 278; 5 W. R. 533; 157 E. R. 31.

Annotation:—**Mentd.** *Kidson v. Turner* (1858), 3 H. & N. 581.

Part IV.—Execution.

SECT. 1.—SIGNING, SEALING, TESTIMONIUM CLAUSE, AND PROOF.

172. Signature—Whether necessary—Common money bond.]—Signing, as well as sealing, a common bond for money is unnecessary.—*Ex p.* **HODGKINSON** (1815), 19 Ves. 291; *Coop. G.* 99; 34 E. R. 525, L. C.

Annotations:—**Mentd.** *Re Mogg, Ex p. Mogg* (1828), 6 L. J. O. S. Ch. 162; *Butler v. Hobson* (1838), 5 Bing. N. C. 128; *Re English & Irish Church & University Assce. Soc.* (1863), 11 W. R. 681.

173. ——— Erroneous—Bond sealed.]—A bond made by "R. Erlin" was signed "R. Erlwin":—*Held*: the variance was not material, because the subscribing was no essential part of the deed, sealing being sufficient.—**CROMWELL v. GRUMSDEN** (1698), 1 Ld. Raym. 335; *Comb.* 477; *Holt, K. B.* 502; 2 Salk. 462; 12 Mod. Rep. 193; 91 E. R. 1119; *sub nom.* **CRUMWELL v. GRUNSDALE** (1696), 5 Mod. Rep. 281.

Annotations:—**Mentd.** *Holman v. Burrow* (1702), 2 Ld. Raym. 794; *Stoddart v. Palmer* (1824), 4 Dow. & Ry. K. B. 624.

174. ——— Of witness—Proof of.]—If the name of a fictitious person be put as a subscribing witness

to a bond, proof of the party's handwriting is sufficient.—**FASSET v. BROWN** (1790), Peake, 33, N. P.

175. ——— ———.]—In debt on bond, if one of the attesting witnesses be dead & the other beyond the process of the ct., it is sufficient to prove the handwriting of the witness that is dead.—**ADAM v. KERR** (1798), 1 Bos. & P. 360; 126 E. R. 952.

Annotation:—**Mentd.** *Andrew v. Motley* (1862), 12 C. B. N. S. 514.

176. ——— After sealing—Presence of obligor.]—It is not necessary that the subscribing witness should see the obligor sign & seal the bond; it is sufficient if, after he has signed & sealed it, the witness is requested to put his name to it, in the presence of the obligor, & it is then stated that the obligor had executed it; & if he does so put his name to it, he is a good witness to prove the execution.—**PARKE v. MEARS** (1800), 2 Bos. & P. 217; 126 E. R. 1244.

177. Sealing—Wafer seal.]—A bond may be sealed with a wafer.—**ANON.** (1701), 12 Mod. Rep. 565; 88 E. R. 1523.

BHAGAVATHAR v. NAGENDRAYAN (1895), 1 L. R. 19 Mad. 31.—**IND.**

d. Gift to solicitor—By client—In addition to charges.]—An obligation, by a client to his law agent while the relation of agent & client still subsisted, for money as a gift, in addition to the ordinary business charges:—

Held: null, & reduced accordingly.—**ANSTRUTHER v. WILKEE** (1856), 18 Dunl. (Ct. of Sess.) 405; 28 Sc. Jur. 136.—**SCOT.**

e. To secure sheriff a salary.]—A bond to secure a sheriff a fixed salary, or otherwise, by his deputy, is void.—**FOOT v. BULLOCK** (1848),

4 U. C. R. 480.—**CAN.**

PART IV. SECT. 1.

f. Sealing—Whether necessary.]—An instrument not under seal is invalid as a bond.—*Re EMERSON'S ELECTION* (1887), 4 Man. L. R. 287.—**CAN.**

Sect. 1.—Signing, sealing, testimonium clause, and proof. Sects. 2 & 3.]

178. By party executing bond.]—A bond cannot be represented as sealed until the seal is put to it by the party executing it. *Qu.* whether, having sealed, he can be heard to say he has not delivered.—*Ex p.* HODGKINSON (1815), 19 Ves. 291; *Coop. G.* 99; 34 E. R. 525, L. C.

Annotations:—Mentd. Re Mogg, Ex p. Mogg (1828), 6 L. J. O. S. Ch. 162; *Butler v. Hobson* (1838), 5 Bing. N. C. 128; *Re English & Irish Church & University Assce. Soc.* (1863), 11 W. R. 681.

179. — Proof of.]—A witness to prove the execution of a bond did not recollect whether at the time it was executed it had any seal; & he swore that he did not read the attestation at the time when he witnessed the execution, but there being a seal at the time of the trial, & the bond itself saying "sealed with our seals":—*Held*: (1) there was sufficient proof; (2) the evidence would not have been sufficient, if there had been no seal on the bond at the time of the trial.—*BALL v. TAYLOR* (1824), 1 C. & P. 417, N. P.

180. — Presumption of—No mark, wafer, or seal visible.]—The exor. of testatrix discovered amongst her papers after her decease, which occurred in 1891, a bond dated in 1874, under the hand only of the obligor in the sum of £800, in favour of S., one of her nieces, conditioned for the transfer by the obligor in her lifetime, or by her exors. or administrators within six calendar months after her decease, into the name of S., for her separate use, or to her exors., administrators, or assigns, of the sum of £400 three per cent. consols, & the bond contained a proviso that if the obligor should by her will or any codicil thereto bequeath to or in favour of S. a sum of consols equal to or greater than such sum of £400 consols therein mentioned, then such sum should be deemed a satisfaction of the whole or part, as the case might be, of such sum of £400 consols. Although the bond bore the words "sealed with my seal," which preceded the date, & the attestation clause stated that the bond was "signed, sealed, & delivered" by the obligor, it did not appear that a seal had in fact ever been affixed, there being no mark, wafer, or seal visible on the face of the document. The bond was properly stamped. S. claimed to be entitled to enforce the bond against the estate of the obligor, as, the document being properly stamped, & purporting to have been sealed, & the attestation clause being in the usual form, there was *prima facie* evidence that the document had been duly sealed, & the ct. would presume that it had been sealed:—*Held*: the ct. could not, in the circumstances, presume that the bond had been sealed, & S., being a volunteer, was not entitled to enforce it.—*Re SMITH, OSWELL v. SHEPHERD* (1892), 67 L. T. 64, C. A.

181. Testimonium—Omission of—Bond sealed.]—A bond, if sealed, is good, although it wants the

formal words "sealed with my seal" or "in witness whereof."—*ANON.* (1536), 1 Dyer, 19 a; 73 E. R. 41.

Annotation:—Reid. Core's Case (1536), 1 Dyer, 19 b.

182. — Incomplete—Sealing not mentioned.]—The *testimonium* of a bill obligatory was:—"In witness whereof I have hereunto set my hand." The obligor had signed & sealed the bill:—*Held*: the bill was good notwithstanding no mention of sealing was made in the *testimonium* of the bill.—*PETERS v. FIELD* (1627), *Het.* 75; 124 E. R. 354.

183. Filling up blanks.]—In proving the execution of a bond, it is not necessary that the attesting witness should be able to state that the blanks were filled up at the time of execution.—*ENGLAND v. ROPER* (1816), 1 Stark. 304, N. P.

184. Identity of obligor—Proof of.]—Evidence must be given of identity of the obligor of a bond with the party sued thereon, where the subscribing witness proves that he never saw deft. before or after he saw it executed.—*LOGAN v. ALLDER* (1832), 3 Tyr. 557, n.

Annotation:—Consd. Roden v. Ryde (1843), 12 L. J. Q. B. 276.

Proof of execution by attesting witness.]—*See, now, Common Law Procedure Act, 1854 (c. 125), s. 26, &, generally, EVIDENCE.*

SECT. 2.—DELIVERY.

185. Determines date.]—The date of a bond is the delivery of it.—*PULLEIN v. BENSON* (1698), 1 Ld. Raym. 349; *Holt, K. B.* 558; 2 Salk. 627; 12 Mod. Rep. 204; 91 E. R. 1130.

186. As escrow—Question for jury.]—Where a bond, executed with the usual formalities, was delivered, by mutual agreement between the obligor & obligee, into the hands of the subscribing witness, there to remain "until the death of A." who was named in the condition, "& until certain securities were returned to the obligor":—*Held*: it was for the jury to determine whether the bond was delivered as an escrow or as a deed.

A bond executed with the usual formalities may operate as a deed *in presenti*, though at the time of execution it is expressly agreed that it shall not take effect until a certain event has happened.—*MURRAY v. STAIR (EARL)* (1823), 2 B. & C. 82; 3 Dow. & Ry. K. B. 278; 107 E. R. 313.

Annotations:—Consd. Bowker v. Burdekin (1843), 11 M. & W. 128; *Davis v. Jones* (1856), 17 C. B. 625. *Distd. Gudgeon v. Besset* (1856), 6 E. & B. 986. *Appld. London Freehold & Leasehold Property Co. v. Suffield*, [1897] 2 Ch. 608. *Reid. Spicer v. Burgess* (1834), 1 Cr. M. & R. 129; *Cumberlege v. Lawson* (1857), 1 C. B. N. S. 709; *Wallis v. Littell* (1861), 5 L. T. 489; *Gerrard v. Clowes*, [1892] 2 Q. B. 11. *Mentd. Smith v. Bond* (1833), 10 Bing. 125; *England v. Watson* (1842), 6 Jur. 763; *Strickland v. Williams* (1898), 68 L. J. Q. B. 241.

187. — To obligee.]—A bond cannot be delivered to the obligee as an escrow.—*ASHFIELD v. WRENSFORD* (1606), *Jenk.* 327; 145 E. R. 238.

g. — After signature.]—Defts., having signed the bond sued on, left in a hurry, without having it properly sealed, which was afterwards done, but it was clear they knew it to be a bond, & it was stated on its face to be under seal:—*Held*: the defence was not one to be favoured.—*MUTUAL FIRE INSURANCE CO. OF PRESCOTT v. PALMER* (1861), 20 U. C. R. 441.—*CAN.*

h. — Question of fact.]—The bond contained the usual attestation clause as to signature & sealing, & deft. had acknowledged several times that he had executed a bond to J., but plff.'s son said he did not think

the original which he saw was sealed. The copy from the Registry contained no indications of seal, & deft. denied that he had ever delivered a sealed bond to J. The question as to the sealing was left to the jury:—*Held*: the question was properly left to the jury.—*HAZELL v. DYAS* (1876), 2 R. & C. 36.—*CAN.*

183 i. Filling up blanks.]—A bond, executed in blank & left to be filled in by another who has no authority, is void.—*R. v. MOLLOY* (1864), 5 Nfld. L. R. 94.—*NFLD.*

k. Admission of execution—Effect.]—A bond must be produced at trial though execution thereof be

admitted.—*LESSLIE v. LEAHY* (1837), 5 O. S. 482.—*CAN.*

PART IV. SECT. 2.

185 i. Determines date.]—A bond bore date Oct. 2, 1856, but was not executed until Sept. 6, 1858:—*Held*: the bond became operative from the day of execution, not from the day of date.—*DICKEY v. HANNA* (1859), 9 L. C. L. R. 446.—*IR.*

1. Delivery & sealing—Pleading.]—Sealing & delivery of a bond are put in issue by a plea that deft. "did not make & deliver any such bond," as that declared on.—*HAZELL v. DYAS* (1876), 2 R. & C. 36.—*CAN.*

188. Condition to be performed by obligee.]—A writing obligatory may be delivered as an escrow by the obligor to the obligee, to become the deed of the obligor when the obligee has performed the conditions under which the escrow was delivered; & the obligee cannot maintain an action upon it until these conditions are performed.—*HAWKSLAND v. GATCHEL* (1601), Cro. Eliz. 835; 78 E. R. 1062.

*Annotations:—*Consd. London Freehold & Leasehold Property Co. v. Suffield, [1897] 2 Ch. 608.

189. — To third person—Death of obligor before condition performed.]—The devisee for life of a rentcharge out of an estate devised in strict settlement assigned it to creditors as a collateral security. The tenant for life with intent to redeem the rentcharge for the annuitant gave bonds to the creditors on condition of giving up their securities to the annuitant to be cancelled. The exors. of the obligor paid all the bonds but one, which they disputed, because, though delivered by the obligor to a third person for the creditor when he should agree to accept it, it was not accepted till after death of obligor:—*Held*: the bond must be treated as an escrow to be delivered to the obligee upon the performance of the condition, so that though the obligor was dead before the condition was performed, the bond was good.—*GRAHAM v. GRAHAM* (1791), 1 Ves. 272; 30 E. R. 339.

*Annotation:—*Mentd. Foundling Hospital v. Crane, [1911] 2 K. B. 367.

190. By joint obligors—At different times.]—If two are bound jointly, & one of them delivers the deed at one time, & the other delivers it at another time, this is a good joint obligation.—*ANON.* (1486), Plowd. Qrs. 30, pl. 167; 75 E. R. 900.

Proof of.]—Where there are joint obligors one may be called as a witness to prove the delivery by the other.—*LOCKART v. GRAHAM* (1717), 1 Stra. 35; 93 E. R. 367.

*Annotations:—*Consd. Hall v. Curzon (1829), 9 B. & C. 646. *Refd.* York v. Blott (1816), 5 M. & S. 71; Blackett v. Weir (1826), 4 L. J. O. S. K. B. 205; Page v. Thomas (1840), 9 L. J. Ex. 245.

192. By agent—Refused by obligee.]—A. executed a bond under seal & delivered it to B. to deliver to C. C. declined to accept it, but B. left it with him:—*Held*: C. could sue on the bond, & A. could not then plead that it was not his deed.—*TAW v. BURY* (1559), 2 Dyer, 167 a; Ben. & D. 75; 73 E. R. 366.

*Annotations:—*Consd. Doe d. Garnons v. Knight (1826), 5 B. & C. 671. *Refd.* Alford v. Lee (1587), Cro. Eliz. 54; Butler v. Baker (1591), 3 Co. Rep. 25 a; Hall v. Denbigh (1600), Cro. Eliz. 773; Williams v. Green (1602), Moore, K. B. 642; Whelpdale's Case (1604), 5 Co. Rep. 119 a; Oshey v. Hicks (1610), Cro. Jac. 263.

SECT. 3.—WHO MAY EXECUTE.

193. Joint bond—Executed by one.]—A bond purporting to be a joint obligation, though sealed by only one of the obligors is good against the party who executes it.—*ANON.* (1724), 11 Mod. Rep. 385; 88 E. R. 1104.

194. Action against one—Proof of execution.]—In an action upon an award, where the

declaration averred a mutual submission of several persons by bond, —*Held*: (1) it was necessary that the execution by all should be proved, though the action was against one only; (2) it would be otherwise if the action were upon the bond, & the bond were joint & several, for then, though the submission might be joint, plffs. might declare upon the several bond, & the declaration would then be satisfied by proof of the execution by deft. alone.—*FERRER v. OVEN* (1827), 7 B. & C. 427; 1 Man. & Ry. K. B. 222; 6 L. J. O. S. K. B. 28; 108 E. R. 783.

*Annotation:—*Refd. Adams v. Bankart (1835), 1 Gale, 48.

195. Bond intended to be joint—Executed by one.]—Where a man executes a bond, meaning it to be the joint bond of himself & another, who does not execute, it is the several bond of the former; but he may have it delivered up as contrary to the intention.—*UNDERHILL v. HORWOOD* (1804), 10 Ves. 209; 32 E. R. 824, L. C.; *subsequent proceedings, sub nom.* WARE v. HORWOOD (1807), 14 Ves. 28, L. C.; *sub nom.* HORWOOD v. UNDERHILL (1808), 10 East, 123; (1812), 4 Taunt. 346.

*Annotations:—*Consd. Re Dover, Hastings, etc. Ry. Co., Carew's Case (1855), 7 De G. M. & G. 43. *Folld.* Evans v. Bremridge (1855), 2 K. & J. 174. *Consd.* Luke v. South Kensington Hotel Co. (1877), 7 Ch. D. 789; *In the goods of* Cowardin (1901), 86 L. T. 261. *Refd.* Gardner v. Walsh (1855), 1 Jur. N. S. 828; Traill v. Baring (1864), 4 De G. J. & Sm. 318. *Mentd.* Philipps v. Crawford (1807), 13 Ves. 475; Dupuis v. Edwards (1813), 18 Ves. 358; Copis v. Middleton (1818), 2 Madd. 410.

196. Joint & several bond—Executed by one for both—Without authority.]—A. executed a bond as the joint & several bond of himself & B., & signed it "A. & B.," having no authority from B. so to do:—*Held*: the bond was good as the several bond of A.—*ELLIOT v. DAVIS* (1800), 2 Bos. & P. 338; 126 E. R. 1314.

*Annotation:—*Mentd. Re Bumsel & Wootton, Ex p. Assignees (1867), 16 L. T. 538.

197. — Executed by one.]—R., together with J., as a surety, agreed to give a bond to bankers to secure advances made by them to R. & Co., & R. & Co. agreed to give a bond to J. to indemnify him. Bonds were prepared, but the joint & several bond by R. & J. to the bankers was never executed by R., but R. & Co., executed the bond of indemnity to J.:—*Held*: J. was not liable to the bankers upon the bond, as it had not been executed by R.—*BONSER v. COX* (1841), 4 Beav. 379; 10 L. J. Ch. 395; 5 Jur. 164; 49 E. R. 385, L. C.; *subsequent proceedings* (1843), 6 Beav. 110; (1844), 13 L. J. Ch. 260, L. C.

*Annotations:—*Consd. Archer v. Hudson (1846), 7 L. T. O. S. 105. *Distd.* Cooper v. Evans (1867), L. R. 4 Eq. 45. *Consd.* Ward v. National Bank of New Zealand (1883), 8 App. Cas. 755. *Refd.* Re Wolmershausen, Wolmershausen v. Wolmershausen (1890), 62 L. T. 541. *Mentd.* Beckett v. Addyman (1882), 9 Q. B. D. 783.

198. — —.]—A surety, who has executed a bond on the faith of its being executed by the principal debtor also, cannot be released from his obligation on the ground that the principal has never executed it, if the principal has executed an instrument on which the surety may sue him & become a speciality creditor of his.—*COOPER v. EVANS* (1867), L. R. 4 Eq. 45; 36 L. J. Ch. 451; 15 W. R. 609.

See, further, GUARANTEE.

PART IV. SECT. 3.

193 i. Joint bond—Executed by two.]—A bond, hearing to be granted by A., B. & C., was signed & delivered by B. & C.; A. was present at execution of the deed, but refused to sign it:—*Held*: B. was not entitled to repudiate the obligation on the ground that A. had not signed the deed.—*CRAIG v. PATON* (or BROWN) (1865), 4 Macph.

(Ct. of Sess.) 192.—SCOT.

193 ii. — — Pleading.]—Plffs. sued defts. H. & D. as having jointly executed a bond to secure payment of rent by H., it appeared that T. was also named in it as obligor but had not executed. He, at the execution of the bond was not present, & deft. D. told plff. that T. could not conveniently attend, but would sign it

at any time. T., on being applied to by plffs., refused to execute, & no objection had been made by D., although aware of the refusal:—*Held*: non-execution by T. was no defence under a plea of *non est factum* by H., as showing a variance between the bond declared on & that set out.—*SYDNEY ROAD CO. v. HOLMES* (1858), 16 U. C. R. 268.—CAN.

Part V.—Interpretation.

SECT. 1.—ACCORDING TO INTENTION AND CIRCUMSTANCES.

199. General rule—*Ut res magis valeat quam pereat.*—A bond shall not be of no effect, if by any means it may be made good.—*VERNON v. AISOP* (1663), 1 Lev. 77; 1 Sid. 105; T. Raym. 68; 1 Keb. 356, 451; 83 E. R. 305.

Annotations :—*Foll.* *Wells v. Ferguson* (1708), 11 Mod. Rep. 191. *Refd.* *Mills v. Wright* (1677), Freem. K. B. 247.

200. Where intention clear.—The conditions of a bond should be interpreted according to the intent of the parties, if it can be made clear.—*FERRERS v. NEWTON* (1666), 1 Sid. 312; 82 E. R. 1126.

201. How intention ascertained—Recitals & conditions.—The intention of the parties ought to govern the ct. in making their decision, in order to discover which, the ct. must look at the recital of the condition of the bond.—*BARCLAY v. LUCAS* (1783), 1 Term Rep. 291, n.; 3 Doug. K. B. 321; 99 E. R. 676.

Annotations :—*Consd.* *Dance v. Girdler* (1804), 1 Bos. & P. N. R. 34; *Weston v. Barton* (1812), 4 Taunt. 673. *Refd.* *Barker v. Parker* (1786), 1 Term Rep. 287; *Metcalf v. Bruin* (1810), 12 East, 400. *Mentd.* *Backhouse v. Hall* (1865), 6 B. & S. 507.

202. ———.—The intention of the parties in executing a bond is to be ascertained by looking at the recital & condition of the bond, exclusively of the extraneous facts.

The intention of the parties to the instrument is to be the criterion, but that is in general to be ascertained from the words of the instrument. We may indeed look at the circumstances which occurred at the time, in order to understand what the parties were about; but when a bond has an express meaning in the words which it contains, we are not to admit any evidence to diminish or enlarge its meaning (*COLERIDGE, J.*).—*LONDON ASSURANCE CO. v. BOLD* (1844), 6 Q. B. 514; 14 L. J. Q. B. 50; 4 L. T. O. S. 112; 8 Jur. 1118; 115 E. R. 192.

Annotations :—*Refd.* *Mills v. Alderbury Union Grdns.* (1849), 3 Exch. 590; *Montefiore v. Lloyd* (1863), 15 C. B. N. S. 203.

203. ——— Surrounding circumstances.—In a bond for £200 the conditions were that if J., the obligor, should happen to die without issue of his body, & by his last will or during his lifetime should convey to W., the obligee, certain lands, or if J. solely or jointly with his wife or heir or heirs should not suffer or permit a recovery by writ of right, etc. of the lands, then the obligation to be void. W. died within the life of J. :—*Held* : (1) the conditions must receive an interpretation in accordance with the will of the parties to be collected from the surrounding circumstances, & they were not impossible or repugnant; (2) the obligor ought to enfeoff the heir of the obligee.—*EATON v. BUTTER* (1629), W. Jo. 180; Palm. 552; 81 E. R. 1216.

PART V. SECT. 1.

200 i. Where intention clear.—If the language of a bond read in its ordinary meaning is clear & intelligible the ct. cannot alter the language to give effect to the presumed intention of the parties.—*MOORE v. ORFORD* (1908), 27 N. Z. L. R. 577.—N.Z.

200 ii. ——— Explanatory evidence inadmissible.—A mtge. contained covenants on the part of A. & B. to repay a loan, & recited a collateral bond executed by them, & a bond executed by C. & D. to secure payment of the

interest on the principal sum. In the latter bond, which was of even date with the mtge., the personal covenants in the mtge. were not recited, nor the collateral bond executed by A. & B. but the loan & conveyance were recited, & the bond proceeded in these terms : “Whereas C. & D. agreed to secure punctual payment of the interest thereon, so long as the sum loaned shall remain outstanding. Now, the condition is, that if C. & D. do & shall, so long as the principal, or any part thereof, shall be permitted to remain upon the said security, pay

interest for thereon, then the foregoing obligation to be void” :—*Held* : there was not a latent ambiguity in the latter bond which would render evidence admissible to explain it.—*FLEMING v. GREENE* (1864), 13 L. T. 103.—IR.

n. Where apparent inconsistency.—The condition of a bond must be construed as a whole, & any apparent repugnance may be reconciled by giving it effect according to the intent apparent on the whole instrument.—*NICOLLS v. MADILL* (1850), 6 U. C. R. 415.—CAN.

204. ———.—A condition of a bond framed in general terms is to be construed with reference to the circumstances to which the bond is intended to apply.—*STOUGHTON v. DAY* (1647), Aleyn, 10; Sty. 18; 82 E. R. 887.

Annotations :—*Refd.* *Arlington v. Merricke* (1672), 2 Saund. 411; *Weston v. Mason*, *Weston v. Chapman* (1765), 3 Burr. 1725; *Wright v. Russell* (1774), 3 Wils. 530; *Barclay v. Lucas* (1783), 1 Term Rep. 291, n.

205. ——— Ambiguous condition.—Deft. executed a bond as surety to an insurance co. for the fidelity of A., who was appointed an agent of the co. at X., & who was about to & afterwards did enter into partnership, as merchants, with B., also an agent of the co. at that place. The condition of the bond was that, if A., his heirs, exors., etc., should well & truly pay & account for all money received by him, the obligation should be void :—*Held* : (1) the surrounding or “co-existing” circumstances were admissible for the purpose of explaining what might be ambiguous in the condition; (2) deft. was not responsible under the bond for money received by the firm of A. & B., notwithstanding he was aware at the time he signed the bond that A. was about to become partner with B.—*MONTFIORE v. LLOYD* (1863), 15 C. B. N. S. 203; 3 New Rep. 82; 143 E. R. 761.

Annotation :—*Refd.* *Leathley v. Spyer* (1870), L. R. 5 C. P. 595.

206. Where two constructions possible.—A condition in a bond, not to molest another in his land or goods, on any account whatsoever, shall be liberally construed to intend a tortious molestation only, but not to restrain the obligor from pursuing the obligee for felony or any other just cause, & the condition is not unlawful.—*DOBSON v. CREW* (1599), Cro. Eliz. 705; 78 E. R. 940.

207. ———.—Where a bond admits of two different constructions, the ct. will take it that way which is most reasonable to make the obligation stand in force.—*WENTWORTH v. WENTWORTH* (1650), Sty. 242; 82 E. R. 679.

Annotation :—*Refd.* *Johnson v. Muller* (1673), 3 Keb. 222.

SECT. 2.—CONSTRUCTION OF OBLIGATORY PART AND CONDITION.

208. Obligation—Construed against obligor—Payment on notice—Obligor to give notice.—A bond was conditioned to pay £50 on Jan. 10 next ensuing, on three months’ warning :—*Held* : the obligor was to give the warning, as the words must be taken most strongly against the obligor.—*LAWSON v. WIDDRINGTON* (1662), 1 Lev. 85; 1 Keb. 380, 415; T. Raym. 61; 83 E. R. 310.

209. ———.—The condition on a bond was to pay on May 2 at deft.’s house, giving thirty days’ notice. Deft. pleaded that pltf. did not give thirty days’ notice. Pltf. replied that if

notice was necessary, debt. had to give it:—*Held*: either the provision requiring notice was void for uncertainty, or the obligor must give the notice, & judgment should be for pltf.—*JOHNSON v. MULLER* (1673), 3 Keb. 222; 84 E. R. 688.

210. — Construed in favour of obligor—Penalty.—The obligation in a bond, or under a covenant involving a penalty, ought to be construed most favourably for the obligor, or covenantor.—*CHALONER v. DAVIS* (1697), 1 Lut. 565; 125 E. R. 297.

211. Condition—Construed in favour of obligor.—Where an obligation is conditioned for the obligor to account or render himself to prison, the obligor has election.

A condition for the obligor to render himself Nov. 28 upon any action commenced, does not oblige him to render to an action commenced after.—*STANLEY v. FEARNE* (1683), 3 Lev. 137; 83 E. R. 617.

SECT. 3.—EFFECT OF RECITALS UPON OTHER TERMS.

212. On condition — Limitation.—The condition of a bond recited that the Postmaster-General had deputed T. to be deputy-postmaster for O. from June 24, 1667, for the term of six months following, & provided that if T. during all the time he should continue deputy-postmaster should faithfully execute & perform the duties of the office in accordance with his instructions, the obligation should be void. T. remained deputy-postmaster for more than three years after June 24, 1667. In an action on the bond for a default committed by T. on Sept. 22, 1670:—*Held*: the terms of the condition were limited by the recital, & the obligor was only bound for the six months.—*ARLINGTON (LORD) v. MERRICKE* (1672), 2 Saund. 411; 3 Keb. 45, 59; 85 E. R. 1221.

Annotations:—*Appld.* *Barker v. Parker* (1786), 1 Term Rep. 287. *Foll.* *Strange v. Lee* (1803), 3 East, 484; *Liverpool Water Works Co. v. Atkinson* (1805), 6 East, 507. *Distd.* *Leadley v. Evans* (1824), 2 Bing. 32; *Bamford v. Iles* (1849), 3 Exch. 380. *Appld.* *N. W. Ry. Co. v. Whinray* (1854), 10 Exch. 77. *Distd.* *Kitson v. Julian* (1855), 4 E. & B. 854. *Consd.* *Oswald v. Berwick-upon-Tweed Corp.* (1856), 5 H. L. Cas. 856. *Refd.* *Tibbs v. Clow* (1719), 11 Mod. Rep. 311; *Wright v. Russell* (1774), 3 Wils. 530; *Barclay v. Lucas* (1784), 1 Term Rep. 291, n; *Hassell v. Long* (1814), 2 M. & S. 363; *Parker v. Wise* (1817), 6 M. & S. 239; *Smith v. Holtzmeier* (1829), 8 L. J. O. S. K. B. 105; *Chapman v. Beckinton* (1842), 3 Q. B. 703; *Berwick v. Murray* (1850), 14 Jur. 659; *Skillett v. Fletcher* (1867), L. R. 2 C. P. 469; *Danby v. Coutts* (1885), 29 Ch. D. 500. *Mentd.* *Bridgewater v. Bolton* (1704), 6 Mod. Rep. 106; *Gale v. Reed* (1806), 8 East, 80; *Hickinbotham v. Leach* (1842), 11 L. J. Ex. 341; *Hutchinson v. Boyle* (1855), 26 L. T. O. S. 80; *Buckhouse v. Hall* (1856), 6 B. & S. 507; *Buccleuch v. Met. Board of Works* (1870), L. R. 5 Exch. 221; *Harper v. Godsell* (1870), L. R. 5 Q. B. 422; *Leathley v. Spyer* (1870), L. R. 5 C. P. 595; *Ratcliffe v. Evans*, [1892] 2 Q. B. 524.

213. Condition general—Recital specific.—A bond, by a receiver of rents, reciting in the condition that he had agreed to collect rents

for a certain co. for twelve months, & that the co. having required security for the due performance of the office in manner or to the effect after-mentioned A. had agreed to become surety for him, contained in the condition more general words binding him to faithful service during such time as he should be employed by the co. & their successors:—*Held*: the recital restrained the operation of the general words of the condition, & it was not forfeited by any breach of duty, after the expiration of twelve months.—*LIVERPOOL WATERWORKS Co. v. ATKINSON* (1805), 6 East, 507; 2 Smith, K. B. 654; 102 E. R. 1382.

Annotations:—*Foll.* *St. Saviour's v. Bostock* (1806), 2 Bos. & P. N. R. 175. *Distd.* *Leadley v. Evans* (1824), 2 Bing. 32. *Refd.* *Sansom v. Bell* (1809), 2 Camp. 39; *Hassell v. Long* (1814), 2 M. & S. 363; *Aurego v. Keen* (1836), 1 M. & W. 390; *Berwick v. Murray* (1850), 14 Jur. 659; *Kitson v. Julian* (1855), 24 L. J. Q. B. 202; *Oswald v. Berwick-upon-Tweed Corp.* (1856), 5 H. L. Cas. 856; *Danby v. Coutts* (1885), 29 Ch. D. 500.

214. — Indemnity bond.—The extent of the condition of an indemnity bond may be restrained by the recitals, though the words of the condition import a larger liability than the recitals contemplate.—*PEARSALL v. SUMMERSETT* (1812), 4 Taunt 593; 128 E. R. 463.

Annotation:—*Mentd.* *Britten v. Hughes* (1829), 3 Moo. & P. 77.

215. — Bank overdraft.—Deft. as surety for A. & B. gave a bond with a condition, reciting that the obligees were bankers, & A. & B. paper manufacturers, & had overdrawn their account with the obligees £4,822, & in order to enable them to carry on their business, had applied to the obligees to allow them for a time to overdraw such further sums as they should require, so as that same, together with the £4,822, should not exceed in the whole at any one time £5,000, which the obligees had agreed to do, & the condition was for the payment by A. & B., & debt., or any of them, of £4,822, & also such further sums as the obligees should or might thereafter advance to A. & B. in the course of their business, not exceeding in the whole £5,000:—*Held*: not to be avoided by the obligees having allowed A. & B. to overdraw to an amount, together with the £4,822, exceeding £5,000, for the restrictive words in the recital were not to be construed as conditional that if the obligees exceeded the amount the bond should be void.—*PARKER v. WISE* (1817), 6 M. & S. 239; 105 E. R. 1232.

Annotations:—*Consd.* *Gordon v. Rae* (1858), 8 E. & B. 1065. *Refd.* *Laurie v. Scholesfield* (1869), L. R. 4 C. P. 622.

216. — Resp. with others gave a joint & several guarantee to applt. bank limited to £2,500 in respect of overdrafts by a customer. Subsequently he with others gave a joint & several bond reciting a desire for advances to the same customer over & above that amount, & securing repayment of the balance of account current. In an action brought both on the guarantee & bond, the former having been held to be invalid:—*Held*: the condition of the bond,

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o. On condition.—A condition will not be restricted by the recital, unless the intention of the parties as apparent on the whole instrument requires it.—*CANADA PERMANENT BUILDING & SAVINGS SOCIETY v. LEWIS* (1859), 8 C. P. 352.—*CAN.*

214 i. — Limitation—Indemnity bond.—Pltf., as sheriff, sued debts. on a joint & several bond of indemnity given by them to indemnify him against all losses, etc., incurred in respect of the sale of property taken under a writ of execution, issued on a

judgment recovered by debts. against W., the property having been claimed by D. under a bill of sale.

The bond of indemnity recited a "bill of sale, dated — day of Aug., 1883"; while judgment was recovered on a "bill of sale dated Aug. 1, 1881, or, in the alternative, under an assignment dated Jan. 12, 1883."

The condition of the bond bound debts. "from time to time & at all times hereafter, well & sufficiently, to save harmless & keep indemnified the sheriff . . . from & against all losses, costs, charges, damages & expenses . . . by reason of selling the said

property so seized . . . & also from & against all actions . . . or any procedure at law or in equity, which now, or shall or may at any time be brought, commenced or prosecuted rightfully or wrongfully against the sheriff . . . for or by reason or means of the selling of the said property":—*Held*: the words of the condition were not controlled by the recital in such way as to limit the liability of debts. to a claim under the particular bill of sale therein mentioned.—*BONNETT v. RITCHIE* (1887), 20 N. S. R. (8 R. & G.) 228; 8 C. L. T. 396.—*CAN.*

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being plainly to secure repayment of all money advanced by the bank & not merely those in excess of the £2,500, could not be controlled by any recital not plainly inconsistent therewith.—**AUSTRALIAN JOINT STOCK BANK v. BAILEY**, [1899] A. C. 396; 68 L. J. P. C. 95, P. C.

217. — Whether obligor excluded.]—The condition of a bond, after reciting that A. had filed a bill in Ch. against several persons, naming them, & debt., was, that debt. should pay all such costs as the Ct. of Ch. should award to all debts. to the bill:—*Held*: the construction of the condition was that debt. should pay the costs awarded to all or any of debts. except himself.—**VESEY v. MANTELL** (1842), 9 M. & W. 323; 11 L. J. Ex. 99; 152 E. R. 137.

218. — Change in mode of remuneration.]—Deft. as surety executed a bond to a railway co., which, after reciting that the co. had agreed to appoint L. as their clerk or agent, for the purpose of selling coal, at a yearly salary of £100, was conditioned for the due accounting by L. of all money received by him for the use of the co. Subsequently it was agreed between L. & the co. to substitute for such salary a commission of 6d. per ton on all coal for which he should obtain orders. L. having failed to pay to the co. sums which he had received:—*Held*: the condition of the bond was restrained by the recital, so that debt. as surety only undertook to be responsible for the faithful conduct of L. whilst he continued clerk at such fixed salary, & debt. was not liable after the change in the mode of remuneration.—**NORTH WESTERN RY. Co. v. WHINRAY** (1854), 10 Exch. 77; 23 L. J. Ex. 261; 23 L. T. O. S. 163; 2 C. L. R. 1207; 156 E. R. 363; *sub nom.* **LONDON & NORTH WESTERN RY. Co. v. WHINRAY**, 2 W. R. 523.

Annotations:—**Consd.** Sanderson v. Aston (1873), L. R. 8 Exch. 73. **Refd.** Stewart v. M'Kean (1855), 24 L. J. Ex. 145; Holme v. Brunskill (1878), 3 Q. B. D. 495.

See, generally, GUARANTEE.

219. — Whether inconsistent—Rent merged in possession.]—Where pltf. sued on a bond conditioned that debt. should pay to pltf. £10, "which is for a rent of" certain lands:—*Held*: it was no defence that pltf. had entered upon the land and so suspended the rent, for this was but a recital that it was for rent, & was not material.—**SAINT-JOHN v. DIGGS** (1613), Hob. 130; 80 E. R. 279.

220. — Survivor of persons named.]—The condition of a bond, after reciting that A., B., & C. had filed a bill in equity against D. & E., was that the obligor would pay all such costs as the Ct. of Ch. should award "to defendants," on the hearing of the cause:—*Held*: the death of E., before any costs awarded, could not be pleaded in discharge of the bond, the intention being that the obligor should pay all such costs as should be awarded to those who at the hearing filled the

character of debts.—**KIPLING v. TURNER** (1821), 5 B. & Ald. 261; 106 E. R. 1188.

221. — Seised in tail or for life only—Vesting in fee.]—A., & B., & C., his sureties, executed a mtge. bond, which recited that A. was seised in tail of certain premises, & was conditioned that a recovery should be suffered, so as & in such manner as that under & by virtue thereof, & of a release to make a tenant to the *praecipe*, also recited, a fee should be vested in D.:—*Held*: the legal effect of the bond was, that D. should have a fee, & A., being seised for life only, the bond was forfeited.—**EDWARDS v. BROWN** (1831), 1 Cr. & J. 307; 1 Tyr. 182; 9 L. J. O. S. Ex. 84; 148 E. R. 1436.

Annotations:—**Refd.** Foster v. Mackinnon (1869), L. R. 4 C. P. 704. **Mentd.** Wheelton v. Hardisty (1858), 8 E. & B. 285; Lee v. Angas (1866), 15 W. R. 119; Hirschfield v. L. B. & S. C. Ry. Co. (1876), 2 Q. B. D. 1; Favell v. Wright (1891), 64 L. T. 85.

222. On obligation—Indemnity bond.]—The recital in the condition of an indemnity bond, professing to state the agreement between the parties, does not confine the responsibility of the sureties to the limits therein specified.—**SANSOM v. BELL** (1809), 2 Camp. 39, N. P.

Annotation:—**Refd.** Hassell v. Long (1814), 2 M. & S. 363.

223. — Obligation general—Recital specific.]—In construing an agreement in the form of a bond, in which a surety becomes liable for the due fulfilment of an agent's duties which are particularly enumerated, a general clause in the obligatory part of the bond must be interpreted strictly, & controlled by reference to the prior clauses specifying the extent of the agency.—**NAPIER v. BRUCE** (1842), 8 Cl. & Fin. 470; 8 E. R. 184, H. L.

224. On penalty—Limitation.]—Deft., with two others, entered into a bond in the penal sum of £1,000 conditioned for the payment of rent, observance of covenants, etc.; the bond recited (*inter alia*) that pltf. & debt. had agreed to execute a bond in the penalty of £500, for the payment of rent, observance of covenants, etc. Upon action on the bond first mentioned, & verdict for pltf. for £750 due for rent, upon motion to reduce the verdict to £500, the penalty in the second bond agreed to be executed:—*Held*: the penalty of the bond, on which pltf. sued, could not be cut down or restricted by the penalty of the bond to which the recital was alleged to refer.—**INGLEBY v. SWIFT** (1833), 10 Bing. 84; 3 Moo. & S. 488; 2 L. J. C. P. 261; 131 E. R. 837.

See, also, Part VI., Sect. 3, *post*.

SECT. 4.—TRANSPOSAL AND REJECTION OF WORDS AND SUPPLY OF ACCIDENTAL OMISSIONS.

225. Words transposed—Condition unintelligible.]—The condition of a bond was to pay £7 by 2s. a week until all was paid, & if there was failure in payment of the 2s. on any of the days it ought to be paid, the obligation to be void, or

222 i. On obligation.]—The condition of a bond recited a demise of premises by articles of Oct. 5 from A. to C. to hold for one year at a weekly rent payable "during said term," & the condition was, that if C. should keep all the covenants, etc., on his part, "in said articles of agreement above recited," the bond to be void. The articles referred to, varied in some respects from those recited in the condition of the bond. Breaches were assigned in the non-payment of rent for many weeks after the term expired:—*Held*: (1) the case was not to be considered upon the articles, but upon

the recital of them in the condition of the bond; (2) upon the condition & recital C. was not answerable for breaches committed after the first year.—**MANDERS v. LAWLER** (1826), Batt. 191.—IR.

223 i. — Obligation general—Recitals specific.]—A bond given as security for costs, under Election Petitions Act, 1880, s. 4 (5), was prepared in a form to meet the case of a petition by more than one person. The recitals were altered before execution so as to refer to a petition by one petitioner only, whose name was

given; but the condition was left in the form that if the petitioners, or any of them, should pay all costs in respect of the petition signed by them, then the obligation should be void, but otherwise should remain in full force:—*Held*: this was a mere blunder which could not prevent the enforcement of the bond.—**WAIRARAPA ELECTION PETITION**, [1897] 15 N. Z. L. R. 471.—N.Z.

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225 i. Words transposed—Or rejected—Insensible words.]—In order to support the condition of a bond, the ct.

else to remain in full force :—*Held* : the condition should be taken distributively by referring particulars to particulars, viz., if he paid the £7 the obligation should be void, but if he failed to pay 2s. at any of the days, it should be in full force.—*VERNON v. ALSOP* (1663), 1 Lev. 77; 1 Sid. 105; T. Raym. 68; 1 Keb. 356, 451; 83 E. R. 305.

Annotations :—*Folld. Wells v. Ferguson* (1708), 11 Mod. Rep. 191, 199. *Refd. Mills v. Wright* (1677), Freem. K. B. 247.

226. ———.]—To support the condition of an arbn. bond the ct. will transpose or reject insensible words, & construe it according to the obvious intent of the parties.—*BUTLER v. WIGGE* (1667), 1 Saund. 65; 85 E. R. 74.

Annotation :—*Refd. Winter v. White* (1819), 1 Brod. & Bing. 350.

227. Words rejected — Condition unintelligible.]—The condition of a bond was that it should be void, if the obligor did not pay, & performance being pleaded on the ground of the literal expression :—*Held* : the palpable mistake of a word should not defeat the true intention of the parties.—*ANON.* (undated), cited in 1 Doug. K. B. at p. 384; 99 E. R. 247.

228. ———.]—The condition of a bond was as follows :—“That whereas the above bounden, etc., shall & will, etc., where same should have been, if the above bounden, etc., shall & will, etc.” :—*Held* : this was a void condition, the same being altogether insensible, & not compulsory, as the same ought to be, & so the obligation was single, & without condition.—*MARKER v. CROSS* (1613), 2 Bulst. 133; 80 E. R. 1011.

229. ———.]—*BUTLER v. WIGGE*, No. 226, *ante*.

230. ———.]—A bond, with a condition that if the obligor do not pay the money, the bond shall be void, shall be construed to become void on payment of the money.—*MILLS v. WRIGHT* (1677), 1 Freem. K. B. 247; 89 E. R. 177; *sub nom. WELLS v. WRIGHT*, 2 Mod. Rep. 285.

231. ———.]—The condition of an arbn. bond was as follows :—“Whereas the above-bounden J.P. (pltf.) & the above-named J.P. had submitted themselves, etc.” In an action to enforce the award :—*Qu.* : whether the words J.P. after the words “above-bounden” might be rejected.—*PRIDEAUX v. ROBERTS* (1715), 1 Com. 231; 92 E. R. 1048.

232. Words repugnant.]—A bond was as follows :—“Memorandum that I, J., the younger, do acknowledge myself to owe & do promise to pay to my mother, A., £10 at any time after the feast of St. Bartholomew, whensoever she shall require same, if my mother shall be then in life; for the payment whereof I bind myself, my heirs, exors. & administrators to J., the elder, my father by these presents” :—*Held* : a good bond to A., the words binding the obligor to J., the elder, being void.—*HARDMAN v. HARDMAN* (1602), Cro. Eliz. 886; 78 E. R. 111.

233. ———.]—The condition of a bond was as follows :—“The condition of this obligation is such that if the above-bounden W. be, etc., then the condition of this obligation to be void & of none effect, or else same to be in full power & virtue :—*Held* : the words “the condition of” might be rejected as repugnant.—*MAULEVERER v.*

HAWKBY (1670), 2 Saund. 78; 85 E. R. 748; *sub nom. MAULEVERER v. HAWKBY*, 1 Sid. 456; 2 Keb. 625; *sub nom. MAULEVERER v. REDSHAW*, 1 Vent. 39; 1 Mod. Rep. 35.

Annotations :—*Mentd. Collins v. Blantern* (1767), 2 Wills. 341; *Payne v. Brecon Corpn.* (1858), 3 H. & N. 572; *Pickering v. Ilfracombe Ry. Co.* (1868), L. R. 3 C. P. 235.

234. ———.]—By 43 Geo. 3, c. 99, the bond given to the comrs. by a collector of taxes has to be conditioned for demanding the taxes, enforcing the Act, & paying the sums collected to the receiver-general. Deft. was sued on a bond which contained those conditions, & also a condition for accounting & paying to the comrs. :—*Held* : the latter condition might be rejected as surplusage, & did not avoid the bond.—*COLLINS v. GWYNNE* (1831), 7 Bing. 423; 5 Moo. & P. 276; 9 L. J. O. S. C. P. 130; 131 E. R. 163; *subsequent proceedings* (1833), 9 Bing. 544; *sub nom. GWYNNE v. BURNELL* (1835), 2 Bing. N. C. 7, Ex. Ch.; (1840), 7 Cl. & Fin. 572, H. L.

Annotation :—*Mentd. Kepp v. Wiggett* (1848), 6 C. B. 280.

235. Words supplied—Omission in obligation.]—The condition of a bond recited that A. was indebted to B. in various sums of money, which were all stated in pounds sterling, & money of a smaller denomination, & that the bond was given to secure payment of those sums. In the obligatory part of the bond the word pounds was omitted; it merely stated that the obligor became bound in 7,700, without stating what description of money :—*Held* : from the condition the intent manifestly was, that the obligor should become bound in 7,700 pounds, & the word pounds might be supplied.—*COLES v. HULME* (1828), 8 B. & C. 568; 3 Man. & Ry. K. B. 86; 7 L. J. O. S. K. B. 29; 108 E. R. 1153.

Annotations :—*Refd. Hart v. Tulk* (1852), 2 De G. M. & G. 300. *Mentd. Re Vince, Ex p. Trustee* (1892), 41 W. R. 138; *County Hotel & Wine Co. v. L. & N. W. Ry. Co.*, [1918] 2 K. B. 251.

236. Defective condition.]—*VESEY v. MANTELL*, No. 217, *ante*.

237. Effect of omission — “Annually.”]—The condition of a bond was that the obligor should pay the obligee 100 marks during the seven years next ensuing at certain feasts in equal portions. The obligor paid 100 marks during the seven years :—*Held* : although the intention was that the obligor should pay 100 marks each year, yet the want of the word “annually” freed him from paying more than 100 marks altogether.—*ANON.* (1549), Benl. 6; 73 E. R. 935.

238. Amount.]—A bond for £——, without saying how much, is void.—*LOGGINS v. TITHEON* (1612), Yelv. 225; 80 E. R. 147.

SECT. 5.—MISTAKES IN SPELLING AND GRAMMAR.

239. Disregarded.]—*WALTER v. PIGOT* (1602), Cro. Eliz. 896; Moore, K. B. 645; 78 E. R. 1119.

Annotation :—*Distd. Parry v. Dale* (1607), Cro. Jac. 146.

240. ———.]—*MATTHEW v. PURCHINS* (1608), Cro. Jac. 203; 79 E. R. 177.

241. ———.]—*PARKER v. RENNADAY* (1608), 1 Brownl. 62; Cro. Jac. 208; 123 E. R. 666.

Annotation :—*Refd. Cromwell v. Grunsden* (1698), 2 Salk. 462.

242. ———.]—*ELLS v. CLARK* (1611), Cro. Jac. 290; 79 E. R. 249.

will transpose or reject insensible words & construe it according to the obvious intent of the parties.—*GREENE v. BRACKEN* (1851), 2 L. C. L. R. 176.—*IR.*

235 l. Words supplied.—Omission in

A bond for “the sum of two thousand of lawful money of B. C.” is unintelligible when the words stand alone & there is nothing in the document to help in construing them.—*MARSHALL MOTOR CAR CO., LTD. v. MCPHALEN & MCPHALEN*, [1919] 2

W. W. R. 811.—*CAN.*

q. ——— *Name of payee.*—The omission in a bond expressly to say to whom money payable is to be paid, may be supplied by intendment.—*ALLEN v. COY* (1850), 7 U. C. R. 419.—*CAN.*

Sect. 5.—Mistakes in spelling and grammar. Sects. 6 & 7: Sub-sect. 1.]

243. —.]—MARSHAM v. JOLLES (1614), Cro. Jac. 337; 79 E. R. 288.

244. —.]—HIGGINS v. TOTTERDEN (1612), Cro. Jac. 355; 79 E. R. 304; *sub nom.* BIGGINS v. TYTHERTON (1612), Cro. Jac. 309; *sub nom.* LOGGINS v. TITHETON (1612), Yelv. 225.

245. —.]—HULBERT v. LONG (1621), Cro. Jac. 607; 79 E. R. 518.

246. —.]—DOWNS v. HATHWAIT (1635), Cro. Car. 417; W. Jo. 366; 79 E. R. 962.

247. —.]—SCOTT v. STONE (1673), 1 Freem. K. B. 358; 89 E. R. 267; *sub nom.* — v. SCOT, 3 Keb. 255.

248. —.]—ANON. (1676), Freem. Ch. 16; 2 Eq. Cas. Abr. 458, pl. 2; 22 E. R. 1028, L. C.

249. —.]—SIMS v. URRY (1676), 2 Cas. in Ch. 225; 22 E. R. 920, L. C.

Annotation:—Consd. Burn v. Burn (1798), 3 Ves. 573.

250. —.]—SIMMS v. BARRY (1679), Cas. temp. Finch 413; 23 E. R. 225.

Annotation:—Consd. Burn v. Burn (1798), 3 Ves. 573.

251. —.]—HOMES v. BARNEHAM (1701), 12 Mod. Rep. 495; 88 E. R. 1471.

252. —.]—FISHER v. MARSON (1679), 1 Freem. K. B. 261; 89 E. R. 187.

253. —.]—CULL v. SEMAINE (1682), 1 Freem. K. B. 541; 3 Lev. 66; 89 E. R. 405.

Annotation:—Consd. Waugh v. Bussell (1814), 5 Taunt. 707.

254. —.]—DENNIS v. SNAPE (1687), Comb. 60; 90 E. R. 343.

255. —.]—HENDERSON v. FOSTER (1692), 2 Salk. 462; Comb. 187; 91 E. R. 399; *sub nom.* ELDERSEY v. THOMPSON, Skin. 310.

256. —.]—CROMWELL v. GRUMSDEN (1698), 1 Ld. Raym. 335; Comb. 477; Holt, K. B. 502; 2 Salk. 462; 12 Mod. Rep. 193; 91 E. R. 1119; *sub nom.* CRUMWELL v. GRUNSDALE (1696), 5 Mod. Rep. 281.

Annotations:—Refd. Holman v. Burrow (1702), 2 Ld. Raym. 794; Stoddart v. Palmer (1824), 4 Dow. & Ry. K. B. 624.

257. —.]—BEECH v. TREVORS (1701), 12 Mod. Rep. 600; 88 E. R. 1546.

258. *Regarded.*—PARRY v. DALE (1607), Cro. Jac. 146; Yelv. 95; 79 E. R. 128.

Annotation:—Refd. Fisher v. Marson (1679), Freem. K. B.

259. —.]—GREGG v. J. S. (1607), Cro. Jac. 190; 79 E. R. 166.

260. —.]—HILLS v. COOPER (1620), Cro. Jac. 603; 79 E. R. 515.

SECT. 6.—EFFECT OF INDORSEMENT OR COLLATERAL MEMORANDUM.

261. *Indorsement—Of condition—After execution.*—A memorandum by way of condition indorsed on a bond after sealing & delivery is not part of his bond; for if anything may be part of the condition it ought to be written before the sealing & delivery, but it is no condition if it be written after.

Even if the indorsement had been written before the sealing & the delivery, it would have been no good condition.—TAYLOR'S CASE (1627), 11 Ct. 136; 124 E. R. 404.

262. — *Limiting condition—Made before sealing.*—The condition of a bond was to save harmless certain lands from all incumbrances made by the obligor, & on the back of the bond there was also a memorandum written that the condition did not extend to an extent on a statute made by the obligor to a certain person. The extent having

been enforced, the obligee brought an action of debt on the bond:—*Held*: the memorandum was part of the condition joined to it, as an exception indorsed on the bond before sealing by way of explanation of the intention of the parties.—BROKE v. SMITH (1602), Moore, K. B. 679; 72 E. R. 835.

Annotations:—Folld. Burgh v. Preston (1800), 8 Term Rep. 483. *Refd.* R. v. Aldbrough (1849), 13 Q. B. 190.

263. — *Right to sue—Before execution.*—

—A bond was conditioned that the obligor should indemnify the obligee from all the sums the latter should pay, or be liable to pay, on the obligor's account, & before the execution of the bond a memorandum was thereon indorsed, that the obligee "has given an undertaking not to sue upon the bond until after the obligor's death":—*Held*: the memorandum was to be taken as part of the condition, & made the bond in effect payable only by the representatives of the obligor after his death.—BURGH v. PRESTON (1800), 8 Term Rep. 483; 101 E. R. 1503.

Annotation:—Refd. Keele v. Wheeler (1844), 7 Man. & G. 665.

264. — *Extending condition—Time for award—Submission rule of court.*—

Two parties submitted to arbn. by bond, & agreed therein that the submission to the award should be made a rule of ct. Afterwards, by a memorandum indorsed on the bond, after the time of making the award had expired, they agreed that the time for an umpire to make his umpirage should be extended to a future day, but without expressly mentioning that such new submission should be made a rule of ct.:—*Held*: the memorandum was a virtual incorporation of all the terms of the bond not inconsistent therewith, & must be taken as containing an agreement to make the submission a rule of ct., under Arbitration Act, 1698 (c. 15).—EVANS v. THOMSON (1804), 5 East, 189; 1 Smith, K. B. 380; 102 E. R. 1042.

Annotations:—Folld. Greig v. Talbot (1823), 2 B. & C. 179.

Refd. Re Smith & Blake (1838), 1 Will. Woll. & H. 311; Gwynne v. Davy (1840), 1 Man. & G. 857. *Mentd.* R. v. Bingham (1829), 3 Y. & J. 101.

265. — *—*—A declaration in debt on a joint & several bond, in the penal sum of £1,000 conditioned for the performance of an award to be made on or before Feb. 1, averred, that before that time expired, the parties to the bond, by deed poll, indorsed on the back of the bond, agreed to give the arbitrators further time, till Mar. 1, to make their award, & that the award was made within the enlarged time, but not performed by the parties against whom it was made:—*Held*: debt was maintainable upon the bond.—GREIG v. TALBOT (1823), 2 B. & C. 179; 3 Dow. & Ry. K. B. 446; 107 E. R. 350.

Annotation:—Refd. R. v. Bingham (1829), 3 Y. & J. 101.

See, further, ARBITRATION, Vol. II., p. 422.

266. — *Qualifying obligation—Payment of interest.*—A son, being indebted to his father upon a bond for £1,000 & interest, subsequently joined his father, as surety, in a bond for £500 & interest, given by the father to a third party, & a memorandum was then indorsed upon the bond for £1,000, by which it was agreed between the father & son that the son should not be called on to pay the within-mentioned £1,000 until the father should have paid all principal money & interest due on the bond for £500:—*Held*: the indorsement did not affect the interest accruing due upon the bond for £1,000, & after the deaths of the father & son, the personal representative of the father might file a bill against the real & personal representatives of the son, praying for immediate payment of the interest on the bond for £1,000, & for payment of the principal when the principal & interest on the

bond for £500 should have been paid.—**REED v. NORRIS** (1837), 2 My. & Cr. 361; 40 E. R. 678, L. C.

267. Collateral memorandum—Letter of obligee—Time of payment—Payment of interest.]—At the time of executing a bond to secure a sum of money the obligors procured a letter from the obligee, stating his intention not to call in the money within a specified period, if the interest were regularly paid:—*Held*: the letter was a binding undertaking.—**NORTON v. WOOD** (1830), 1 Russ. & M. 178; 39 E. R. 69

Annotation:—**Mentd.** *Owens v. Pizey* (1862), 7 L. T. 350.

268. — Letter of obligee's agent—Implied authority.]—S., the commander of one of the East India Coy.'s ships, on his arrival at Madras in 1832, reported his arrival to the Govt. Board, & that Board, by their secretary, desired him to place himself under the orders of the Marine Board. The Marine Board entered into a treaty with him for the sale to him of a quantity of cotton, the property of the Govt. Board, & he made a proposal to the Marine Board for the purchase of it, which proposal was communicated by the Marine Board, through their secretary, to the Govt. Board. The Govt. Board, by a letter of their secretary to the Marine Board, accepted the proposal with the additional term, that the cotton might occupy the tonnage of the ship, or such part of it as S. might please, "he holding himself subject to the payment of such freight as the coy. shall see fit to demand, for which he must be required to enter into a sufficient agreement." This was communicated to S. by the secretary of the Marine Board, when S. immediately objected to the latter term, & said "that he would not take the cotton if he was to pay any freight for it." Some days then elapsed, when a bond was presented to him for execution, binding him (*inter alia*) to pay freight for the cotton according to the letter of the Govt. Board. He objected to sign the bond, although the secretary of the Marine Board told him that the clause as to freight was inserted as a matter of form only, & that it would not be enforced against him, stating also, that he should have an official letter to that effect. Accordingly the Marine Board, by their secretary, wrote a letter, inclosing the bond for execution, & containing the following clause: "You will be allowed the usual privilege tonnage, & no freight will be charged on the cotton purchased by you from the Govt., as it will be laden in a portion of the co.'s three-fifths, nearly the whole of which is unoccupied." S. thereupon executed the bond:—*Held*: (1) S. was justified in presuming that the Marine Board had the authority of the Govt. Board for writing that letter, & of considering himself safe from the legal effect of the bond; (2) the bond should be controlled by that letter.—**SMITH v. EAST INDIA CO.** (1848), 16 Sim. 76; 17 L. J. Ch. 178; 10 L. T. O. S. 411; 12 Jur. 367; 60 E. R. 801.

See, generally, **AGENCY**, Vol. I., pp. 319–324.

269. — As to bank overdraft & interest.]—The condition of a bond executed by C. & deft. recited that C. had opened, & then kept & proposed to continue to keep, an account with a banking co., of which pltf. was the registered officer, &

that for the security of the bank it had been arranged that C. & deft. should execute the bond. The condition was for payment by C. & deft., or one of them, on demand, etc., of all such sums not exceeding in the whole £1,000, as should from time to time be due & owing on account of cash & bills, etc., & for payment of charges & advances for interest, etc., as usually charged by bankers. At the time of execution of the bond by deft., the balance due from C. was £978 4s. 11d., & that sum formed the commencement of the account secured by the bond, & was continued for several years. When deft. received the bond from the bank she objected that it might make her liable beyond the £1,000, & thereupon it was suggested, by the bank, that if the balance exceeded £1,000 at their half-yearly accounts they should require it to be reduced, or that the amount should be limited to £950, which would leave a sufficient margin for interest, etc. In consequence of deft. still refusing to execute the bond, a memorandum was given her, & annexed to the bond, to the following effect: "C.'s advance to be limited to £950, & [deft.] to be informed if the amount, with interest, shall reach £1,000 & not be reduced within a month." Upon the faith of that, deft. signed the bond. On many occasions the limit of £950 was exceeded; on three occasions the amount of £1,000 was exceeded, without deft. having been informed of it, though it was not reduced within a month, & on one occasion at the half-yearly account, the amount was £1,004 10s. 1d., but was within two days reduced to £1,000. An action having been brought upon the bond to recover from deft. £996 12s. 11d., together with interest & commission usually charged by bankers:—*Held*: (1) the bond did not become inoperative by reason of an advance beyond the stipulated sum, & the words "not exceeding," etc., did not raise any condition or restriction against the bank giving C. a larger credit; (2) the meaning of the memorandum was, that £950 should be substituted for £1,000, as the sum which deft. was bound to pay as principal money under the bond; (3) the above facts could not be relied upon as raising an equitable defence to the action.—**GORDON v. RAE** (1858), 8 E. & B. 1065; 27 L. J. Q. B. 185; 31 L. T. O. S. 55; 4 Jur. N. S. 530; 120 E. R. 396. *Annotation*:—**Mentd.** *Price v. Kirkham* (1864), 3 H. & C. 437.

See, generally, **BANKERS & BANKING**, Vol. III., pp. 295, 296.

SECT. 7.—OF PARTICULAR TERMS.

SUB-SECT. 1.—PAYMENT.

270. Time—Omission of "annually."]—The condition of a bond was that the obligor should pay the obligee 100 marks during the seven years next ensuing at certain feasts in equal portions. The obligor paid 100 marks during the seven years:—*Held*: although the intention was that the obligor should pay 100 marks each year, yet the want of the word "annually" freed him from paying more than 100 marks altogether.—**ANON.** (1549), Berl. 6; 73 E. R. 935.

PART V. SECT. 6.

r. Collateral memorandum—Varying condition.]—To an action on a bond deft. cannot set up as a defence a separate agreement not under seal, varying the condition from that which the bond itself imports, & alleged to have been entered into at the same time with the making of the bond.—**CRAMER v. HODGSON** (1846), 3 U. C. R.

174.—CAN.

a. Verbal agreement—Before execution—Varying construction.]—A bond recited that D. had been appointed agent of A. The condition of the bond was that D. should from time to time & at all times thereafter, faithfully execute the office of agent to A. & pay over all moneys, etc. There was a verbal agreement between

A. & D. before making the bond that the latter's appointment was to be for a year. In an action on the bond:—*Held*: the verbal agreement, that the agency was to be for a year, was at variance with the construction of the bond.—**CANADA LIFE ASSURANCE CO. v. CALKINS** (1884), 24 N. B. R. 276.—**CAN.**

Sect. 7.—Of particular terms: Sub-sects. 1 & 2.]

271. — “February 29 next following.”]—The condition of a bond was that A. should deliver to B. twenty quarters of corn Feb. 29 next following. The next Feb. had but twenty-eight days:—*Held*: A. was not bound to deliver the corn until such a year as was leap year.—ANON. (1588), 1 Leon. 101; 74 E. R. 94.

272. — Day & month “next ensuing.”]—A bond dated Oct. 13, 1589, to pay £20, of “lawful English money which shall be in 1599, in & upon Oct. 13 next ensuing the date hereof” must be construed to mean Oct. 13 in 1599.—SHARPLUS v. HANKINSON (1595), Cro. Eliz. 420; Gouldsb. 187; 78 E. R. 661.

Annotation:—*Refd.* Graves v. Ashenhurst (1673), Freom. K. B. 77.

273. — —.]—If a bond bear date May 1, conditioned to pay money on May 15 “next ensuing,” this shall have relation to the day & not to the month.—PRESCOT v. — (1622), Cro. Jac. 646; 79 E. R. 558.

Annotation:—*Refd.* Buckley v. Guildbank (1623), Cro. Jac. 678.

274. — —.]—A bond dated May 5 was conditioned for the obligor to pay £20 on May 11 “next ensuing”:—*Held*: the eleventh day of the same May was meant, & not the next May.—ANON. (1622), 2 Roll. Rep. 255; 81 E. R. 783.

275. — —.]—If an agreement be made on May 23, to lend money for a year at legal interest, & the lender take a bond of that date for payment of principal & interest on May 24 “next ensuing,” it shall not be construed usurious, if it appear to be a mere mistake of the scrivener, & not a usurious intention in the parties, for the words “next ensuing” shall refer to the month & not to the day.—BUCKLEY v. GUILDBANK (1623), Cro. Jac. 678; 79 E. R. 587.

Annotation:—*Refd.* Murray v. Harding (1773), 2 Wm. Bl. 859.

276. — Day & month “next following.”]—In debt on a bond dated Mar. 20, to pay Mar. 28 “then next following,” it shall be intended, after verdict, to mean the current month.—LISTER v. STANLEY (1674), 1 Mod. Rep. 112; 3 Keb. 291; 86 E. R. 771.

277. Annuity—After fixed sum—Limitation of payments.]—The condition of a bond was to pay £15 on Michaelmas Day next following & £15 annually on Michaelmas Day until H., pltf.’s chaplain, were advanced to a benefice. H. was advanced to a benefice before the first Michaelmas Day:—*Held*: the obligor was bound to pay the first £15, for the limitation, “until he were advanced, etc.” went only to the other subsequent payments.—WARWICK (COUNTESS) v. COVENTRY (BP.) (1596), Cro. Eliz. 549; 2 And. 65; Noy, 64; 78 E. R. 795.

278. — Until induction to living.]—A bond for performance of a covenant to pay an annuity, until a person should be in the enjoyment of a benefice which he might hold during his life of the yearly value of £600:—*Held*: to be satisfied by his induction to a living of that value, accompanied by a bond to resign in favour of either of two sons of the patron when qualified to take it, but liberty given to take the opinion of a ct. of law.—*Ex p.* RAINIER, ROWLATT v. ROWLATT (1820), 1 Jac. & W. 280; 37 E. R. 382, L. C.

Annotation:—*Refd.* Fletcher v. Sondes (1827), 1 Bl. N. S. 144.

Validity of resignation bonds, see Part III., Sect. 3, sub-sect. 4, *ante*.

279. — Until sufficiently provided for.]—A grandfather, in consideration of a bond from the

father to grant him an annuity of £50 during his life, entered into a counter bond with the father conditioned for payment to the son of a like annuity “in case he was not sufficiently provided for during the life of the grandfather, exclusive of any allowance from his father.” The son obtained, through some other interest, a place in the Ordnance office, with a salary exceeding the amount of the annuity:—*Held*: that was not a sufficient provision within the bond, being an office only during pleasure, whereas the provision in the contemplation of the parties must have been one of a permanent nature.—PECHE v. SMITH (1817), 3 Mer. 312; 36 E. R. 120.

280. — To mother & children jointly—Death of child.]—The father of two illegitimate children executed a bond conditioned for payment of an annuity of £30 for the support of them & their mother during their joint natural lives or, in case of the death of the children, during the natural life of the mother. One of the children having died:—*Held*: the exor. of the obligor was liable on the bond for the arrears of the annuity accruing after the death of that child, on the ground that it was the manifest intention that the annuity should be payable at all events during the life of the mother.—JAMES v. TALLENT (1822), 5 B. & Ald. 889; 1 Dow. & Ry. K. B. 548; 106 E. R. 1416.

281. — To wife after death of husband.]—R. executed a bond conditioned for payment of an annuity of £250, in case C., the intended wife of J., should survive him, for her use, provided J. should hold a commission in the army at the time of his death, & there should be issue of the marriage then living. C. & several children survived J., who at the time of his death held a commission as colonel in the army, but received no pay in respect thereof, though he was liable to be called into service:—*Held*: the annuity was payable to his widow during her life.—GREY v. GREY (1843), 12 L. J. Ch. 458.

282. By instalments—Penalty—Separate obligations.]—A bond to pay by instalments, “& for payment hereof I bind myself in £10 *nomine pence*”:—*Held*: two several obligations.—ANON. (1600), Cro. Eliz. 771; 78 E. R. 1002.

283. — — Default.]—The condition in a bond required by a loan society from borrowers of money, to secure repayment, provided that when & so often as the borrower should make default in payment of any of the monthly instalments, he should pay to the society 1s. in the pound for each & every pound of the instalment so left unpaid. The society claimed not only 1s. in the pound, for the month in which default was made, but for all subsequent months during which it remained unpaid, & also 1s. in the pound for every fractional part of a pound:—*Held*: they were entitled only to 1s. in the pound for the month in which default was made, & they could take nothing on the fraction of a pound.—THREE TOWNS BRITISH MUTUAL DEPOSIT & LOAN SOCIETY LTD. v. DOYLE (1862), 13 C. B. N. S. 290; 1 New Rep. 26; 7 L. T. 276; 11 W. R. 22; 143 E. R. 116.
Amount recoverable generally, see Part VIII., *post*.

284. To what person—Executors—Includes administrators.]—A bond was conditioned for payment after M.’s death to his exors. M. died without exors.:—*Held*: “exors.” comprehended “administrators,” & payment must be made to his administrators.—MANNINGHAM’S CASE (1628), Het. 115; 124 E. R. 386.

285. — To daughter if no son—Posthumous son—Relief in equity.]—A. gave a bond to pay

£900 to his daughter in case he should have no son living at the time of his decease, & he died, his wife being great with a son:—*Held*: in equity the daughter should not have the £900, for although there was no son living at his decease, so that it was not recoverable at law, yet it could not be presumed to be A.'s intention, that if a son were born after his decease the daughter should run away with the estate.—*GIBSON v. GIBSON* (1698), 2 Eq. Cas. Abr. 184; *Freem. Ch.* 223; 22 E. R. 159. *Annotation*:—*Reid. Villar v. Gilbey*, [1907] A. C. 139.

286. "Payments" under lease—Includes rent.]—Debt upon bond to make all payments & perform all covenants & conditions of a lease, to which the bond was collateral. Breach that rent was not paid:—*Held*: "payments" implied rent, & pltf. was entitled to judgment.—*POLSON v. WARREN* (1628), *Palm.* 490; 81 E. R. 1186.

287. Advances on shares.]—In the condition of a bond it was recited that pltfs. were shareholders in the S. co., that 30 per cent. had been paid by instalments upon the shares, that pltfs. had agreed to pay up the remaining instalments forthwith, that M., W., & H. had agreed to purchase the shares, & that the price was to be secured by the joint bond of M. & deft. The condition of the bond was, that M. & deft. should pay pltfs. the amount of the shares, together with interest thereon from the time of the advance or payment thereof by pltfs. Pltfs. being also shareholders & treasurers of the P. co., which co. was indebted to them in £12,000, prevailed on the S. co. to purchase the pipes of the P. co.; & to effect payment for the pipes, pltfs., without any calls having been made, entered up in their books as paid, the remaining 70 per cent. due on the S. co.'s shares, & having made the entry, paid the P. co., deducting & transferring to their own account, enough to discharge the debts due from the P. co. to themselves. In an action against deft. for the sum claimed in respect of the sale of the shares of the S. co., the jury having found for pltfs.:—*Held*: pltfs. had advanced or paid the money for the shares, within the terms of the condition of the bond, & new trial refused.—*EVERETT v. EYRE* (1824), 2 Bing. 166; 9 Moore, C. P. 326; 3 L. J. O. S. C. P. 238; 130 E. R. 269.

288. On future event—Option.]—Debt on bond. The condition, after reciting that the obligor was about to marry with A., a widow, & thereby to become possessed of a stock-in-trade, & it was agreed that he should execute a bond to pay to the children of A. by her late husband £300 within twelve months after her death, in the event thereafter specified, was, that "if the obligor should, within twelve months after the decease of A. pay to her children £300, if, upon an account taken, the stock-in-trade & effects in the business, if then carried on by the obligor, should amount to £400, but in case, upon such account to be taken, the stock-in-trade should amount to less than £400, then if the obligor should pay to the children of A. £120, the bond should be void." Plea, that long before the death of A. the obligor retired from & ceased to carry on the trade:—*Held*: the true construction of the condition of the bond was, that the obligor had an option to continue or discontinue the trade during the life of A., & he having discontinued it, the event on which the money was to come to the children of A. had never happened, & the plea was good.—*BESWICK v. SWINDELLS* (1835), 3 Ad. & El. 868; 5 Nev. & M. K. B. 378; 5 L. J. Ex. 287; 111 E. R. 643, Ex. Ch.

Annotations:—*Reid. Tasker v. Shepherd* (1861), 6 H. & N. 575. *Mentd. Newton v. Wilmot* (1841), 8 M. & W. 711.

289. Amount recoverable—Mistake in calculation.]—A bond with a penalty of £288 was conditioned for delivery of 35,000 tiles to the value of £144 at 15s. 6d. a thousand. The number of tiles at the price mentioned did not amount to that sum, & was inserted in mistake for 185,000:—*Held*: it being plain that the intent was to satisfy a debt of £144, the bond was good for that sum.—*HOLMES v. IVY* (1678), 2 Show. 15; 89 E. R. 764.

290. — Foreign money.]—Upon a bond in which a foreigner binds himself by his description as a foreigner in so much "*legalis monetae prae dictae*" with a condition for the payment of foreign money, he is only bound in foreign money.—*BASS v. FIRMEN* (1701), 1 Ld. Raym. 697; 91 E. R. 1364. *Annotation*:—*Mentd. Melchart v. Halsey* (1771), 3 Wils. 149.

291. — Loans by five bankers—Further advances by four survivors.]—A bond conditioned to repay to five persons all sums advanced by them or any of them in their capacity of bankers, will not extend to sums advanced after the decease of one of the five by the four survivors, the four then acting as bankers.—*WESTON v. BARTON* (1812), 4 Taunt. 673; 128 E. R. 495.

Annotations:—*Consd. Simson v. Cooke* (1824), 1 Bing. 452. *Reid. Backhouse v. Hall* (1865), 34 L. J. Q. B. 141.

292. — Dues to Lincoln's Inn—Non-practising barrister.]—Under a bond conditioned for due payment to the society of Lincoln's Inn of all such sums as should from time to time become due & payable, according to the customs & orders of the society, the obligor cannot dispute such payments as were, at the time of the execution of the bond, considered as dues to the society, although he has not lived in the Inn or practised at the Bar.—*ROSSLYN (LORD) v. JODRELL* (1815), 4 Camp. 303; 1 Stark. 148.

—.]—*See, further, Part VIII., post.*

SUB-SECT. 2.—INDEMNITY.

293. Upon proof of loss—After demand.]—Where deft. gave a bond undertaking that if his son, apprenticed to pltf., embezzled any of pltf.'s property, he would pay same to pltf. within three months after demand, upon due proof thereof:—*Held*: the proof preceded payment, & pltf. was not entitled to sue until three months after proof & notice to deft.—*COKAIN v. GOODLAGE* (1810), 1 Bulst. 40; 80 E. R. 744.

294. Incumbrance—Grant of presentation—Ouster.]—A. granted the presentation to a church to pltf., & gave him a bond conditioned to make good the grant from all incumbrances made, or to be made, by him & his heirs. On A.'s death, the church becoming void, A.'s heir presented:—*Held*: (1) such tortious presentation was no breach of the condition, which extended only to lawful disturbances by the heir, who in the present case had no right to present; (2) if the condition had been that he should peaceably enjoy from any act, or acts, made by him or his heirs, a tortious disturbance would have been a breach of the condition.—*HUNT v. ALLEN* (1621), *Win.* 25; 124 E. R. 21.

295. — By third party—Wrongful entry.]—The condition of a bond, which recited the purchase from W. by pltfs. of land, was to save them & the land harmless from all manner of mtges., judgments, extents, executions, & other incumbrances, had & obtained, or thereafter to be had & obtained, by T., or any other person:—*Held*: it bound the obligor against the wrongful entry of T., being particular against the acts of a particular person.—

**Sect. 7.—Of particular terms: Sub-sects. 2, 3 & 4
Part VI. Sect. 1: Sub-sects. 1 & 2.]**

NASH v. PALMER (1816), 5 M. & S. 374; 105 E. R. 1088.

Annotations:—*Consd.* Fowle v. Welsh (1822), 1 B. & C. 29.
Mentd. Shaw v. Stanton (1858), 30 L. T. O. S. 352.

296. Debts by wife after separation.]—Declaration on bond. Plea that it was conditioned for performance of covenants, which were to indemnify the obligee from alimony & debts incurred by his wife after their separation, & that deft. had performed the covenant. Replication that a judgment was recovered against the obligee by a creditor of his wife, & he paid the debt & costs, of which deft. had notice:—*Held*: (1) deft. was liable for the costs as the debt paid by pltf. for the covenant to indemnify was general, & it was not necessary for pltf. to give notice that an action was commenced; (2) if it had been necessary, pltf. must have recovered on the pleadings, for deft. had admitted notice.—**DUFFIELD v. SCOTT** (1789), 3 Term Rep. 374; 100 E. R. 628.

Annotations:—*Consd.* Amory v. Brodrick (1822), 5 B. & Ald. 712; Jones v. Williams (1841), 7 M. & W. 493; Lloyd v. Mostyn (1842), 6 Jur. 974; Gray v. Lewis, Parker v. Lewis (1873), 8 Ch. App. 1035. *Refd.* Smith v. Compton (1832), 3 B. & Ad. 407; Penley v. Watts (1841), 7 M. & W. 601. *Mentd.* Tildasley v. Stephenson (1834), 10 Bing.

SUB-SECT. 3.—PERFORMANCE OF AGREEMENT OR COVENANTS.

297. Waste.]—In debt upon a bond the condition was to perform all covenants & agreements. Pltf. had covenanted with deft. that it should be lawful for deft. to cut down wood for firebote & hedgebote without making any waste or cutting more than was necessary; the breach of covenant, which was the covenant of pltf., assigned was committing waste:—*Held*: the condition was broken, for it was the agreement of the lessee, although it was the covenant of the lessor, pltf.—**STEVINSON'S CASE** (1589), 1 Leon. 324; 74 E. R. 295.

Annotations:—*Consd.* Saltoun v. Houstoun (1824), 1 Bing. 433; Iven v. Elwes (1854), 3 Drew. 25.

298. Proviso to covenant—Payment.]—The condition of a bond was for the performance of all covenants, payments, articles & agreements comprised in a specified deed. The deed was a deed of feoffment whereby deft. in consideration of £110 had infeoffed pltf. of certain land, with a proviso that on payment of money at such a day the deed should be void, & he might re-enter. Pltf. assigned as a breach that deft. did not pay the money at the day named according to the proviso:—*Held*: the bond was not forfeited by non-payment of the money at the day, for there was no covenant in the deed to pay money, the proviso merely giving deft. the option to get the land back on paying the money if he chose, so that there was not a "payment" within the covenant.—**BRISCOE v. KING** (1611), Cro. Jac. 281; 79 E. R. 241.

SUB-SECT. 4.—MISCELLANEOUS TERMS.

299. To deliver possession on request—Assignment to joint tenants—Request by one.]—Where the condition of a bond was that R. should deliver possession of a farm to pltf. or his assigns, upon being requested by pltf. or his assigns, & pltf. assigned his reversion to two joint tenants:—*Held*: a request by one joint tenant was sufficient.—**LINGEN v. PAYN** (1617), J. Bridg. 128; 123 E. R. 1250.

300. Maintenance—Action against obligee.]—Where deft. bound himself not to assist a certain person in any actions brought by him against pltf.:—*Held*: (1) the bond applied only to maintaining such person in his proper suits against pltf., & not to a case in which pltf. had sued deft. & such person jointly, & deft. & such person had afterwards brought a writ of error; (2) deft. might have bound himself by express words not to bring a writ of error, but the law would not imply such a term on such general words as those used.—**LAMB v. THOMPSON** (1618), Hob. 304; Hut. 40; 80 E. R. 448.

301. Bailiff's returns of warrants—Executed within hundred.]—A bond recited that pltf. was sheriff of S. & had made T. his bailiff of the hundred of B. Condition that if he should execute his office, etc., & make true returns of all warrants directed to him, then, etc.:—*Held*: though the words of the condition were general, to make return of all warrants directed to him, they must be taken to mean only such warrants as were to be executed within the hundred of which he was made bailiff.—**STOUGHTON v. DAY** (1647), Aleyn, 10; Sty. 18; 82 E. R. 887.

Annotations:—*Consd.* Arlington v. Merricke (1672), 2 Saund. 411. *Distd.* Weston v. Mason, Weston v. Chapman (1765), 3 Burr. 1725. *Consd.* Wright v. Russell (1774), 3 Wils. 530; Barclay v. Lucas (1784), 1 Term Rep. 291, n.

302. Friendly society committee—Split in society—Two committees.]—By one of the original rules of a friendly society it was ordered that the meetings should be held at a certain public-house, & the club box, containing the society's money, securities, etc., was deposited in the hands of deft., the master of the inn, who entered into a bond to the clerk of the peace, with condition that he, his heirs, etc., would at any time thereafter, when required to do so by a majority of the society at one of their annual, or quarterly meetings, or by their committee for the time being, return & deliver to the committee for the time being of the society, for the use of the society, the society's box, & all their securities, etc., which should have been deposited therein, or otherwise delivered to deft. for the use of the society, uninjured, & in the same manner, plight, & condition that same were, or should be in, when so delivered to him, etc., & likewise would render a just & true account according to the rules, orders & regulations of the society, & of 33 Geo. 3, c. 54. All the members of the society, except twenty-seven or twenty-eight, who continued to assemble at the old house, & appointed a second committee out of their number, removed their meetings to another inn, in pursuance of a resolution carried by them at an extraordinary general meeting, convened at the first house by the legally appointed committee for the time being, & of which six days' public notice had been given, but deft. refused to deliver up the box to the same committee, who had made a formal requisition of it, broke it open, & took out the contents. In an action against him on the bond for the non-delivery:—*Held*: he had committed a breach in refusing to deliver up the box, etc., to the committee, for the time being, who were, in the circumstances, authorised in demanding it, & the last words of the condition were not to be connected with their demand.—**WYBERGH v. AINLEY** (1824), M'Cle. 669; 148 E. R. 280.

303. Termination of liability—Specific notice.]—A bond given to secure an account contained a provision that a month's notice in writing might be given by the obligors, "or their respective representatives," in order to determine the

liability. Notice of the death of an obligor was given by his exor. to the holders of the bond, but no special notice was given to determine the liability, of which the exor. was wholly unaware:—*Held*: the word “representatives” included “legal personal representatives,” & as the special notice contemplated by the bond had not been

given, the estate of the deceased obligor was liable for his contribution under the bond.—*Re SILVESTER, MIDLAND RY. CO. v. SILVESTER*, [1895] 1 Ch. 573; 64 L. J. Ch. 390; 72 L. T. 283; 43 W. R. 443; 39 Sol. Jo. 333; 13 R. 448.

Annotation:—*Reid. Re Crace, Balfour v. Crace*, [1902] 1 Ch. 733.

Part VI.—Operation and Incidents.

SECT. 1.—NATURE OF OBLIGATION.

SUB-SECT. 1.—IN GENERAL.

304. Trust.—A mother gave a bond to her son, conditioned to surrender a copyhold estate to him, of which she was heir:—*Held*: she was a trustee for her son.—*ALISON'S CASE* (1723), 9 Mod. Rep. 62; 88 E. R. 317.

305. “Debt.”—Common Law Procedure Act, 1854 (c. 125).—D., having induced C. to sue J., gave C. a bond for £200, conditioned for payment to J. of such costs as C. should be liable to pay in case he should be defeated in such suit. A non-suit was entered in the action, & the costs of J. were taxed at £199 1s. 10d.:—*Held*: the bond was a mere covenant of indemnity, & the penalty therein named, being for an unliquidated amount, did not constitute a “debt” within ss. 61, 64, of the Act, so that it might be attached by J.—*JOHNSON v. DIAMOND* (1855), 11 Exch. 73; 24 L. J. Ex. 217; 25 L. T. O. S. 85; 1 Jur. N. S. 938; 3 W. R. 407; 3 C. L. R. 1010; 156 E. R. 750; *subsequent proceedings*, 11 Exch. 431.

Terms creating obligation.—*See* Part III., Sect. 1, *ante*.

306. Bond to Crown under 33 Hen. 8, c. 39.—By a bond given to the Crown under the above Act all the lands of the obligor are bound from its date, & as such bond is a voluntary act, the obligor cannot by mortgaging any portion of his lands, even under a power of appointment contained in a deed prior to the bond, render them free from liability under an extent subsequently issued on the bond.—*ELLIS v. R.* (1851), 6 Exch. 921; 20 L. J. Ex. 348; 18 L. T. O. S. 7; 15 Jur. 917; 155 E. R. 820, Ex. Ch.; *affg.*, *R. v. ELLIS* (1849), 4 Exch. 652.

SUB-SECT. 2.—SPECIALTY DEBT.

See, now, Conveyancing & Law of Property Act, 1881 (c. 41), s. 59.

307. Whether heir bound.—A grant by A. of an annuity to B. & his heirs for thirty years to commence at A.'s death, binds A.'s heir, & so it is of an obligation to be paid forty years after.—*CLOTWORTHY v. CLOTWORTHY* (1629), Het. 137; Cro. Car. 436; 124 E. R. 404; *sub nom.* *TEWKLEY v. CLOTHWORKER*, Litt. 245.

308.—Where a bond was entered into in £1,600 to perform covenants in an indenture for payment of £77 a year until £1,100 was paid:—*Held*: the £1,100 & interest ought to be paid by

the heir of the obligor.—*WAKE v. CALLEY* (1662), 1 Rep. Ch. 201; 21 E. R. 550.

309.—Exors. are bound by their testator's bond, though they be not named, but the heir is not bound unless the bond is expressed to bind him.—*HUNT v. SWAIN* (1665), 1 Keb. 890; 1 Lev. 165; 1 Sid. 248; T. Raym. 127; 83 E. R. 1303.

Annotation:—*Reid. Jackson v. Pesked* (1813), 1 M. & S. 234.

310.—An *assumpsit* is not maintainable against an heir on a promise to pay money due upon the bond of his ancestor, unless the heir was expressly bound in the bond.—*BARBER v. FOX* (1671), 2 Saund. 136; 1 Vent. 159; 2 Keb. 836; 85 E. R. 860.

Annotations:—*Consd. Jackson v. Pesked* (1813), 1 M. & S. 234.

Distd. Lee v. Muggeridge (1813), 5 Taunt. 36. *Reid. Liversidge v. Broadbelt* (1859), 28 L. J. Ex. 332. *Mentd. Stream v. Seyer* (1696), 1 Ld. Raym. 111; *Crouther v. Oldfeld* (1706), 1 Salk. 364; *Loyd v. Lee* (1718), 1 Stra. 94; *Morton v. Burn* (1837), 7 Ad. & El. 19; *England v. Davidson* (1840), 9 L. J. Q. B. 287.

311.—If one binds himself & his heirs, the heir's lands are chargeable as he is terre tenant, & not as heir.—*ANON.* (1700), 12 Mod. Rep. 404; 88 E. R. 1410.

312.—Where a man gives a bond for himself “& his heirs,” the obligee is entitled to priority, in respect of the real estate, over creditors by specialty, in which the “heirs” are not bound.—*JENKINS v. ROBERTSON* (1853), 1 Eq. Rep. 123; 22 L. J. Ch. 874; 1 W. R. 298; *sub nom.* *RICHARDSON v. JENKINS*, 1 Drew. 477; 17 Jur. 446; *subsequent proceedings* (1854), 2 Drew. 351.

Annotation:—*Mentd. Holland v. Holland* (1869), 4 Ch. App. 450, n.

313.—T., the heir-at-law & exor. of a bond debtor, entered into possession of his real estates, & admitted assets & died, before 1833, having devised his real estates to A., whom he appointed extrix. A. paid interest on the bond up to her death in 1834, & interest was afterwards paid by her exors. Upon a bill filed within twenty years after the death of A., seeking payment of the bond out of the real estates of T. & A.:—*Held*: (1) the debt was the personal debt, but not the specialty debt of T., & the creditors were not entitled to have it paid out of his real estates: (2) the debt was not the debt of A., unless by reason of her *devastavit*, the remedy for which was barred by Stat. Limitations.—*THORNE v. KERR* (1855), 2 K. & J. 54; 25 L. J. Ch. 57; 26 L. T. O. S. 233; 2 Jur. N. S. 322; 4 W. R. 131; 69 E. R. 691.

Annotations:—*Distd. Re Baker, Collins v. Rhodes, Re Seaman*,

PART VI. SECT. 1, SUB-SECT. 1.

304 i. Trust.—W. gave his wife M. a bond conditioned that his exors. should make certain payments to M., & bound himself “to make full provision for her” in his will: & in the event of his not making a will “this” should “be full authority” to his exors. to make such payments. The obligation was to be null & void on

the exors. making the specified payments:—*Held*: the bond could not be regarded as a declaration of trust.—*GLASS v. BURT* (1884), 8 O. R. 391.—*CAN.*

PART VI. SECT. 1, SUB-SECT. 2.

307 i. Whether heir bound.—A bond purporting to bind the obligor & his heirs, & payable 6 months after the

obligor's death, cannot be enforced against the obligor's lands.—*ANDERSON v. PAINE* (1867), 14 Gr. 110.—*CAN.*

307 ii.—An obligor bound himself & his heirs for the maintenance of B.:—*Held*: the bond, although naming the heir, was not a charge on real estate.—*MCLELLAN v. MCLELLAN* (1879), 1 R. & G. 80.—*CAN.*

Sect. 1.—Nature of obligation: Sub-sects. 2 & 3.
Sect. 2.]

Rhodes v. Wish (1881), 20 Ch. D. 230. *Follid. Re Gale*, Blake v. Gale (1883), 22 Ch. D. 820. *Consd. Re Marsden*, Bowden v. Layland, Gibbs v. Layland (1884), 26 Ch. D. 783; *Re Hyatt*, Bowles v. Hyatt (1888), 38 Ch. D. 609; *Lacons v. Warmoll*, [1907] 2 K. B. 350; *Re Blow*, St. Bartholomew's Hospital v. Cambden, [1914] 1 Ch. 233.

SUB-SECT. 3.—MERGER.

See, generally, CONTRACT; MORTGAGE.

314. Of simple contract debt.]—To *assumpsit* debt. may plead a bond given for the recovery, for the bond determines the contract.—*ACTON v. SYMON* (1635), Cro. Car. 414; 79 E. R. 960.

315. — Collateral agreement.]—Pltf. brought an action on a special agreement entered into by debt., whose brother was in prison. The agreement given in evidence upon the opening of the cause was only verbal, that pltf. should endeavour to procure debt.'s brother a pardon, & that in consideration debt. should give pltf. £1,000 if he succeeded, & what his labour was worth if he should not. Debt. produced a bond of £2,000 in evidence, with condition that debt. should give pltf. & H. £1,000 if the pardon should be procured in six months. The bond was afterwards cancelled, but it was contended that it drowned the first agreement:—*Held*: pltf. might give further evidence that the intent of the bond was only to reduce one part of the agreement into writing, as it was the chief, & bring H. to witness that.—*BROWN v. HATCH* (1729), 1 Barn. K. B. 321; 94 E. R. 218.

316. — —.]—In the case of a bond given by one of several joint debtors, the legal effect of which is to merge the simple contract debt:—*Qu.*: whether this effect can be controlled by the parties agreeing by a separate instrument that such bond shall be deemed a collateral security only, & that all remedies shall remain for the simple contract debt as if the bond had not been taken.—*OWEN v. HOMAN* (1851), 3 Mac. & G. 378; 20 L. J. Ch. 314; 18 L. T. O. S. 45; 15 Jur. 339; 42 E. R. 307, L. C.; *affd.* on different grounds (1853), 4 H. L. Cas. 997, H. L.

Annotations:—*Mentd.* *Newton v. Chorlton* (1853), 2 Drew. 333; *North British Insce. v. Lloyd* (1854), 10 Exch. 523; *Davies v. Stainbank* (1855), 6 De G. M. & G. 679; *Price v. Barker* (1855), 4 E. & B. 760; *Gardner v. Chapman* (1860), 6 Jur. N. S. 1254; *Way v. Hearn* (1862), 11 C. B. N. S. 774; *Lee v. Jones* (1864), 17 C. B. N. S. 482; *Bateson v. Gosling* (1871), L. R. 7 C. P. 9; *Oriental Financial Corp'n. v. Overend, Gurney* (1871), 7 Ch. App. 142; *Muir v. Crawford* (1875), L. R. 2 Sc. & Div. 456; *Duncan, Fox v. North & South Wales Bank* (1880), 6 App. Cas. 1; *Rouse v. Bradford Banking Co.*, [1894] 2 Ch. 32; *Nicholas v. Ridley*, [1904] 1 Ch. 192; *Viola v. Anglo-American Cold Storage Co.*, [1912] 2 Ch. 305.

317. — Intention of parties.]—A bond or covenant given to secure an existing debt, irrespectively of the intention of the parties, operates in law as a merger of the remedy on the simple contract.—*PRICE v. MOULTON* (1851), 10 C. B. 561; 20 L. J. C. P. 102; 15 Jur. 228; 138 E. R. 222.

Annotations:—*Consd.* *Boaler v. Mayor* (1865), 19 C. B. N. S. 76; *Stamps Comr. v. Hope*, [1891] A. C. 476. *Refd.* *Westmorland Green & Blue Slate Co. v. Feilden* (1891), 60 L. J. Ch. 680; *Wegg-Prosser v. Evans* (1894), 63 L. J. Q. B. 728.

318. — Sums due or to become due—Pay-ment after notice.]—Deft. opened an account with a banking co. in July, 1834, & in Oct., together with a surety, signed & delivered to the managing directors of the co. a bond, reciting that certain title deeds had been deposited with the co., & conditioned for payment by the obligors to the co., at the expiration of a three calender months'

notice, all such sums of money not exceeding £5,000 as should at the time of the demand be due & owing to the co. in respect of advances already made or thereafter to be made by the co. for or on account of debt., together with interest etc.:—*Held*: the co. were not precluded by the bond from suing debt. in *assumpsit*.—*HOLMES v. BELL* (1841), 3 Man. & G. 213; 3 Scott, N. R. 479; 133 E. R. 1120.

Annotations:—*Apld.* *Norfolk Ry. Co. v. M'Namara* (1849), 3 Exch. 628. *Distd.* *Price v. Moulton* (1851), 10 C. B. 561. *Refd.* *Bingham v. Corbitt* (1863), 11 W. R. 232; *Chetwynd v. Allen*, [1899] 1 Ch. 353.

319. — — —.]—Deft. being indebted to pltf. on simple contract, executed, with sureties, a bond in the penal sum of £2,000, whereby, after reciting that pltf. had agreed to give debt. time for payment of the debt then owing, & of such further sums as might afterwards become due, the condition was, that, if debt. should pay pltf. the sum then due, & such further sums as might become due, or in case debt. should make default, & the sureties should, within one month after notice, pay pltf. the sum due, not exceeding £1,000, or, if no notice should be given, the bond to be void:—*Held*: no merger, & pltf. might, notwithstanding the giving of such bond, recover the amount of the original debt in an *indebitatus* count for the carriage of goods.—*NORFOLK RY. CO. v. M'NAMARA* (1849), 3 Exch. 628; 154 E. R. 996.

Annotations:—*Distd.* *Price v. Moulton* (1851), 10 C. B. 561. *Refd.* *Chetwynd v. Allen*, [1899] 1 Ch. 353.

SECT. 2.—LIABILITY OF SEVERAL, JOINT, AND JOINT AND SEVERAL OBLIGORS.

320. Several—Joint claimants.]—Where joint claimants submit to an arbn., & enter into separate bonds to the opposite party, to abide by the award, if the award be that such joint claimants shall do an entire thing, each of them is bound for the performance of the whole award, although their bonds were several.—*HAYES v. HAYES* (1636), Cro. Car. 433; 79 E. R. 976.

Annotations:—*Refd.* *Lynch & Templeman v. Clemence* (1700), 1 Lut. 571. *Mentd.* *Thorp v. Thorp* (1701), 12 Mod. Rep. 455; *Elletson v. Cummins* (1740), 2 Stra. 1144.

321. — Drawn as joint by mistake.]—Relief was granted in equity, on an instrument which had been drawn by mistake as a joint bond, & in respect of which the remedy at law was gone, the nature of the transaction implying the obligee's right to demand the consideration from the parties severally.—*BISHOP v. CHURCH* (1751), 2 Ves. Sen. 371; 28 E. R. 238, L. C.

Annotations:—*Consd.* *Devaynes v. Noble, Sleech's Case* (1816), 1 Mer. 529; *Beresford v. Browning, Browning v. Beresford* (1875), L. R. 20 Eq. 564. *Refd.* *Burn v. Burn* (1797), 3 Ves. 573; *Ball v. Storie* (1823), 1 Sim. & St. 210. *Mentd.* *Hoare v. Contencin* (1779), 1 Bro. C. C. 27; *Devaynes v. Noble* (1831), 2 Russ. & M. 495; *Freeman v. Lomas* (1851), 9 Hare, 109; *Re Henley, Thurgood* (1863), 11 W. R. 1021; *Middleton v. Pollock, Ex p. Nugee* (1875), L. R. 20 Eq. 29; *Kinnaird v. Trollope* (1889), 42 Ch. D. 610.

322. — — —.]—A., B. & C., who carried on business in partnership as A. & Co. & were indebted to X. in a large sum of money, gave to X. a bond, which was in the following form:—“Know all men etc., that we, A. & Co., are held & firmly bound unto X.,” & was conditioned for payment by “A & Co.” to X. & was executed “A. & Co.” by A., but was not executed by B. or C. The intention was that each partner should be severally bound, but the bond was framed as a joint bond through mistake & the ignorance

of the parties, & it was executed by A. merely because his name stood first in the firm. B. having died:—*Held*: B.'s estate was severally liable to X., who was entitled to be admitted as a specialty creditor in the administration of B.'s estate.—*BURN v. BURN* (1798), 3 Ves. 573; 30 E. R. 1162, L. C.

Annotation:—*Reid*. *Ferguson v. Gibson* (1872), 41 L. J. Ch. 640.

323. — “*Ourselves & each of us for himself.*”]—C., D. & E. entered into a bond in £1,000 each, in the following words:—“for which we bind ourselves, & each of us for himself, for the whole & entire sum of £1,000 each.” The seal of C. had been torn from the bond:—*Held*: the bond was several, & the seal of one of the obligors being taken away did not prevent the obligees from suing on it against D.—*COLLINS v. PROSSER* (1823), 1 B. & C. 682; 3 Dow. & Ry. K. B. 112; 1 L. J. O. S. K. B. 212; 107 E. R. 250.

Annotations:—*Reid*. *Lee v. Nixon* (1834), 1 Ad. & El. 201. *Mentd*. *Servante v. James* (1829), 5 Man. & Ry. K. B. 299; *Caldwell v. Parker* (1869), 17 W. R. 955.

324. Joint—“*Ourselves & each of us jointly.*”]—Three persons covenanted in the following words:—“we bind ourselves and each of us jointly”:—*Held*: an action did not lie against one alone, as the words “each of us” did not make the bond several, but only showed the intent of the partners that all should be bound.—*ANON.* (1588), Moore, K. B. 260; 72 E. R. 567.

325. — *Statute staple void for informality.*]—A statute staple by two obligors which is void as a statute for want of the required formalities, may be sued against one obligor, in an action of debt as on a bond.—*ASCUE v. HOLLINGWORTH* (1597), Cro. Eliz. 514; 78 E. R. 791.

Annotations:—*Mentd*. *Cabell v. Vaughan* (1670), 1 Saund. 291; *Brown v. Hedges* (1708), 1 Salk. 290; *Abbot v. Smith* (1774), 2 Wm. Bl. 947; *Scott v. Godwin* (1797), 1 Bos. & P. 67.

326. — *Agreement to be bound.*]—A., B. & C. agreed to be bound in a bond to D., by such a bond and in such a sum as should be agreed amongst them:—*Held*: the bond must be a joint bond, & not a joint & several bond.—*MALCOT v. DEAN* (1614), 2 Bulst. 287; 1 Roll. Rep. 71; 80 E. R. 1127.

327. — *Death of joint obligor—Absence of mistake or special agreement.*]—A. & B. executed

a joint bond to C., A. being principal, & B. surety. The principal died, leaving the surety surviving him. A decree having been made in a specialty creditor's suit, in the usual form, against the estate of A.:—*Held*: in the absence of proof of any mistake having been made in the preparation of the bond, & of any contract between the parties to the bond, giving a right to the obligees to have the debt satisfied out of the separate assets of A., it could not be the foundation of a claim in equity against A.'s assets.—*RICHARDSON v. HORTON* (1843), 6 Beav. 185; 12 L. J. Ch. 333; 49 E. R. 796.

Annotations:—*Reid*. *Richardson v. Jenkins* (1853), 1 Drew. 477; *Other v. Iveson* (1855), 3 Eq. Rep. 562.

328. Joint & several—“*Us & either of us.*”]—Two persons bound themselves by the following words:—“We bind us and either of us,” without saying jointly & severally:—*Held*: the bond was joint & several.—*ANON.* (1572), Ben. & D. 85; 123 E. R. 294.

329. — “*Et uterque eorum.*”]—If two persons bind themselves “*et uterque eorum*” in £60 the bond is joint & several.—*HARGRAVES v. ROGERS* (1604), Cro. Jac. 45; 79 E. R. 38.

Annotation:—*Mentd*. *Booth v. Johnson* (1703), 7 Mod. Rep. 143.

330. — “*Themselves or any of them, their heirs, etc.*”]—*Executed by two obligors.*]—If two persons jointly seal & deliver a bond, in which they bind “themselves, or any of them, their heirs, exors., or either of their heirs, etc.” it is a joint & several bond, & not a joint bond only.—*HANKINSON v. SANDILANDS* (1613), Cro. Jac. 322; 2 Bulst. 70; 79 E. R. 275; *sub nom.* *HAUKINSON v. SANDILANDS*, 1 Brownl. 121.

331. — “*Myself & my heirs, etc.*”]—*Executed by three obligors.*]—The words:—“I bind myself & my heirs, exors., & administrators” in a bond executed by three obligors, render the bond joint and several.—*SAYER v. CHAYTOR* (1699), Int. 695; 125 E. R. 364.

Annotation:—*Mentd*. *Abbot v. Smith* (1774), 2 Wm. Bl. 947.

332. — “*Nos et quemlibet nostrum.*”]—Where the first words of an obligation were joint, but the latter words were, “*si defecrimus, volumus, etc., quod currat super nos et quemlibet nostrum*”:—*Held*: the obligation was joint & several.—*ROGERS*

PART VI. SECT. 2.

a. Several—“*Ourselves & each of & each of our heirs.*”]—A bond, “We, G., J. & H., are jointly & severally held & firmly bound, in the several penal sums of money hereinafter mentioned, that is to say, the said G. in £3,000, the said J. in £500, the said H. in £500, for which several payments, etc., we & each of us bind ourselves, & each & every one of our heirs, exors., & administrators,” etc.:—*Held*: a several, not a joint, or joint & several, bond.—*ESSEX CORPN. v. BULLOCK* (1861), 11 C. P. 323.—*CAN.*

b. — — — — —]—A., B., C., & D. executed a bond to E., the bond being in the following form: “We, A., B., C., & D., are held & firmly bound to E. in the sum of £50 each, to be paid to E., to which payment we hereby bind us, & each of us, our & each of our heirs, exors., & administrators, & every of them”:—*Held*: the bond was the separate bond of each obligor.—*ARMSTRONG v. CAHILL* (1880), 6 L. R. Ir. 440.—*IR.*

c. *S. P. ARMSTRONG v. KELLY* (1881), 15 I. L. T. Jo. 138.—*IR.*

d. — “*Severally & firmly held each in the sum of.*”]—A bond recited that the parties were “severally & firmly held” each in the sum of:—

Held: the bond was several, not “joint & several.”—*LONDON & LANCASHIRE INSURANCE CO. v. HART* (1912), Q. R. 43 S. C. 28.—*CAN.*

e. Joint—General rule.]—Unless otherwise agreed upon, the liability of co-obligors is joint, not several.—*DE PASS v. COLONIAL GOVERNMENT* (1886), 4 S. C. 383.—*S. AF.*

f. — “*Himself along with the other.*”]—Two parties granted separate letters, by which each bound himself “along with the other”:—*Held*: the obligation was joint, & not joint & several.—*ALEXANDER v. SCOTT* (1827), 6 Sh. (Ct. of Sess.) 150.—*SCOT.*

g. — *Or joint & several—Intention of parties.*]—Where money was lent on credit given by two persons, who passed a joint bond for it, the instrument was joint & several, according to what appeared to have been the intention of the parties.—*O'LEARY v. PURCELL* (1841), 3 I. Eq. R. 329.—*IR.*

h. — *Non-execution by one obligor.*]—The condition of a bond recited that five persons named as obligors had agreed to secure the payment of a sum of money to pltf.; one of the persons named did not execute the bond:—*Held*: (1) it was

the joint bond of the obligors who executed it; (2) the omission of one of the persons named in the bond to execute it did not render it merely the several bond of each obligor who did.—*KEATOR v. SCOVIL* (1848), 3 Kerr. 647.—*CAN.*

k. — *Release of some joint obligors.*]—Deft. with others signed a bond to a bank. The majority of the bondsmen, under an agreement with the bank, took policies in an insurance co. to provide for payment of the amounts severally secured by them, & assigned their interest to the bank. Their liability upon the bond was thereupon released. Deft. also took a policy, but did not assign it:—*Held*: deft. was liable on the bond.—*MARE v. WHITEWAY* (1900), 8 Nfld. L. R. 384.—*NFLD.*

l. Joint & several—“*Ourselves & each of us by himself.*”]—A bond stated that sureties were jointly & severally held & jointly bound, instead of firmly bound, & “we bind ourselves & each of us by himself,” instead of binds himself:—*Held*: it was uncertain whether it could be properly construed as a joint & several bond.—*JAMIESON v. LONDON & CANADIAN LOAN & AGENCY CO.* (1899), 18 P. R. 413.—*CAN.*

Sect. 2.—Liability of several, joint, and joint and several obligors. Sect. 3.]

v. DANVERS (1673), 1 Freem. K. B. 127; 1 Mod. Rep. 165; 89 E. R. 93.

333. — “*Nos et utrumque nostrum.*” — The words, “*obligamus nos et utrumque nostrum*” in a bond, make it joint and several.—*ROBINSON v. WALKER (1703), 7 Mod. Rep. 153; 1 Salk. 393; 87 E. R. 1159.*

Annotations:—Refd. White v. Tyndall (1888), 13 App. Cas. 263. Mentd. Hopkinson v. Lee (1845), 6 Q. B. 964.

334. — “*They or either of them, their heirs, etc.*” — E. & F. entered into a bond, of which the condition was, that if they or either of them, their or either of their heirs, etc., duly paid an annuity to B. for his life in manner following, viz., one moiety thereof by E. during her life, & the other moiety thereof by F., his exors. or administrators, during the life of E., & after the death of E., the whole by F., his heirs, exors., or administrators, during the life of B., then the bond should be void:—*Held*: the liability under the bond was joint & several, & F. having failed, after the death of E., in paying the annuity, the estate of E. was liable on his default.—*CHURCH v. KING (1836), 2 My. & Cr. 220; 40 E. R. 624.*

335. — Obligors “*jointly*” & their heirs, etc., “*respectively.*” — Three obligors bound themselves “*jointly,*” & their heirs, etc., “*respectively,*” to pay by a bond, which was conditioned to be void, if they or either of them, their or either of their heirs, paid:—*Held*: it was a joint & several obligation, & one having died, his assets were liable.—*TIPPINS v. COATES (1853), 18 Beav. 401; 52 E. R. 158.*

Annotation:—Refd. Levy v. Sale (1877), 37 L. T. 709.

336. — Bond drawn as joint—By mistake.]—A tradesman, ignorant of the nature of a bond, filled up one from A. & B. to C., in which the obligors were only jointly bound. One of them being dead, the question arose, whether the survivor was answerable for the whole money:—*Held*: the ct. would relieve upon the mistake.—*SIMPSON v. VAUGHAN (1739), 2 Atk. 31; 26 E. R. 415, L. C.*

Annotations:—Mentd. Thorpe v. Jackson (1837), 2 Y. & C. Ex. 553; Whyte v. Burnby (1846), 16 L. J. Q. B. 156; Morgan's Patent Anchor Co. v. Morgan (1876), 35 L. T. 811.

337. — — — — —.]—Where the intention of the parties is to make a bond joint and several, & such intention appears on the face of the bond, the ct. will treat it as a joint & several bond, although it is only joint in form.—*Ex p. SYMONDS (1786), 1 Cox, Eq. Cas. 200; 29 E. R. 1128, L. C.*

338. — Intention of parties.]—A joint bond may be treated as joint & several in equity, if the parties appear to have intended it to be so.—

m. — “*We hereby become bound.*” — Defender & another became bound by an obligation in these terms: “*We hereby become bound*”; it being expressly understood. In an action for implement *in solidum* of the obligation, on the ground that it was an obligation *ad factum præstandum* inferring a conjunct & several liability:—*Held*: the obligation was *ad factum præstandum*.—*DARLINGTON v. GRAY (1836), 15 Sh. (Ct. of Sess.) 197.—SCOT.*

n. — — — — —.]—Three parties granted to a bank a cash-credit bond in the usual style for £400 on an account to be operated on by one of their number. In a question with one of the co-obligants:—*Held*: the co-obligant was liable for the whole account up to the stipulated amount of the credit.—*REDDIE v. WILLIAMSON (1863), 1 Macph. (Ct. of Sess.) 228.—SCOT.*

THOMAS v. FRAZER (1797), 3 Ves. 399; 30 E. R. 1074, L. C.

SECT. 3.—ESTOPPEL OF PARTIES BY RECITALS.

339. Obligor—Statement of fact.]—The obligor of a bond is estopped from denying the truth of the facts in the recital.—*HART v. BUCKMINSTER (1648), Aleyn, 52; Sty. 103; 82 E. R. 912.*

Annotation:—Refd. Shelley v. Wright (1737), Willes, 9.

340. — — — — —.]—A party executing a deed is estopped, by the recital of a particular fact in that deed, from denying such fact.

Where it was recited in the condition of a bond that the obligor had received sums of money for the obligee, which he had not brought to account but acknowledged that a balance was due to the obligee:—*Held*: the obligor was estopped from saying that he had not received any money for the use of the obligee.—*SHELLEY v. WRIGHT (1737), Willes, 9; 125 E. R. 1029.*

Annotations:—Consd. Hill v. Manchester & Salford Waterworks Co. (1831), 2 B. & Ad. 544. Apld. Bringloe v. Goodson (1839), 5 Bing. N. C. 738. Refd. Lainson v. Tremere (1834), 1 Ad. & El. 792.

341. — — — — —.]—Where a distinct statement of a particular fact is made in the recital of a bond, & a contract is made with reference to that recital, it is not, as between the parties to the instrument, & in an action upon it, competent to the party bound to deny the recital; but a party to an instrument is not estopped, in an action by the other party, not founded on the deed, & wholly collateral to it, from disputing the facts so admitted; but evidence of the circumstances in which such admission was made, is receivable to show that the admission was inconsiderately made, & is not entitled to weight as a proof of the fact it is used to establish.—*CARPENTER v. BULLER (1841), 8 M. & W. 209; 10 L. J. Ex. 393; 151 E. R. 1013.*

Annotations:—Consd. Carter v. Carter (1857), 3 K. & J. 617; Fraser v. Pendlebury (1861), 31 L. J. C. P. 1; Re Simpson, Ex p. Morgan (1876), 2 Ch. D. 72. Refd. Young v. Raincock (1849), 7 C. B. 310; Stroughill v. Buck (1850), 14 Q. B. 781; Wiles v. Woodward (1850), 5 Exch. 557; S. E. Ry. Co. v. Warton (1861), 6 H. & N. 520; Re Foster, Barnato v. Foster, [1920] 3 K. B. 306.

342. — Written obligation to pay.]—The obligor of a bond conditioned for payment of all sums for which A. stands bound by deed to B., is estopped from pleading that A. was never bound by any deed to B.—*RAINSFORD v. SMITH (1560), 2 Dyer, 196 a; 73 E. R. 432.*

Annotations:—Refd. Willoughby v. Brook (1600), Cro. Eliz. 756; Cullingsworth's Case (1610), Godb. 177.

343. — — — — —.]—In debt on an obligation, which was indorsed that if the obligor should pay all the sums which he was obliged to pay by his

PART VI. SECT. 3.

339 i. Obligor—Statement of fact—Amount of consideration received.]—Where suit was brought upon two bonds executed by deft. for the principal & interest reserved, the bonds contained a statement that the principal had been borrowed & received in cash:—*Held*: it was open to deft. to show by evidence that only a portion of the principal sum had been received by him.—*ZAMINDAR STRIMATU GAUREVALLABA RAMACHANDRA VELLIA HOMAYA NAYIK v. VIRAPPA CHETTI (1864), 2 Mad. 174.—IND.*

339 ii. — — — — —.]—Oral evidence is admissible to prove that consideration has not been paid at all or in full, notwithstanding the recital in the bond that full consideration has been paid.—*WALEE MAHOMED v.*

KUMUR ALI (1867), 7 W. R. 428.—IND.

p. — Property in goods seized on execution—Indemnity to sheriff.]—A sheriff, holding executions against deft., took from him a bond reciting that the sheriff had seized deft.'s goods, & indemnifying the sheriff “*against any loss, damage, or liability, which may be incurred by reason of the execution, wrongful execution, or non-execution of the said writ.*” The sheriff was informed by deft. that the goods belonged to G., but sold them contrary to deft.'s wish. G. brought trover against the sheriff & recovered the value of the goods. The sheriff then sued deft. on his bond:—*Held*: deft. was not estopped by the recital from denying his property in the goods.—*CORBETT v. HOPKIRK (1852), 9 U. C. R. 479.—CAN.*

several written obligations, the obligation should be void, *deft.* said he had not made any written obligations by which he was obliged to pay any sum:—*Held*: no plea, because repugnant to the condition, & he was estopped from speaking against its purport.—*ANON.* (1561), *Ben. & D.* 28; 123 *E. R.* 247.

344. — Existence of lease.]—In debt on an obligation, the condition of which was that whereas *J.*, claimed to have a lease for years of the manor of *D.*, made & granted to him by *W.*, if *deft.* left without damage *pltf.* etc., then etc. *deft.* pleaded that *J.*, had not any such lease:—*Held*: by the recital *deft.* was estopped from saying there was no such lease.—*BRANTHWAIT'S CASE* (1584), 3 *Leon.* 118; 74 *E. R.* 578.

345. — Execution of lease.]—Debt on bond conditioned for the performance by *R.* of all the covenants on his part mentioned in a certain indenture bearing even date with the bond, made or expressed to be made between *pltf.* & *R.* Plea that before the execution of the bond it was agreed that *pltf.* should grant to *R.* a lease under certain covenants, & that *deft.* should enter into a bond as surety for performance of those covenants, that *deft.* did enter into the bond on which the action was brought, & that the indenture mentioned in the condition thereof was the lease so agreed upon & no other, but that the lease never was executed:—*Held*: *deft.* was estopped by the condition of the bond from pleading the plea.—*HOSIER v. SEARLE* (1800), 2 *Bos. & P.* 299; 126 *E. R.* 1292.

Annotation:—*Refd.* *Lainson v. Tremore* (1834), 1 *Ad. & El.* 792.

346. — Actions pending.]—If a bond recites that “there are divers suit in Banco Regis,” the obligor is estopped from pleading that there are no suits there.—*WILLOUGHBY v. BROOK* (1600), *Cro. Eliz.* 756; 78 *E. R.* 988.

Annotation:—*Refd.* *Shelley v. Wright* (1737), *Willes*, 9.

347. — Payment of rent reserved—No interest in land demised.]—In debt on bond conditioned for payment of rent reserved upon a demise according to certain articles, *deft.* is estopped from saying he had not acquired any interest in the land demised by the articles.—*STROUD v. WILLIS* (1596), *Poph.* 114; *Cro. Eliz.* 362; 79 *E. R.* 1221.

Annotations:—*Refd.* *Palmer v. Ekins* (1728), 2 *Str.* 817; *Lainson v. Tremore* (1834), 1 *Ad. & El.* 792.

348. — To give all goods devised by father—No goods devised.]—If one be bound in an obligation, that he will give to *J.* all the goods which were devised to him by his father, in debt brought upon such an obligation, *deft.* cannot plead that he had not any goods devised to him, for the bond shall conclude him from saying the contrary.—*CULLINGWORTH'S CASE* (1610), *Godb.* 177; 78 *E. R.* 107.

349. — Conveyance of copyhold land—Lands not copyhold.]—In debt on a bond conditioned to convey copyhold land, the obligor is estopped from saying that the lands are not copyhold.—*KARNE v. PRYTHER* (1615), *Cro. Jac.* 375; 79 *E. R.* 320.

350. — To enfeof party of all lands in specified place—No lands there.]—Where the condition is general, as to enfeof one of all his lands in *D.*, the obligor may say that he has no lands there.—*PAINE v. SHELTRORPE* (1647), *Aleyn*, 13; 82 *E. R.* 889.

351. — Obligor & wife—Obligor not married.]—Where the condition of a bond is if *deft.* & his wife shall appear on such a day at the Palace Ct., it is not a good performance that *deft.* appeared himself, though he was not married at the time of the obligation or ever afterwards, since he is

estopped from denying that he had a wife.—*PAINE v. SHELTRORPE* (1647), *Aleyn*, 13; 82 *E. R.* 889.

352. — Release of lands by stranger—No right of stranger to lands.]—If the condition of a bond be, that the obligor shall procure a stranger to release all the right which he has, or pretends to have, in certain lands, the obligor must at his peril procure such stranger to make a release *de facto*, though he has no right.—*DOUGHTY v. NEAL* (1669), 1 *Saund.* 215; 2 *Keb.* 471; 85 *E. R.* 226.

Annotations:—*Refd.* *Acherley v. Vernon* (1739), *Willes*, 153; *Edwards v. Brown* (1829), 3 *Y. & J.* 423. *Mentd.* *Hughes v. Humphreys* (1827), 6 *B. & C.* 680.

353. — Custom of court—No custom.]—Debt upon an obligation the condition was that if *deft.*, who was arrested upon a *latitat*, should appear such a day *ad respondendum J. secundum consuetudinem curie*, etc., then it should be void. *Deft.* pleaded that there was no such custom, etc.:—*Qu.*: whether *deft.* was estopped from saying there was no such custom, contrary to the condition of the bond.—*FORTH v. WALKER* (1673), 1 *Freem. K. B.* 100; 89 *E. R.* 74; *sub nom.* *FOORTH v. WALKER*, 3 *Keb.* 160, 181.

354. — To pay legacy devised by will—Revocation before death.]—A bond given after the death of *J.* to pay a legacy devised by the will of *J.* cannot be met by a plea that though *J.* did leave such a legacy by his last will, he revoked that will & left nothing to *pltf.* Even if the bond were before death of *J.* *deft.* has undertaken & must pay it at his peril.—*BACKWEL v. BARDJEW* (1674), 3 *Keb.* 303; 1 *Mod. Rep.* 113; 84 *E. R.* 734.

355. — To take obligor as apprentice—Whether compelled to take.]—If the consideration of a bond appears by the condition to be that the obligee should take the obligor apprentice, & the condition recites that he had consented so to do, the obligor cannot object in avoidance of the bond that the obligee was not compellable to take him.—*CHESMAN v. NAINBY* (1727), 2 *Ld. Raym.* 1456; 2 *Str.* 739; 92 *E. R.* 447; *affd.* 1 *Bro. Parl. Cas.* 234, II. L.

Annotations:—*Consd.* *Low v. Peers* (1770), *Wilm.* 364; *Nicholls v. Stretton* (1847), 11 *Jur.* 1008. *Refd.* *Price v. Green* (1847), 16 *M. & W.* 346. *Mentd.* *Clerke v. Comer* (1734), *Lee temp. Hard.* 53; *Young v. Timmins* (1831), 1 *Cr. & J.* 331; *Hitchcock v. Coker* (1837), 6 *Ad. & El.* 438; *Mallan v. May* (1843), 11 *M. & W.* 653; *Green v. Price* (1845), 13 *M. & W.* 695; *Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt*, [1893] 1 *Ch.* 630; *Dowden v. Pook*, [1904] 1 *K. B.* 45; *Eastes v. Russ*, [1914] 1 *Ch.* 468.

356. — Allowance out of personal estate—Insufficient estate.]—Debt on bond given by *deft.* on his marriage, with condition that he would permit his intended wife either during the marriage or by will to dispose of £50 out of his personal estate. Plea, that *deft.* had not prevented his wife disposing of that sum. Replication, setting forth a particular disposition of the money by the wife, & a request on *deft.* to pay, & a refusal by him. Rejoinder, that *deft.* had not any personal estate out of which he could pay the £50:—*Held*: the rejoinder was ill, because *deft.* was estopped by the condition of the bond from saying he had not sufficient estate.—*COSENS v. COSENS* (1737), *Willes*, 25; 125 *E. R.* 1037.

357. — Amount of rent reserved.]—In an action upon a bond conditioned for payment of the rent of certain premises, recited in the condition to be demised by indenture at a rent of £170, *deft.* cannot plead that the indenture mentioned in the condition was an indenture by which a rent of £140 was reserved, & that such less rent has been paid, because that is virtually a denial that any such lease as that recited in the bond

Sect. 3.—Estoppel of parties by recitals. Part VII.
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existed.—**LAINSON v. TREMERE** (1834), 1 Ad. & El. 792; 3 Nev. & M. K. B. 603; 4 L. J. K. B. 207; 110 E. R. 1410.

Annotations:—Consd. **Bowman v. Taylor** (1834), 2 Ad. & El. 278; **Carpenter v. Buller** (1841), 8 M. & W. 209; **Young v. Raincock** (1849), 7 C. B. 310; **Carter v. Carter** (1857), 3 K. & J. 617. **Refd.** **Smith v. Osborne** (1857), 6 H. L. Cas. 375.

358. — Duties of income tax collector.]—

In a bond given as a security for the due performance by L. of his office of collector of income tax, it was recited that L. had been duly appointed collector for the year ending Apr. 5, 1847, & that duplicates of the assessments & a warrant for collecting same had been delivered to him. An action having been brought for default by J. in non-payment of sums received by him as such collector, the jury found a verdict for plffs., subject to a case, which stated that J. having been nominated & appointed in the usual manner, collected several sums which had been assessed under Schedules A & D for the year ending Apr. 5, 1847, that as to the sums collected by him under Schedule A duplicates of assessment & a warrant for collection had been delivered to him, before he collected those sums, but, as to the sums collected under Schedule D, no duplicate assessment or warrant had been delivered to him, & at the time when he received those sums, the time appointed for appeals against the assessments under Schedule A had not expired:—**Held**: (1) the sureties were liable for the sums collected by L. under Schedule A, but they were not liable for those collected under Schedule D, such collection having been an unauthorised act, for want of the duplicate assessment & warrant; (2) the above recitals in the bond did not estop defts. from setting up the above defence, inasmuch as it was true that J. had been nominated & appointed a collector, in one sense, & duplicates of assessments & warrants to collect had been delivered to him with regard to the sums assessed under Schedule A, though not as to those assessed under Schedule D.—**KEPP v. WIGGETT** (1850), 10 C. B. 35; 20 L. J. C. P. 49; 14 Jur. 1137; 138 E. R. 15.

Annotations:—Refd. **Turquand v. Hennet** (1849), 7 C. B. 179. **Mentd.** **Durham Corpn. v. Fowler** (1889), 22 Q. B. D. 394.

359. — Statutory borrowing powers.]—In an action against improvement comrs., the declaration stated that defts., by their writing obligatory, acknowledged that they, by virtue of certain improvement Acts, were bound to P. in a certain sum, subject to a condition for repayment, which recited "that, by virtue of the Acts, defts. were authorised to borrow any sum of money for the purposes of the Acts, & to secure same by their bonds, & that defts., in pursuance of the Acts, had borrowed of P. £5,000 for enabling them to carry the purposes of the Acts into execution." Defts. pleaded that they did not, in pursuance of the Acts, borrow of P. the sum for enabling them to carry the purposes of the Acts into execution, nor was same lent by P. for that purpose, & that the writing obligatory was not made by defts. for securing payment of any sum of money borrowed by defts. for the purposes of & under the powers & provisions of the Acts:—**Held**: the plea was bad, on the ground that defts. were estopped by the recitals of the bond from denying that the money was in fact borrowed for those purposes.—**HORTON v. WESTMINSTER IMPROVEMENT COMRS.**

q. Obligeo — Statement of fact.]—A bond contained a recital that the obligee had delivered to the obligors a statement in writing which was made a part of the bond, & further recited

that it was agreed & declared that the bond was given upon the faith of such statement by the obligee. In an action on the bond:—**Held**: the obligee was estopped from disputing the facts

(1852), 7 Exch. 780; 21 L. J. Ex. 297; 19 L. T. O. S. 219; 155 E. R. 1165.

Annotations:—Refd. **Royal British Bank v. Turquand** (1855), 5 E. & B. 248; **Prince of Wales Assce. v. Harding** (1858), E. B. & E. 183; **Re Companies Acts, Ex p. Watson** (1888), 21 Q. B. D. 301; **Re Holland, Gregg v. Holland**, [1901] 2 Ch. 145. **Mentd.** **Kennett v. Westminster Improvement Comrs.** (1855), 3 W. R. 597.

Liability personal or as executor.]—

L., one of the exors. of M., & of the devisees in trust of M.'s estate, gave a bond to O. for £7,000, describing himself as sole exor. of M., but the condition was for payment by L., his heirs, exors. & administrators in an action on the bond:—Held: L. could not plead that the debt was not due from himself personally, but from him in his character of exor.—**LINDSAY v. ORIENTAL BANK AT COLUMBO** (1860), 13 Moo. P. C. C. 401; 3 L. T. 98; 15 E. R. 151, P. C.

Annotations:—Mentd. **Lindsay v. Duff** (1862), 15 Moo. P. C. C. 452; **Gavin v. Hadden** (1871), L. R. 3 P. C. 707.

361. — Extent of estoppel—Will or legacy.]—

A condition in a bond was "to pay all legacies that J. has devised by his will":—**Held**: the covenantor was estopped from alleging that J. made no will, but he might allege that J. gave no legacy by his will.—**PARAMOURE v. DURING** (1594), Moore, K. B. 420; 72 E. R. 668.

Annotation:—Refd. **Galloway v. Jackson** (1842), 3 Man. & G. 960.

362. — Indenture or covenants.]—

The condition of a bond for performance of covenants in an indenture estops the obligor from saying there is no such indenture, but does not estop him from saying there are no covenants.—**HOLLOWAY'S CASE** (1669), 1 Mod. Rep. 15; 86 E. R. 695.

Annotation:—Refd. **Lainson v. Tremere** (1834), 1 Ad. & El. 792.

363. — Invalidity of bond or improper execution.]—

In an action against a corpn. on a bond, the condition of which recited, that the co. were, by Act of Parliament, authorised to raise money by bond, & that at a general assembly of the co. it had been resolved that the bond should be issued for that purpose, defts. pleaded *non est factum*:—**Held**: although the co. could not, under that plea, show that the bond executed by them was invalidated by collateral matter, they might show that it was void because executed contrary to the Act of Parliament.—**HILL v. MANCHESTER & SALFORD WATER WORKS CO.** (1833), 5 B. & Ad. 866; 2 Nev. & M. K. B. 573; 3 L. J. K. B. 19; 110 E. R. 1011.

Annotations:—Distd. **Mestayer v. Biggs** (1834), 4 Tyr. 466. **Consd.** **Re Young v. Brompton Waterworks Co.** (1861), 1 B. & S. 675. **Mentd.** **Prince of Wales Assce. v. Harding** (1858), E. B. & E. 183.

364. Obligeo — Omission of "younger" after name.]—If A. sen. & A. jun. be jointly & severally bound in a bond, but, in reciting their names in the condition, the word "younger" be omitted, the obligee, in debt on the bond, is not estopped from averring that A. jun. is the person named in the condition, for it is consistent with the record.—**ANON.** (1688), 3 Mod. Rep. 216; 87 E. R. 139.

365. — Estate in tail or for life.]—A., with B. & C. his sureties, entered into a bond to D., the condition of which, after reciting that A. was seised in tail of an estate of which he had covenanted to suffer a recovery at a future day, to enure to the use of D. in fee, was, that the bond should be void, if the recovery should be suffered "so & in such

stated in the bond.—**ARNPRIOR v. UNITED STATES FIDELITY & GUARANTY CO.** (1914), 30 O. L. R. 618; 20 D. L. R. 929.—**CAN.**

manner as that, under & by virtue thereof, the estate should be vested in D. for ever." The recovery was duly suffered, but A. being seised for life only, D. brought an action upon the bond, to which one of the sureties pleaded that, if A. had been seised in tail, the recovery was suffered so as to vest the estate in D. in fee:—*Held*: the plea was bad, because the recital in the condition did not estop D. from disputing that A. was seised

in tail, nor release the surety from his obligation, it being the intention of the parties, that D. should have an estate in fee.—*EDWARDS v. BROWN* (1829), 3 Y. & J. 423; 148 E. R. 1244; *subsequent proceedings* (1831), 1 Cr. & J. 307.

Annotation:—*Distd.* *Wheulton v. Hardisty* (1858), 3 E. & B.

Effect of recitals on other terms.—*See Part V. Sect. 3, ante.*

Part VII.—Performance or Breach of Condition.

SECT. 1.—CONDITION PRECEDENT TO PERFORMANCE.

SUB-SECT. 1.—WHAT AMOUNTS TO.

366. Demand—Payment of money.—No request for payment due under a bond is necessary. The obligor must make payment without request.—*BRET v. AVERDER* (1587), 1 Brownl. 49; 123 E. R. 658.

367. ——— Rent due under express covenant.—In debt on bond conditioned for payment of rent under an express covenant, it is not necessary to allege a demand for the rent.—*ANDREWS v. WOOD* (1594), Cro. Eliz. 332; 78 E. R. 582.

368. ————In debt by a lessor on a bond given by the lessee & deft. in a penal sum, conditioned for payment of rent at the day & place mentioned in a recited lease, pltf. may assign for breach non-payment of rent at the day & place, without showing a demand of the rent.—*REDE v. FARR* (1817), 6 M. & S. 121; 105 E. R. 1188.

Annotations:—*Mentd.* *Arnsby v. Woodward* (1827), 6 B. & C. 519; *Rippinghall v. Lloyd* (1833), 5 B. & Ad. 742; *Bowser v. Colby* (1841), 1 Hare, 109; *Jones v. Carter* (1846), 15 M. & W. 718; *Grey v. Friar* (1854), 4 H. L. Cas. 565; *Toleman v. Portbury* (1871), 40 L. J. Q. B. 125; *New Zealand Shipping Co. v. Soc. des Ateliers et Chantiers de France*, [1919] A. C. 1.

369. ————In debt on a bill for payment of a sum of money upon demand, it is not necessary to show any actual demand.—*CAPP v. LANCASTER* (1597), Cro. Eliz. 548; 78 E. R. 794.

Annotations:—*Reid.* *Thomson v. Butler* (1599), Cro. Eliz. 721; *Ashenden v. Clapham* (1673), Freem. K. B. 113. *Mentd.* *Fowkes v. Joyce* (1688), 3 Lev. 260; *Re Brown's Estate*, *Brown v. Brown*, [1893] 2 Ch. 300.

370. ——— If demanded—Action sufficient demand.—In debt on bond payable if demanded, the action is a sufficient demand.—*DOCKREY v. TANNING* (1610), Cro. Jac. 242; 79 E. R. 209.

371. ——— Two obligors or either of them—Demand from one.—Under a bond two obligors, or either of them, were bound to pay a sum of money within five days after request:—*Held*: a request to one, & non-payment, constitute a breach.—*RATCLIFFE v. CLARK* (1616), 3 Bulst. 210; 81 E. R. 177.

372. ————In debt upon a bill obligatory to repay money on demand, no special request is necessary.—*ASHENDEN v. CLAPHAM* (1673), 1 Freem. K. B. 113; 3 Keb. 176; 89 E. R. 84.

373. ————In debt upon a bond conditioned for payment of all dues to an Inn of Ct.

as a barrister, if deft. pleads payment, a replication that for a length of time each barrister has used to pay an annual sum for pensions to the treasurer of the society for the time being, & that an annual payment was in arrear from deft. at the time of the commencement of the action, is good, though it does not show that such sum was ever demanded.

Upon a bond conditioned for payment of a sum in gross, the obligor is bound to pay it, though it is not demanded.—*LEVINZ v. RANDOLPH* (1700), 1 Ld. Raym. 594; 12 Mod. Rep. 413; 91 E. R. 1298.

See, further, BARRISTERS, Vol. III., pp. 317, 318.

374. ————If a son borrow money for the use of his mother, & give a bond to pay it on demand, & his mother do not pay it, the obligee may declare on the bond against the obligor, without stating any special request to the mother to pay the money.—*HARWOOD v. TURBERVILLE* (1704), 6 Mod. Rep. 200; 87 E. R. 955.

375. ————Where to debt on bond conditioned for payment of a sum of money on demand, deft. pleads that no demand was made, upon which issue is joined, pltf. must prove an express demand before action brought.—*CARTER v. RING* (1813), 3 Camp. 459.

Annotations:—*Distd.* *Gibbs v. Southam* (1834), 5 B. & Ad. 911; *Mentd.* *Ameer-oon-Nissa v. Moorad-oon-Nissa* (1855), 6 Moo. Ind. App. 211; *Re Brown's Estate*, *Brown v. Brown*, [1893] 2 Ch. 300.

376. ————A., B., & C., being bankers in copartnership, were appointed treasurers of a corporate body & executed a joint & several bond in a penalty of £20,000 conditioned for the due performance by them of various duties as treasurers, & especially that they would "when thereunto required, etc., pay all balances in their hands, etc." A commission of bkpcy. issued against A., B., & C., who had at the time a large balance in their hands, as treasurers, but no demand was made by the co. before the bkpcy. The co. petitioned to prove against the separate estates:—*Held*: there was not any such breach of the condition as would constitute an existing debt, & entitle the co. to prove under the bond.—*Re DILWORTH, Ex p. LANCASTER CANAL CO.* (1831), Mont. 27. L. C.; *subsequent proceedings* (1832), Mont. & B. 94, L. C.

Annotations:—*Reid.* *Re Fox, Ex p. Marshall* (1834), 3 Deac. & Ch. 120. *Mentd.* *Re Lett, Ex p. Masterman* (1835), 4 L. J. Bcy. 54; *Re Lashman, Ex p. Vallance* (1837), 6 L. J. Bcy. 52; *Bradley v. Holdsworth* (1838).

execute deed.—The condition of a bond was, that when the parties should see cause to survey & divide lot A., the obligor should execute a deed of the north-east half of the lot to the obligee:—*Held*: survey & division were not conditions precedent to the execution of the deed.—*RUTTAN v. RUTTAN* (1840), 4 Ont. Dig. 7169.—*CAN.*

PART. VII. SECT. 1, SUB-SECT. 1.

366 i. Demand—Payment of money—At named place.—Defts. promised to pay the amount of a bond to the holder thereof upon presentation of warrants or coupons thereunto annexed:—*Held*: it was not necessary for pltf., as a condition precedent to his recovery, to aver & prove presentment at the particular place.—*FELLOWS v. OTTAWA GAS CO.* (1869), 19 C. P. 174.—*CAN.*

s. Tender of deed—Payment of money—Price of land.—Deft. gave a bond to pltf. for the price of land, conditioned to pay £50 on June 1, & the remainder in three annual instalments:—*Held*: tender of a deed was not a condition precedent to the right to recover the first instalment.—*DYKEMAN v. CRAIG* (1851), 2 All. 265.—*CAN.*

t. Survey & division of land—

Sect. 1.—Condition precedent to performance: Subsect. 1.]

1 Horn. & H. 156; *Baxter v. Newman* (1844), Pig. & R. 182; *Baxter v. Brown* (1845), 7 Man. & G. 198; *Re Pearse, Ex p. Littledale* (1855), 6 De G. M. & G. 714.

377. — — —.]—An action on a bond, conditioned generally for payment of a specified sum with interest, may be brought without a demand being made.—*GIBBS v. SOUTHAM* (1834), 5 B. & Ad. 911; 3 Nev. & M. K. B. 155; 110 E. R. 1028.

Annotation:—*Mentd.* *Ameer-oon-Nissa v. Moorad-oon-Nissa* (1855), 6 Moo. Ind. App. 211.

378. — — —.]—Declaration in debt on a bond given by defts. & L. for £8,000 to be paid by them to pltf., or E., on request, whereby & by reason of the non-payment, etc. Defts., by their plea set out the bond & condition, which was that defts. & L. should pay over sums of money assessed & collected by L., & that L. should demand the sums assessed & proceed against default. Averment, that defts. performed all things on their part to be performed:—*Held*: (1) it was not necessary to state a request in the declaration; (2) the allegation "by reason of the non-payment," etc., was a sufficient denial of payment to pltf. or E., after plea.—*KEPP v. WIGGETT* (1848), 6 C. B. 280; 17 L. J. C. P. 295; 11 L. T. O. S. 243; 12 Jur. 831; 136 E. R. 1259; *subsequent proceedings* (1849), 12 L. T. O. S. 430; (1850), 10 C. B. 35.

Annotations:—*Mentd.* *Turquand v. Hennet* (1849), 7 C. B. 179; *Durham Corpn. v. Fowler* (1889), 22 Q. B. D. 394.

379. — — —.]—Debt against deft. as surety for J. on a bond conditioned that J. would duly & faithfully account for, apply & pay to pltf. all sums of money which had or should come to his hands as treasurer of the S. turnpike roads, according to 26 Geo. 4, c. lxxi., & three other Acts extending that Act, & of 3 Geo. 4, c. 126. Plea, that 3 Geo. 4, c. 126 was repealed by 4 Geo. 4, c. 95, & that up to the time of such repeal J. had duly & faithfully accounted, etc. Replication, assigning as a breach that although after the repeal J. was required by the then trustees of the S. roads to render to A. & G., then being persons duly appointed by them for that purpose, a true & perfect account in writing of all money which he had received & disbursed as treasurer, & although a reasonable time had elapsed, yet J. had not rendered such account, & for a further breach, that J. had received large sums of money as treasurer, & had failed duly to account for & pay same, according to the Acts & 3 Geo. 4, c. 126, and the bond, although before & after the repeal large sums remained in his hands, & although during all the time there were trustees entitled & ready to receive same, & although no other person was authorised to receive same. Rejoinders, as to the first breach, that part of the sum was received by J. before the repeal of 3 Geo. 4, c. 126, for which he had duly accounted, & that the residue of the sum was received after the repeal of 3 Geo. 4, c. 126; & as to the other breach, that no part of the sums in that breach mentioned was received by J. before the repeal of 3 Geo. 4, c. 126:—*Held*: (1) the first breach assigned was bad, as the local Act provided only for the treasurer being called upon to account to the trustee themselves, & the sect. in 3 Geo. 4, c. 126, requiring the treasurer to account to such person or persons as the trustees should appoint, had been repealed by 4 Geo. 4, c. 95; (2) although the other breach required no aid from the repealed sect. of 3 Geo. 4, c. 126, & the statement as to that Act was surplusage, yet as there was no allegation of a requisition to account or pay, as provided by the local Act, the breach failed to show a forfeiture of the bond

under that Act, & was bad.—*DAVIS v. CARY* (1850), 15 Q. B. 418; 20 L. J. Q. B. 48; 15 L. T. O. S. 560; 14 J. P. 623; 15 Jur. 310; 117 E. R. 517.

Annotation:—*Reid.* *Brown v. London Corpn.* (1861), 9 C. B. N. S. 726.

380. Request—To sell on request.]—M. sued J. in debt for £90 on an obligation, the condition of which was that J. should observe all the covenants in a certain indenture. By that indenture J. covenanted that he & C., or their heirs, should at the Feast of Annunciation next after the indenture upon the reasonable request of M., or his heirs, sell a third part of the manor of O. secured by a good & indefeasible conveyance drawn by learned counsel, & M. covenanted in consideration of the sale to pay £450 in instalments. J. said M. did not make any requisition for the bargain & sale, & that he was not bound to pay the £90:—*Held*: pltf. was entitled to recover.—*METCALF v. JACKSON* (1575), Ben. & D. 274; 123 E. R. 193.

381. — — — Seamstress to make linen required.]—The condition in a bond was to make all such linen as deft. should want during his life:—*Held*: as pltf. was a seamstress & it was not customary for such or tailors to find the linen to make the clothes from, deft. must supply her with it.—*OATS v. THORNILL* (1662), 1 Keb. 466; 83 E. R. 1056.

382. — — — To free apprentice if requested.]—If a master give a bond to make his apprentice free of the city at the end of seven years, if requested, deft. may plead, to an action of debt on the bond, "that at the end of seven years, or after, he was not requested, etc.," for he was not bound to do it, except upon request made at the time appointed for the performance.—*FITZ-HUGH v. DENNINGTON* (1704), 6 Mod. Rep. 227, 259; 2 Ld. Raym. 1094; 2 Salk. 585; 3 Salk. 309; Holt, K. B. 68; 87 E. R. 978, 1005.

Annotations:—*Reid.* *Beswick v. Swindells* (1835), 3 Ad. & El. 868. *Mentd.* *Roe d. Wrangham v. Hersey* (1771), 3 Wils. 274; *Ackland v. Lutley* (1839), 9 Ad. & El. 879.

383. — — — To marry on request.]—Debt on a bond entered into by deft.'s wife *dum sola*, conditioned that she should, within ten days after pltf.'s return from his voyage marry him if requested:—*Held*: leave should be given to plead that pltf. never requested her.—*DUNN v. VACHER* (1731), 2 Stra. 908; 93 E. R. 934.

384. Notice—Indemnity against waste.]—On a bond conditioned to pay within one month after notice the value of such goods as an apprentice should mis-spend, proof must be given to the obligor, before action brought, that the goods have been mis-spent.—*TEDCASTLE v. HOLLIWELL* (1591), Cro. Eliz. 236; 78 E. R. 492.

Annotation:—*Reid.* *Williams v. Steadman* (1693), Holt, K. B. 126.

385. — — —.]—The condition in a bond was that if an apprentice should waste the goods of his master, deft. would pay the damage to the master. Pltf. did not allege that notice of the waste had been given:—*Held*: none need be given.—*FRENCH v. PIERCE* (1662), 1 Keb. 467, 471; 83 E. R. 1057, 1060.

386. — — — Indemnity against actions.]—Defts. were obligors in a bond conditioned to indemnify pltf. from all actions, etc., from C., to whom pltf. at the request of defts. were indebted. The debt not having been paid, pltf. were sued by C., & they sued defts. on the bond:—*Held*: defts. were liable, notwithstanding they had no notice of the loss of pltf.—*CUTLER v. SOUTHERN* (1667), 1 Saund. 116; 1 Lev. 194; 85 E. R. 125.

Annotations:—*Reid.* *Knight v. Preston* (1767), 2 Wils. 332; *Nash v. Palmer* (1816), 5 M. & S. 374; *Gwynne v. Burnell* (1840), 6 Bing. N. C. 453. *Mentd.* *Stukeley v. Butler* (1614), Hob. 168.

387. Payment without action brought.]

—A bond, conditioned to save A. harmless from all actions, legal proceedings & costs, etc., which may be the consequence of delivering over to deft. a bill of exchange, part of the proceeds whereof a third person is entitled to, is forfeited by payment over by A. to such third person of his share of the proceeds, upon his demanding same, without his bringing any action, though A. give no notice of the payment to deft.—*KER v. MITCHELL* (1786), 2 Chit. 487.

388. — Indemnity against payments—

Expenses incurred on being sued.]—In an action of debt on a bond, on which pltf. was bound with deft., an excise man, that deft. should give a true account of money received by him, & in which deft. was bound that he should save pltf. harmless from all payments, etc., under the bond, pltf. alleged that a *sci. fa.* was issued against him on the bond & that he was forced to retain an attorney & paid 1s. for his appearance. Deft. demurred that pltf. had not given him notice:—*Held*: no notice was necessary.—*KING v. ATKINS* (1670), 1 Vent. 35, 78; 2 Keb. 596; 1 Sid. 442; 86 E. R. 25, 54.

389. — Payment on contingent event.]

In debt on a bond payable within ten days after an act done, notice of performance need not be specially alleged.—*NORMANVILLE v. POPE* (1607), Cro. Jac. 137, 150; 79 E. R. 120, 131.

390. — —.]

—If a man is bound to pay £100 two months after A. return from Rome, he ought to give notice of his return before he can have an action upon this obligation, for he may land at Newcastle, or Plymouth, where by common intendment the obligor cannot know whether he be returned, or not (*DODDERIDGE, J.*).—*HODGES v. MOORE* (1626), Poph. 164; 79 E. R. 1262.

391. — To pay costs due to attorney of obligee.]—On a bond conditioned to pay all such costs as shall appear to be due to the attorney of the obligee, it is not necessary to give the obligor notice that so much was due, in order to sustain an action.—*PITMAN v. BIDDLECOMBE* (1693), 4 Mod. Rep. 230; 87 E. R. 364.

392. — To pay on notice to obligor or executor.]—A declaration in debt against an exor., on a bond conditioned to pay on notice to the obligor or his exor., must allege that the notice was given after the death of testator.—*GOLD v. DEATH* (1615), Cro. Jac. 381; 3 Bulst. 55; Hob. 92; 79 E. R. 325.

Annotations:—*Mentd.* *Travis v. Meers* (1661), 1 Keb. 135; *Layworthy v. Chichester* (1672), Freem. K. B. 53; *Tracy v. Cheshire* (1667), 2 Keb. 239; *Mansfield v. Richman* (1730), Fortes. Rep. 330.

393. — Failure to account—Embezzlement.]

—Under a bond conditioned that if F. should duly account for all moneys, etc., received by him in pltf.'s service as a clerk, & if F. should embezzle, etc., pltf.'s property, & should, within three days after proof thereof, repay, etc., pltf. the damage sustained by such misbehaviour or misdoing, or, in default thereof, if deft. should, after notice given, make a full recompense to pltf., then the bond should be void, pltf., in order to render deft. liable for F.'s not accounting, must give deft. notice thereof, as by the construction of the condition the notice must be given for F.'s not accounting, as well as for his embezzling.—*PHILLIPS v. FORDYCE* (1779), 2 Chit. 676.

394. — Dishonoured bill of exchange.]

The condition of a bond, after reciting that deft. & J. had delivered & indorsed to pltf. a bill of exchange, drawn by J. & accepted by A., was, that deft. & J., or either of them, their heirs, etc.

should pay, or cause to be paid, to pltf., his exors., etc. the sum secured by the bill, within one month after it should become due & payable, in case it should not be then paid by the acceptor, to pltf., his exors., etc., according to the tenor of the bill, together with interest from the time the bill became due. To an action on the bond:—*Held*: it was not a good plea, that the bill, when due, had not been presented for payment to the acceptor, or that due notice of its dishonour had not been given to deft. J., or either of them.—*MURRAY v. KING* (1821), 5 B. & Ald. 165; 106 E. R. 1153.

Annotation:—*Mentd.* *Holborow v. Wilkins* (1822), 2 Dow. & Ry. K. B. 59.

See, generally, *BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS*, Vol. VI., pp. 224 *et seq.*, 250 *et seq.*

395. — Investment to be approved by trustees—Notice by trustees.]

Two persons gave a bond, that if one of them, then about to be married, should die & leave his wife without children, the heirs, exors., etc. of the husband, out of his effects, should, within three months after his decease, put out £1,000 on good security, to be approved of by two trustees. The wife survived, without children:—*Held*: the surety or co-obligor was bound to find out the heir, & it was not necessary for the trustees, within the three months, to give notice of what security they approved.—*JOYCE v. BLOUNT* (1824), 3 L. J. O. S. K. B. 9.

396. — Advance by banker.]—A joint & several bond was given by A., B., & C. By the condition, which recited an agreement by pltf.s., bankers, to advance money not exceeding £200 at any one time to B. on security, the bond was to be void if A., B., & C., or either of them, should pay to pltf.s. all such sums not exceeding £200 as pltf.s. should advance for or on account of bills from time to time drawn by B. on pltf.s., within three calendar months "after receiving notice to pay such sums":—*Held*: in assigning a breach of the condition, it was not enough to aver that deft. "had & received notice" that certain sums were due from B., without averring a notice or request to pay.—*BATSON v. SPEARMAN* (1838), 9 Ad. & El. 298; 3 Per. & Dav. 77; 112 E. R. 1225.

Annotation:—*Distd.* *Jones v. Williams* (1841), H. & W. 80.

397. Election—By obligee—Alternative conditions.]—Where one of two things are to be performed by the obligor at the election of the obligee, "no election" is a good bar to debt on the bond.—*SHEPARD v. KEARNE* (1588), Cro. Eliz. 119; 78 E. R. 377.

398. — — — Specific date.]—A bond conditioned to do one thing or another at the election of the obligee before a particular day is void, if the obligee do not make the election before the day.—*GRENINGHAM v. EWER* (1596), Cro. Eliz. 396, 539; 78 E. R. 641, 785.

Annotation:—*Apld.* *Bassett v. Bassett* (1677), 1 Mod. Rep. 264.

399. Award—Within limited time.]—A bond conditioned for the assessment of, & arbn. on the damages occasioned by the obligee's working a mine, every two months:—*Held*: to be imperative & not merely directory.—*STEPHENS v. LOWE* (1832), 9 Bing. 32; 2 Moo. & S. 44; 1 L. J. C. P. 150; 131 E. R. 526.

Time extended.]—*See* *ARBITRATION*, Vol. II., p. 422, Nos. 734, 735.

400. Writ of covenant—Levy of fine.]—In an action on a bond, which contains a condition to levy a fine & that pltf. is to sue out the writ of covenant, deft. must show he has done all that could be done on his side towards a performance; & it is not a sufficient answer that no writ of

Sect. 1.—Condition precedent to performance: Sub-sects. 1 & 2. Sect. 2: Sub-sect. 1.]

covenant has been sued out.—**WILLIS' CASE** (1707), Holt, K. B. 123; 90 E. R. 967.

401. Assignment of judgment.]—To debt on bond conditioned to pay so much money, for which the obligee had recovered judgment against A. upon consideration that the obligee would forbear to sue out execution against A. & assign over the judgment, if deft. plead that the obligee had not assigned, pltf. may reply that he was ready to assign the judgment, for the assignment is not a condition precedent.—**TURNER v. GOODWIN** (1714), 10 Mod. Rep. 153, 189, 222; Gilb. C. P. 40; 88 E. R. 671, 687, 702.

402. Appointment by will.]—A bond conditioned for payment of a sum of money to such person as A. shall by will appoint, is not forfeited by non-payment to the residuary legatee of A., no specific appointment having been made.—**BUCKLAND v. BARTON** (1793), 2 Hy. Bl. 136; 126 E. R. 472.

Annotations:—Mentd. Hales v. Margerum (1796), 3 Ves. 299; Langham v. Nenny (1797), 3 Ves. 467; Bai Moti-vahoo v. Bai Mamobai (1897), 13 T. L. R. 307.

SUB-SECT. 2.—PERFORMANCE.

403. Alternative condition—Performance of first part—Within reasonable time.]—Where the condition of a bond is that if something be done, payment of a specified sum is to be made, & if it is not done, the obligor is to do something else, the first thing must be done within a reasonable time.—**WILLIAMSON v. HENLEY** (1647), Sty. 11; 82 E. R. 491.

404. — When obligee had son that "shall or can," etc.]—To debt on bond conditioned to pay when the obligee had a son that "shall or can" speak the Lord's Prayer, a plea that he had a son *qui potuit loqui* the Lord's Prayer is good, for the condition being in the disjunctive, the obligee may show performance of either the one or the other precedent act; but the most apt & proper issue had been, that he had a son *qui locutus fuit*.—**LANE v. COLMAN** (1599), Cro. Eliz. 727; 78 E. R. 961.

405. — Proof by confession or otherwise—Notice of confession given.]—To debt on bond conditioned to pay within three months after due proof of a particular act, either by confession or otherwise, if deft. plead that pltf. had not proved the act done, a replication stating that the party had confessed the act, & that due notice of such confession was given, is good, for although the legal mode of proving fact is by trial by jury, yet parties may agree to abide by any other medium of proof.—**GOLD v. DEATH** (1615), Cro. Jac. 381; 3 Bulst. 55; Hob. 92; 79 E. R. 325.

Annotations:—Refd. Travis v. Meers (1661), 1 Keb. 135; Tracy v. Cheshire (1667), 2 Keb. 239. **Mentd.** Layworthy

PART VII. SECT. 1, SUB-SECT. 2.

a. To convey land—Inability to make title.]—A bond recited that deft. had agreed to transfer to pltf. land to which he was entitled as a private in the militia, as soon as a patent should be obtained from the Crown, & the condition was to keep such agreement:—**Held:** there could be no breach of the condition till a patent had issued.—**CRYSLER v. ELIGH** (1844), 1 U. C. R. 227.—**CAN.**

b. — — —.]—Pltfs. acquired a right to purchase a tract of land for the purpose of establishing a colony, & then entered into an agreement with prospective colonists to sell the

lands to them. Defts., who had signed the agreement to purchase from pltfs., executed a bond in favour of pltfs., reciting & incorporating the agreement, the condition being that the obligors should duly & faithfully carry out the terms of the agreement by paying to pltfs. a sum, "on account of the purchase-price of the lands":—**Held:** (1) on the evidence, pltfs. had never acquired legal or enforceable right to purchase, & therefore had no title; (2) defts. were absolved from performing the condition.—**COLWELL v. NEUFELD** (1910), 14 W. L. R. 83.—**CAN.**

c. — — — Tender of deed.]—Deft. agreed by bond to sell to pltf.

v. Chichester (1672), Freem. K. B. 53; *Mansfield v. Richman* (1730), Fortes. Rep. 330.

406. — Payment of bill in India or return protested for non-payment—Protested in India for non-acceptance—In England for non-payment.]—Bills of exchange were drawn by A. in England on B. in the East Indies, payable sixty days after sight, & a bond was entered into conditioned to be void if the bills should be duly paid in India, or come back to England duly protested for non-payment & the amount of them paid by the obligor within a certain time after they should be so returned protested for non-payment. The bills were sent to India, but before they arrived, B., the drawee, had left the country, & his agent there refused to accept them. They were then protested in India for non-acceptance, sent back to England so protested, & being presented to the drawee in England for payment, were protested for non-payment:—**Held:** a substantial performance of the condition of the bond.—**FRENCH v. CAMPBELL** (1793), 2 Hy. Bl. 163; 126 E. R. 485; *subsequent proceedings sub nom. CAMPBELL v. FRENCH* (1795), 6 Term Rep. 200.

Annotations:—Mentd. Worsley v. Wood (1796), 6 Term Rep. 710; *Whitcher v. Hall* (1826), 5 B. & C. 269.

407. To pay on statement of bill of costs—By two attorneys chosen by parties—Only one attorney chosen by obligee.]—A bond conditioned to pay when such a bill of costs should be stated by two attorneys, to be indifferently chosen between the parties, as forfeited by a refusal of the obligor to appoint an attorney.—**OTWAY v. HOLDIPS** (1677), 2 Mod. Rep. 266; 86 E. R. 1064.

Annotations:—Refd. Pilbrow v. Pilbrow's Atmospheric Ry. Co. (1848), 5 C. B. 440. **Mentd.** Shales v. Seignoret (1697), 1 Ld. Raym. 440.

408. To pay amount awarded—Note payable at future day awarded.]—The condition of a bond being to pay pltf. so much money as the arbitrators, under a submission entered into between pltf. & A., should award A. to pay to pltf., an award that A. should give a promissory note to pltf., payable at a future day, is within the condition.—**BOOTH v. GARNETT** (1737), Andr. 28; 2 Stra. 1082; 95 E. R. 283.

See, generally, ARBITRATION, Vol. II., pp. 532 et seq.

409. To pay amount of verdict—No appeal.]—Pltf. obtained a verdict in an action against E., who then, in consideration of a stay of proceedings until the following term, executed a bond, the condition of which was, that if the determination of the action should be in favour of pltf., & E. should pay the amount for which the verdict was given, the bond should be void. A rule to set aside the verdict upon a point reserved at the trial was afterwards discharged, & E. gave notice of appeal under C. L. P. Act, 1854, s. 37, but, no bail having been put in under s. 38, & more than two years having passed without any step being taken to prosecute the appeal, pltf. brought an action

land for £600, of which £50 was to be paid down & the remainder "within ten years from the date thereof," with interest, & conditioned that deft., "on receiving the principal & interest at the days & times mentioned for payment thereof," should "sign, seal, & deliver & execute" unto pltf. a sufficient deed in fee of the land, free from all incumbrances:—**Held:** pltf. was bound to tender a deed for execution & was not relieved by general allegations in the declaration that deft. could not give a good title, etc.—**BURNS v. BOYD** (1860), 19 U. C. R. 547.—**CAN.**

d. To pay compensation for market tolls—None received—Pleading.]—A.,

on the bond;—*Held*: the time for putting in bail having elapsed, & no bail having been put in, the action against E. must be considered as determined in favour of pltf., & the bond might be enforced.—*BURNABY v. EARLE* (1874), L. R. 9 Q. B. 490; 43 L. J. Q. B. 209; 30 L. T. 760; 22 W. R. 877.

SECT. 2.—WHAT AMOUNTS TO PERFORMANCE OR BREACH.

SUB-SECT. 1.—PAYMENT.

410. Where made—At another place.]—If a man be bound in an obligation to pay £10 to the obligee at a place beyond the sea at a certain day, if the obligor pay at another place, & on the same day in England, & the other accepts it, it is good.—*ANON.* (1546), Bro. N. C. 2, 44; 73 E. R. 848, 866.

See, also, No. 541, *post*.

411. To whom made—Third person—Release of debt.]—If a man is bound to A. in £20 to pay £10 to J. & he releases to J. £20, which he owes him:—*Semle*: this is no performance of the condition, for it ought to be a payment in fact.—*ANON.* (undated), Plowd. Qrs. 23, pl. 130; 75 E. R. 889.

412. — To A. with defeasance on payment to B.—Tender to B.]—On a bond to A., with a defeasance on payment to B., a tender to B. will avoid the penalty, but not if B. had been a mere stranger.—*HUISH v. PHILIPS* (1603), Cro. Eliz. 754; 78 E. R. 986; *sub nom.* *HUGHES v. PHILLIPS*, Yelv. 38; *sub nom.* *PHILIPS v. HUISH*, Cro. Jac. 12. *Annotations*:—*Refd.* *Lancashire v. Killingworth* (1701), 12 Mod. Rep. 529. *Mentd.* *Roskelley v. Godolphin* (1683), T. Raym. 483; *Horn v. Luines* (1700), 12 Mod. Rep. 352; *Harvey v. Stokes* (1737), Willes, 5; *Bullythorpe v. Turner* (1744), Willes, 475.

413. — To creditor by request.]—Debt on bond conditioned to pay "ledd." Deft. pleaded that pltf. was indebted to J. in £10 for "ledd," & that by agreement & consent of pltf. he paid J. the money due to him from pltf. in satisfaction of the price he was to pay to pltf. for the ledd:—*Held*: deft. was discharged.—*FOREWOOD v. DICTON* (1616), 1 Roll. Rep. 296; 81 E. R. 497.

414. — Creditor's securities not cancelled.]—A. agreed to sell property to B. for £500 & let B. into possession upon his giving a bond for that amount. Subsequently at A.'s request B. paid £200 to A.'s creditor, C., but took an assignment of C.'s security & later paid £300 to another of A.'s creditors, D., but took security from D. to refund the £300 on certain conditions:—*Held*: B.'s bond to A. was not discharged by the payments to C. & D., so long as the security assigned by C. & that given by D. were not delivered up to be cancelled.—*MAGSON v. FANE* (1673), Cas. temp. FINCH, 84; 23 E. R. 45.

415. — Scrivener—Bond in custody of obligee.]—A scrivener put out money on bond, & received the interest from time to time, & then received part of the principal, the bond remaining in the obligee's custody:—*Held*: not a good payment.—*ROBERTS v. MATTHEWS* (1682), 1 Vern. 150; 23 E. R. 379.

Annotation:—*Refd.* *Beaufort v. Neeld* (1845), 12 Cl. & Fin. 248.

upon being appointed clerk of the market to the board of police of L., entered into a bond to pay a sum in compensation for the market tolls which the board allowed him to receive. Being sued on his bond for non-payment, he pleaded "that he discovered after the execution of the bond that pltf. had no legal right to erect a market, or make by-laws respecting fees to be taken thereat"; & then averred that pltf. had no such

authority, & that on this account, the bond was void:—*Held*: bad, in not showing that no market was erected or existed, & in not averring that fees were not in fact received by him.—*LONDON BOARD OF POLICE v. TALBOT* (1847), 3 U. C. R. 311.—CAN.

PART VII. SECT. 2, SUB-SECT. 1.

411 i. To whom made—Third person—Equitably entitled only.]—The

—*See, also*, AGENCY, Vol. I., p. 365, Nos. 738, 742.

—*Bond in custody of scrivener.]—See* AGENCY, Vol. I., p. 365, Nos. 739-743.

416. — One trustee—Bond to two trustees.]—Payment of a bond debt to one of two trustees is a good discharge as to both.—*HUSBAND v. DAVIS* (1851), 10 C. B. 645; 2 L. M. & P. 50; 20 L. J. C. P. 118; 138 E. R. 256.

417. — One executor—Bond to two executors.]—D., the obligor of a bond given to two exors., to secure a debt forming part of testator's general assets, thirteen years after testator's death, paid to one of the exors. a moiety of the debt, the other moiety having been previously paid off, & obtained a receipt therefor purporting to be signed by both exors. In fact, the exor. receiving the money forged the signature of his co-exor. to the receipt & appropriated the money to himself. In a suit against D. by the exor. whose receipt was forged & by the *cestuis que trust* to recover the money from him:—*Held*: D. was released from his debt by payment to, & the receipt of one exor.—*CHARLTON v. DURHAM (EARL)* (1869), 4 Ch. App. 433; 38 L. J. Ch. 183; 20 L. T. 467; 17 W. R. 995, L. C.

Annotations:—*Consd.* *Macbryde v. Eykyn* (1871), 24 L. T. 461. *Distd.* *Lee v. Sankey* (1873), L. R. 15 Eq. 204.

See, generally, EXECUTORS & ADMINISTRATORS.

418. By whom made—Solicitor of both parties—Solicitor indebted to obligor.]—Pltf. at the request of M., her solr., lent to deft. £200 on the security of his bond. M. was also the solr. of deft., & was accustomed to receive his rents & make payments on his account. Pltf. applied to M. for payment of the bond. M., who was then indebted to deft., borrowed the amount from a bank, with whom he deposited the bond as a security, & with the money so borrowed paid the bond. Deft. had no knowledge of the transaction. M. afterwards died insolvent, & the bank sued deft. on the bond in the name of pltf.:—*Held*: there was no payment of the bond by deft.—*LUCAS v. WILKINSON* (1856), 1 H. & N. 420; 26 L. J. Ex. 13; 5 W. R. 197; 156 E. R. 1265.

419. How made—To bank account.]—Debt on a bond, dated Jan. 10, 1837, conditioned for repayment of principal & interest on Apr. 6 following, & given as a security by debts. to pltf. on the advance of £1,000 by pltf. to L., one of debts., who had then lately opened an account with a bank, of which pltf. were trustees. Several sums of money had been paid in by L. to the credit side of his account previous to & since the execution of the bond:—*Held*: there being evidence to lead to such a conclusion, the bond was given as a continuing security, & was not discharged by the sums paid in by L.—*HENNIKER v. WIGG* (1843), 4 Q. B. 792; 1 Dav. & Mer. 160; 1 L. T. O. S. 229; 7 Jur. 1058; 114 E. R. 1095.

Annotations:—*Expld.* *Merriman v. Ward* (1860), 1 John. & H. 371. *Consd.* *Mosse v. Salt* (1863), 32 Beav. 269. *Distd.* *Re Boys, Eedes v. Boys, Ex p. Hop Planters Co.* (1870), L. R. 10 Eq. 467. *Consd.* *City Discount Co. v. McLean* (1874), L. R. 9 C. P. 692; *Re Hamilton, Ex p. Smith* (1877), 25 W. R. 760; *Re Hallett's Estate, Knatchbull v. Hallett* (1880), 13 Ch. D. 696; *Deeley v. Lloyds Bank*, [1912] A. C. 756. *Refd.* *Cory v. Mecca*, [1897] A. C. 286.

condition of a bond was to pay to the obligee; payment was made by obligor, a person to whom the original obligee's interest had been assigned under an agreement not made with such third person as an obligee but in a different right & character:—*Held*: such payment could not be considered in law a payment to the obligee.—*HOSKING v. NORTON* (1844), Res. & Eq. Jud. 12.—AUS.

Sect. 2.—What amounts to performance or breach:
Sub-sect. 1.]

420. Time of payment—No date fixed.]—If a bond be conditioned for payment of a less sum, & no time mentioned, it is payable on demand.—*Nose v. Bacon* (1600), Cro. Eliz. 798; 78 E. R. 1028.

421. ——— Within six months.]—To debt on bond payable within six months, if payment be pleaded, it must be within the time.—*Huntington (Earl) v. Hall* (1601), Cro. Eliz. 823; 78 E. R. 1050.

Annotation:—Refd. Tryon v. Carter (1734), Cunn. 106.

See, also, No. 506, post.

422. ——— Before date.]—Payment before the day named is sufficient discharge of a bond.—*Anon.* (1581), Godb. 10; 78 E. R. 7.

423. ———.]—The condition of a bond was, to pay at or before Sept. 29 next, at such a place, £10 to the obligee:—*Held*: (1) if the obligor tendered the money on Sept. 18 at the place, & the obligee was not there to receive it, it was a void tender, for the tender was to be the last day; (2) if the obligor met the obligee at the place before the day, & he then tendered it, that was sufficient, & the obligee ought to receive it.—*Hawley v. Simpson* (1583), Cro. Eliz. 14; 78 E. R. 280.

Annotations:—Refd. Hammond v. Ouden (1700), 12 Mod. Rep. 421; *Startup v. Macdonald* (1843), 6 Man. & G. 593.

424. ———.]—*Solvit ad diem* is satisfied by proof of payment before the day.—*Bond v. Richardson* (1588), Cro. Eliz. 142; 78 E. R. 398.
Annotation:—Refd. Albemarle v. Bath (1693), Freem. Ch. 193.

425. ———.]—An obligor may discharge himself by paying the penalty before the money is due by the condition.—*Gage v. Acton* (1699), 1 Freem. K. B. 515; Carth 511; 1 Com. 67; 1 Salk. 325; 89 E. R. 387; *sub nom.* *Cage v. Acton*, 1 Ld. Raym. 515; Holt, K. B. 309; 12 Mod. Rep. 288; *sub nom.* *Acton v. Acton* (1704), Prec. Ch. 237; *sub nom.* *Acton v. Peirce*, 2 Vern. 480.

Annotations:—Consd. Milbourn v. Ewart (1793), 5 Term Rep. 381; *Hartley v. Manton* (1843), 13 L. J. Q. B. 61; *Fitzgerald v. Fitzgerald* (1868), L. R. 2 P. C. 83. *Mentd. Stonehouse v. Ilford* (1706), 1 Com. 145; *Jones v. Meredith* (1739), 2 Com. 661; *Bishop v. Church* (1751), 2 Ves. Sen. 371; *Rogers v. Acaster* (1851), 14 Beav. 445; *Purdew v. Jackson* (1824), 1 Russ. 1; *Honner v. Morton* (1828), 3 Russ. 65; *Davis v. Gyde* (1835), 2 Ad. & El. 623; *Palne v. Emery* (1835), 4 L. J. Ex. 250; *Duberley v. Day* (1852), 16 Beav. 33; *Jones v. Davies* (1860), 5 H. & N. 766.

426. ———.]—The condition of a bond was for payment of £100 & interest on Dec. 5. Deft. pleaded that on Dec. 1 he paid the principal & interest. Pltf. replied *non solvit modo et forma*. On demurrer:—*Held*: judgment must be given for pltf.—*Martin v. Pritchard* (1725), 1 Stra. 622; 8 Mod. Rep. 345; 93 E. R. 739.

Annotation:—Dbtd. Sturdy v. Arnaud (1790), 3 Term Rep. 599.

427. ———.]—Debt on bond for payment on or before Dec. 5, & plea of payment at the day. Replication that deft. did not pay it on the day:—*Held*: ill, not saying that he did not pay it at any time before.—*Tryon v. Carter* (1734), Cunn. 71, 106; 2 Stra. 994; 7 Mod. Rep. 231; 94 E. R. 1069, 1091.

Annotation:—Refd. R. v. Phillips (1757), 1 Burr. 292.

428. ———.]—*Solvit ante diem*:—*Held*:

436 i. Time of payment—After time for performance—After breach—Pleading.]—A plea of payment in satisfaction of a bond conditioned to do a collateral thing is bad, unless it aver that payment was made after time for performance, & after a breach.—*Prindle*

v. McCann (1848), 4 U. C. R. 228.—*CAN.*

i. ——— Before scire facias—Presumption.]—Pltf., having sued deft. on a bond to pay money by instalments, obtained judgment for the penalty, & execution of the first &

not an immaterial plea in debt on bond.—*Fletcher v. Hennington* (1760), 2 Burr. 944; 1 Wm. Bl. 210; 97 E. R. 646.

429. ———.]—Debt on a bond to pay money on or before such a day:—*Held*: payment before the day, *scilicet*, such a day, was good.—*Anon.* (1763), 2 Wils. 173; 95 E. R. 750.

430. ——— On date—Extension by parol.]—Debt on bond conditioned for payment at a certain day. A plea that pltf. gave a longer day of payment:—*Held*: bad, for an agreement by parol could not dispense with an obligation, even when made before breach.—*Hayford v. Andrews* (1598), Cro. Eliz. 697; 78 E. R. 932.

Annotations:—Consd. Andrews v. Eaton (1729), Fitz-G. 73. *Refd. Aldridge v. Harper* (1833), 10 Bing. 118; *Davis v. Gyde* (1835), 2 Ad. & El. 623. *Mentd. Callander v. Howard* (1850), 10 C. B. 290.

431. ——— Effect of non-payment.]—If a bond be conditioned to pay £12 a year, or £150, the obligor has an election, but if he neglect to pay the £12 on any of the days of payment, it is a forfeiture of the penalty.—*Abbot v. Rookwood* (1620), Cro. Jac. 594; 79 E. R. 507.

432. ——— Provided by mortgage.]—A bond was conditioned to perform all covenants & conditions in an indenture of mtgo., wherein was a proviso, that if the mtgor. paid the money on the day, the mtge. should be void. In an action on the bond the breach alleged was non-payment of the money on the day:—*Qu.*: whether there was a breach of the condition, & whether the bond was forfeited.—*Tomles v. Chandler* (1675), 2 Lev. 116; 83 E. R. 476; *sub nom.* *Tooms v. Chandler*, 3 Keb. 454; Freem. K. B. 386.

433. ——— Of bond.]—A bond dated on a day certain in a penal sum conditioned for payment of a lesser sum generally, without naming any day of payment, is payable on the day of the date.—*Farquhar v. Morris* (1797), 7 Term Rep. 124; 101 E. R. 889.

Annotation:—Mentd. Re Dixon, Heynes v. Dixon, [1900] 2 Ch. 561.

434. ——— Taxed costs.]—A bond conditioned to pay costs on Nov. 29 in Cumberland, when taxed by the master is forfeited by non-payment, though in fact the costs were only taxed on Nov. 25, of which deft. had no notice on or before Nov. 29, for deft. might have had them taxed before, & thus have known their amount in time.—*Bigland v. Skelton* (1810), 12 East, 436; 104 E. R. 170.

435. ——— Of infant's majority—Bankruptcy of obligor during infancy.]—A. gave B. a bond conditioned for payment of £1,000 when C. an infant, if living, should attain twenty-one, with interest in the meantime payable half-yearly. A. became bankrupt during the minority of C. At the date of the fiat there was an arrear of interest due on the bond:—*Held*: the bond was forfeited, & B. was entitled to prove against the estate of A. for the whole £1,000 with interest to the date of the fiat.—*Re Cawood, Ex p. Shaw* (1850), Fonbl. 159; 15 L. T. O. S. 368.

436. ——— After date.]—In debt on a bond to pay money, deft. pleaded payment of part after the bond was forfeited:—*Held*: a plea of payment after the day for payment was a bad plea.—*Marshall v. Freahe* (1622), Palm. 287; 81 E. R. 1086.

second instalments successively. He then brought *sci. fa.* for the third. Deft. pleaded satisfaction by set-off; & an acknowledgment was produced, signed by pltf., of deft.'s set-off, & that the bond had been paid in full:—*Held*: it should be assumed that

437. — — —.]—Where a bond is conditioned for payment of money on a certain day, payment of the money after the day is no discharge of the bond.—*NESSON v. FINCH* (1698), 1 Ld. Raym. 382; 91 E. R. 1152.

Sec. now, 4 & 5 Anne, c. 3, s. 12.

438. — Impossible date.]—An action of debt was brought upon an obligation to pay £100 on Sept. 31, & the issue upon payment was found for pltf.:—*Held*: it was payable presently, & non-payment *ad diem* was well found for pltf.—*GIGGHAM v. PURCHASE* (1626), Noy, 85; 74 E. R. 1052; *sub nom.* *GIBBON v. PURCHASE*, Lat. 158.

439. — — — Payment on demand.]—A bond to pay on Feb. 33 is presently due on demand, because it is an impossible date.—*GOSSE v. BROWN* (1631), Het. 175; 124 E. R. 432.

440. — After forfeiture.]—Acceptance of satisfaction, after a bond is forfeited, will not discharge the obligation.—*ANON.* (1586), Cro. Eliz. 46; 78 E. R. 309.

441. — — —.]—Payment, after forfeiture, of the principal, interest, & costs, due upon a bond to an infant of eighteen years of age, who was one of three exors. of the obligee, cannot be pleaded in satisfaction to an action of debt, by all the exors. for the penalty.—*KNIVETON v. LATHAM* (1637), Cro. Car. 190; 79 E. R. 1023.

*Annotations:—*Consd. Bank of England v. Morrice (1736), Lee temp. Hard. 219; Pennington v. Healey (1833), 1 Cr. & M. 402.

442. — Before breach—After breach.]—Payment to a bond with condition indorsed, is a good plea before breach, but not afterwards, no more than to an action of debt upon a single bill, for the benefit of the condition is lost when the breach is made.—*MARLE v. MAKE* (1701), 2 Salk. 508; 91 E. R. 431; *sub nom.* *MARLE v. FLAKE* (1700), 3 Salk. 118.

*Annotation:—*Mentd. Williams v. Hayward (1859), 1 E. & E. 1040.

443. — Due payment—Payment by receipts of following day.]—Debt on a bond conditioned for the due payment by the chief clerk of a railway co. of all money received by him on account of the co. He allowed the other clerks to be in arrear, & made up the deficiency on one day by appropriating to it a portion of the money received on the following day, but, in fact, he paid over a sum equal to the amount received on each day up to the time of his dismissal:—*Held*: the condition had been broken.—*LONDON, BRIGHTON & SOUTH COAST RY. Co. v. GOODWIN* (1849), 3 Exch. 736; 18 L. J. Ex. 337; 13 L. T. O. S. 74; 154 E. R. 1042.

444. Interest—Default.]—A bond executed by deft., as surety for J., on Mar. 1, 1832, was conditioned for payment of £5 interest on a principal sum of £200 on Mar. 1, 1833, £5 on Mar. 1, 1834, & £205 on Mar. 1, 1835. The first year's interest was not paid till Mar. 30, 1833. In June, 1833, deft. became bkpt.:—*Held*: the bond had been forfeited, & was provable under defts.'s commission.—*SKINNERS' CO. v. JONES* (1837), 3 Bing. N. C. 481; 3 Hodg. 18; 4 Scott, 271; 6 L. J. C. P. 113; 132 E. R. 495.

445. — — —.]—On a bond with a penalty conditioned for payment of money at a given day, & interest at stated intervals in the meantime, the whole sum becomes demandable on default in the regular payment of interest. It is no defence

to plead that the obligors credited the obligee with interest in their books upon which the obligee could draw.—*GOAD v. EMPIRE PRINTING & PUBLISHING Co., LTD.* (1888), 52 J. P. 438.

446. Of lesser sum.]—The acceptance of a lesser sum *pendente billâ* cannot be pleaded in abatement to debt on bond. *Qu.*: whether it can be pleaded in bar.—*STONE v. RADISH* (1591), Cro. Eliz. 253; 78 E. R. 508.

447. — — —.]—In an action on a bond of £200 with condition for payment of £101 at a day certain, made by deft. & two others jointly & severally, deft. pleaded that pltf. released the bond by payment of £100:—*Held*: the release of a bond of £200 by payment of £100 did not discharge a bond for payment of £101, for though a greater sum included a lesser as to a tender, yet the debt & duty was entire & could not be discharged by a release of a lesser sum.—*CHACE v. GOLD* (1648), Aleyn, 71; 82 E. R. 921.

448. — — —.]—Payment of a lesser sum in satisfaction of a greater is not a good plea in an action of debt on bond, though it is good in an *assumpsit*.—*HILLIARD v. SMITH* (1685), Comb. 19; 90 E. R. 317.

449. From another obligor.]—Pltfs., on becoming sureties for deft., took a joint & several indemnity bond from deft. & J. Pltfs. afterwards became liable, as such sureties, to pay, & paid, £1098. They then sued J. on the indemnity bond, & obtained a verdict for £1098, but accepted £215 from him in compromise, giving him a receipt as follows:—"Received of J. £215, being the sum we have agreed to accept in discharge of the damages & costs in this action." Pltfs. afterwards sued deft. on the same bond, & he pleaded payment by J. of £215 in full satisfaction:—*Held*: proof of the compromise with J., as above stated, did not support the plea.—*FIELD v. ROBINS* (1838), 8 Ad. & El. 90; 3 Nev. & P. K. B. 226; 1 Will. Woll. & H. 145; 7 L. J. Q. B. 153; 2 Jur. 855; 112 E. R. 770.

450. Part payment—Agreement to take residue at future date.]—Part payment & an agreement to take the residue at a future day cannot be pleaded as satisfaction in bar to debt on bond.—*BALSTON v. BAXTER* (1593), Cro. Eliz. 304; 78 E. R. 555.

*Annotation:—*Reid. Lynu v. Bruce (1794), 2 Hy. Bl. 317.

451. — Another bond given for residue.]—In debt on a bond to pay money, deft. pleaded payment of part after the bond was forfeited, & as to the balance, that he had given a bond to pltf. in exoneration of the bond in suit:—*Held*: the plea that deft. had given a bond in discharge of the other bond was not a good plea, for they were of the same nature, & one did not determine the other.—*MARSHALL v. FREAKE* (1622), Palm. 287; 81 E. R. 1086.

452. — & accord as to remainder.]—To an action for breach of covenant in not paying £8 a year & in not purchasing lands worth £100, deft. pleaded that he had paid part, & that for the rest pltf. was to enter & receive profits of certain lands:—*Held*: an accord was a good plea to a covenant to pay a sum or to an obligation, when joined with other things uncertain.—*OUTRAM v. ROLSTON* (1666), 2 Keb. 51, 64; 84 E. R. 32, 41.

Sec. further, Part X, Sect. 3, post.

453. By instalments—Default.]—Debt lies on a bond payable by instalments after non-payment

payment had been made before this *sci. fa.* issued, & it was therefore admissible under the plea.—*SHIPMAN v. HENDERSON* (1862), 21 U. C. R. 447.—*OAN.*

453 l. By instalments—Default —

Waiver.]—Where, after default in payment of an instalment upon a bond, conditioned that upon such default the whole amount of the bond should become due, pltf. accepted payment of such instalment, as also several

subsequent ones:—*Held*: by so doing the parties reverted to the old arrangement for payment by instalments, or made a new one to the same effect.—*GYAN CHUND v. JAWAHUR* (1870), 2 N. W. 83.—*IND.*

Sect. 2.—What amounts to performance or breach:
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of the first instalment; & the judgment shall stand as a security for the arrears.—**WEBB v. DWIGHT** (1733), 7 Mod. Rep. 191; 87 E. R. 1183.

454. — —.—.]—If a bond be given to pay money by instalments, an action will lie on failure to pay the first instalment.—**HALL v. HODGES** (1752), Say. 29; 96 E. R. 792.

455. — —.—.]—In the case of a bond with condition to pay money at three times, the bond is in force by making any one default.—**COATES v. HEWIT** (1744), 1 Wils. 80; 95 E. R. 503.

456. Alternative condition—Performance of things not provided for.]—Where the condition of a bond is to pay, or to do a collateral thing, this cannot be discharged by the performance of another collateral thing.

The first difference, where the condition of a bond is for payment of money, this may be performed by the payment of another thing, because it is of value certain, & this may be performed by any other collateral thing; otherwise it is, where the condition of a bond is to do a collateral thing. A second difference, three are bound to deliver a collateral thing, they pay money for this; this is no good satisfaction, notwithstanding *mumms est mensura rerum commutandarum*, as if a man is bound to deliver to the obligee so much lead, of the value of £7 certain, & he delivers to him £7, this is no satisfaction of the condition, because that lead may be worth more, the price of this may rise, it may be dearer, or it may be cheaper. A third difference, a man is bound to pay a sum of money, or a powder of lead. If he delivers this to another, by & with the consent of the obligee, this is a good performance of the condition (**DODDERIDGE, J.**).—**MOORWOOD v. DICKENS** (1615), 3 Bulst. 148; 81 E. R. 127.

457. — Replace stock sold—Refusal to replace.]—A. agreed to lend B. a loan of £600 Navy 5 per cent. stock. He sold the stock for £522, which he paid to B. A bond was drawn by an unprofessional man, to repay “£522, being the produce of £600 Navy 5 per cent. stock, or such other sum as would replace the stock, with lawful interest.” A sum equal to the dividends was paid half-yearly, but B., on discharging the bond, refused to transfer the stock, & would only pay the money received by her. A. objected to that, but at length received it, & gave up the bond, remonstrating on the injustice of the proceedings, but being told, at the same time, that the money would only be paid in discharge of the bond:—**Held**: (1) A. had no relief in equity, for he should not have received the money, unless the party paying it had agreed that the remedy should remain open; (2) the costs should be refused.—**BARNHAM v. MUNN** (1829), Tambl. 84; 48 E. R. 35.

458. — Pay insurance premiums—Lapse & revival of policy.]—A bond was conditioned to pay a sum of money on a given day, or to perform an agreement keeping a life policy on foot. Pltf. did not pay one of the premiums on the proper

day, but subsequently to action brought for the principal sum, revived the policy at the original premium:—**Held**: the fact of pltf. having put himself into his original position as regarded the security of the policy, was not a sufficient ground for granting relief, but the action should be restrained on the ground, that in the peculiar circumstances of the case appearing in the bill & affidavits, pltf. might have been under a mistake as to his liabilities in respect of a family arrangement.—**SHEARMAN v. M'GREGOR** (1853), 11 Hare 106; 1 W. R. 302; 68 E. R. 1206.

459. Without acquittance.]—In an action on a bond, deft. pleaded payment without acquittance:—**Held**: payment without acquittance was no plea, & the bond was not discharged.—**NICHOLS' CASE** (1595), 5 Co. Rep. 43a; Jenk. 257; 77 E. R. 121; *sub nom.* **CHAMBERLAYN v. NICHOLS**, Cro. Eliz. 455; Moore, K. B. 692.

Annotations:—**Consd.** **Pitts v. Polehampton** (1698), 1 Ld. Raym. 390. **Refd.** **Holms v. Broket** (1617), Cro. Jac. 434; **Lightfoot v. Brightman** (1622), Hut. 54; **Anon.** (1698), 1 Ld. Raym. 408; **Hill v. Fleming** (1736), Lee temp. Hard. 341.

460. —.]—Quod solvit pendente lite:—Held: no plea to debt on bond, without producing the specialty.—**COLBROOK v. FORSTER** (1602), Cro. Eliz. 885; 78 E. R. 1109.

See, further, Part XII., Sect. 3, sub-sect. 3, post.

Of indemnity bond.]—See Sub-sect. 4, post.

To obtain relief against penalty—Under 4 & 5 Anne, c. 3.]—See cases in Part VIII, Sect. 4, sub-sect. 2, post.

SUB-SECT. 2.—RELEASE.

See Part X., Sect. 5, sub-sect. 1, post.

SUB-SECT. 3.—DELIVERY OF BOND OR GOODS.

461. Bond—After judgment.]—A condition to deliver an obligation is not performed by delivery of it after it has been put in suit, & judgment recovered on it.—**TEAT'S CASE** (1582), Cro. Eliz. 7; 78 E. R. 273.

Annotation:—Mentd. **Boson v. Sandford** (1688), 1 Show. 101.

462. — To third party to use of plaintiff.]—A condition to deliver a bond to pltf. is not satisfied by delivery of it to a third person to his use.—**BEASE v. DRAITON** (1589), Cro. Eliz. 143; 78 E. R. 400.

463. Goods—To common carrier—Delivery to servant of carrier.]—If a condition be to deliver so many shoes to A., a common carrier, for the use of the obligee, a delivery of them to the servant of A. is sufficient, & the master shall be bound by it.—**STAPLES v. ALDEN** (1678), 2 Mod. Rep. 309; 86 E. R. 1091.

SUB-SECT. 4.—OF INDEMNITY BONDS.

See, generally, GUARANTEE.

464. Against debt—Subsequent payment.]—Upon a bond to save pltf. harmless against a debt,

453 ii. S. P. SRI RAJAH PAPAMMA ROW GARU v. TOLETI VENKAIYA (1870), 5 Mad. 198.—**IND.**

h. Of moneys collected—Pleading.]—The condition was to pay over moneys. Plea, payment of all moneys collected, without showing how much collected:—**Held**: sufficient.—**DENISON v. DONNELLY** (1846), 2 U. C. R. 395.—**CAN.**

k. Presumption of—Possession of bond by mortgagor.]—The presumption of payment of a bond which arises

from its possession by the obligor loses much of its force when raised, not between the original creditor & debtor, but between debtor & the purchaser of the debt at an execution sale.—**DEBENDRA KUMAR MANDEL v. RUP LALL DASS** (1886), 1 L. R. 12 Calc. 546.—**IND.**

PART VII. SECT. 2, SUB-SECT. 3.

1. Goods—Delivery to sheriff.]—A bond by a party whose goods are seized under a *fi. fa.*, to deliver them

to the sheriff on request, means morely that they shall be forthcoming when demanded, & where, in such case, the obligor has once delivered up the goods to the sheriff, the condition is performed; a refusal to give them up on a subsequent occasion is no breach of the condition.—**MALLOCK v. PATTERSON** (1844), 1 U. C. R. 261.—**CAN.**

PART VII. SECT. 2, SUB-SECT. 4.

m. Legal result—Trouble & expense.]—A person giving a bond to

he is damnified & the condition of the bond is broken the moment judgment for the debt is given, & deft. cannot avoid the penalty by a subsequent payment of the debt.—*BUSH v. RENGLEY* (1591), Cro. Eliz. 264 ; 78 E. R. 520.

465. — Failure to pay.]—When the principal debtor gives his surety a bond to save him harmless, there is a forfeiture if the principal debtor fails to pay the debt by the due date.—*ABBOTS v. JOHNSON* (1616), 3 Bulst. 233 ; 81 E. R. 197.

466. Against previous bond—Action commenced—Subsequent payment.]—If a counter bond be given to save the obligee harmless from another bond in which he is the obligor, the covenant is broken if the original bond be put in suit, although the money is afterwards paid.—*BOTHWRIGHT v. HARVY* (1594), Cro. Eliz. 369 ; 78 E. R. 617.

467. — Previous bond paid—Terror of suit.]—Deft. having given a bond to pltf. to save him harmless against another bond, pltf. went to the place where the money due on the first bond was to be paid, on the day of payment, & perceiving no person there to pay the money due upon it, paid the money to the obligee in the first bond to save the penalty. In an action on the counter bond :—*Held* : the condition had been broken, for terror of suit was a damnification.—*BROUGHTON'S CASE* (1600), 5 Co. Rep. 24a ; 77 E. R. 86.

Annotations :—*Foll.* *Rove v. Harris* (1613), 2 Bulst. 115. *Dist.* *Browne v. Hancocke* (1628), Het. 111. *Refd.* *Freeman v. Sheen* (1614), Cro. Jac. 339 ; *Haddon v. Ayers* (1858), 1 E. & E. 118 ; *Andrews v. Garrett* (1859), 6 C. B. N. S. 262 ; *Collins v. Cave* (1860), 6 H. & N. 131.

468. — Capias issued.]—Where pltf. was bound as surety for deft., gave pltf. a bond to save him harmless :—*Held* : there was a breach when deft. failed to pay his debt, whereby there was a *capias* against pltf.—*REVE v. HARRIS* (1613), 2 Bulst. 115 ; 80 E. R. 996.

469. — Effect of non-payment.]—Where a counter bond is given to save harmless from a penal bond before condition broken, if the penal sum be not paid at the day, the party to be saved harmless becomes thereby liable to the penalty ; & so is damnified, & the counter bond is forfeited.—*GRIFFITH v. HARRISON* (1693), 1 Salk. 196 ; *Skin.* 397 ; 90 E. R. 176.

Annotation :—*Mentd.* *Wright v. Russell* (1774), 3 Wils. 530.

470. — .]—X. became bound as a surety with Y. to A. on Aug. 10, 1778, conditioned for payment in six months. On Mar. 1, 1780, he became bound with Y. to B. conditioned for payment in six months ; & on Mar. 4, 1780, Y. became bound to X. conditioned for payment of the two former bonds, & also to indemnify X. against those two bonds. The money secured by the second bond not being paid on the day when it became due :—*Held* : the last bond was thereby forfeited, though X. was not called on to pay the money in the second bond until afterwards, & X. might prove it as a debt under the commission of bkpcy. that issued against Y. after the forfeiture & before payment.—*HODGSON v. BELL* (1797), 7 Term Rep. 97 ; 101 E. R. 874.

Annotations :—*Consd.* *Collinge v. Heywood* (1839), 9 Ad. & El. 633 ; *Refd.* *Hankin v. Bennett* (1852), 8 Exch. 107.

471. Against claim of dower—Action for arrears.]—The obligee in an indemnity bond, on being damnified, has an immediate right to be reimbursed.

The condition of a bond was that deft. should indemnify pltf. from all manner of claim of dower

that might be made by A. A. subsequently married D., who filed a bill for arrears of dower :—*Held* : pltf. was not bound to wait until the determination of the suit, but had an immediate right to enforce the bond.—*CHALLONER v. WALKER* (1758), 1 Burr. 574 ; 2 Keny. 297 ; 97 E. R. 455.

Annotation :—*Refd.* *Re Fox, Ex p. Marshall* (1834), 3 Deac.

472. Parish against pauper—Maintenance in another parish.]—A bond to indemnify a parish against a pauper is forfeited, though the parish, to avoid the expense of removal, chooses to pay a weekly sum for his maintenance in another parish.—*ALLEN v. PESHALL* (1777), 2 Wm. Bl. 1177 ; 96 E. R. 694.

473. Parish against inhabitant—Residence after term.]—A bond given to parish officers reciting that B. had taken a house in the parish for a term of seven years, & conditioned to indemnify the parish against any charges which they might sustain on account of B. & his family becoming inhabitants of & belonging to the parish, is not discharged by B.'s purchasing an estate of the value of £30 in the parish, & residing on it upwards of forty days, after the expiration of the seven years' lease.—*EDWARDS v. BOBBIT* (1813), 1 M. & S. 120 ; 105 E. R. 45.

474. Parish for maintenance of bastard child—Refusal by parish to deliver child to obligor.]—The putative father of a bastard child voluntarily entered into a bond, conditioned to pay pltf., parish officers, & their successors 2s. 6d. a week, for all costs & charges concerning the child, so long as it should live, & be provided for at the expense of the parish. To an action on the bond, to recover weekly payments deft. pleaded that he was able & willing to pay for the child without the assistance of the parish, & that he had requested pltf. to deliver it over to his care, but that the child had been provided for at the expense of the parish, by pltf., of their own wrong, & that, if they were damnified, they were damnified of their own wrong :—*Held* : the plea disclosed no matter of legal defence to the action, since the only plea in discharge of the bond would be performance, as the child had been provided for at the expense of the parish.—*POPE v. SALE* (1831), 7 Bing. 477 ; 5 Moo. & P. 336 ; *Nev. & M. M. C.* 240 ; 9 L. J. O. S. C. P. 150 ; 131 E. R. 185.

Annotation :—*Mentd.* *Follit v. Koetzow* (1860), 21 J. P. 612.

475. Against expenses of bastard child—Child under seven removed by mother.]—Debt on bond to indemnify pltf. from charges which he might be liable to on account of a bastard child. Plea, that the mother took the child away from defts. Replication, that it had since been chargeable to the parish, & pltf. had been obliged to pay. Rejoinder that the child was an infant under seven & in the keeping of the mother, & that it was not in defts.' power to take it from her & keep it so as to indemnify pltf. :—*Held* : the plea was bad, because the bond was a general bond to indemnify pltf. as to the child against all the world, & defts. could plead nothing except either (1) that pltf. had not been damnified, or (2) if he had been damnified he himself was the occasion thereof.—*HULLAND v. MALKEN* (1760), 2 Wils. 126 ; 95 E. R. 723.

Annotation :—*Refd.* *Strangeways v. Robinson* (1812), 4 Taunt. 498.

See, further, BASTARDY, Vol. III., pp. 384, 385.

hold harmless in any actions that may be brought, & to pay all costs & charges thereby accruing, is bound to

indemnify as well against the legal result of any such actions, as for the trouble & expense occasioned by them

to the person to be indemnified.—*HAMILTON v. DAVIS* (1844), 1 U. C. R. 176.—CAN.

Sect. 2.—What amounts to performance or breach : Sub-sects. 5, 6 & 7.]

5.—OF BONDS DEALING WITH INTERESTS IN AND COVENANTS RELATING TO LAND.

476. Descent to son at death—Land sold & repurchased.]—A man was bound in an obligation on condition that if he allowed his lands to descend to his son immediately after his death without any act being done relating to the lands, the obligation should be void. He sold part of the land during his life, but bought it back & allowed it to descend to his son :—*Held* : he had broken the condition.—*HOWARD (LORD) v. UDER* (1537), Benl. 9 ; Ben. & D. 19 ; 73 E. R. 937.

Annotation :—Mentd. Anon. (1562), Ben. & D. 121.

477. Release of rights—Lease to another to use of obligor.]—A. was bound in an obligation that he should release all his right in B. to the obligor, & in performance of the condition he made such a lease, & delivered same to C. to the use of the obligor :—*Held* : the condition was not performed, because the obligor had not the lease in his own hands to plead, but was put to his writ of detinue against C.—*ANON.* (1584), 4 Leon. 122 ; 74 E. R. 771.

478. Performance of covenants in lease—Rent reserved by award.]—Arbitrators awarded that the obligee of a bond should grant a lease to the obligor reserving a certain rent. The lease was granted, but the obligor did not pay the rent :—*Held* : the lessor could not bring an action of debt on the bond, for the words "reserving rent" were not parcel of the award, the effective part of which was the granting of the lease, & the lessor had other remedies for recovering the rent.—*ANON.* (1535), Benl. 4 ; 73 E. R. 933.

479. — Breach.]—Debt on bond conditioned for performance of covenants in a lease will lie on a breach of the covenants before the condition is performed, though the lease becomes void before the action is brought.—*HILL v. PILKINGTON* (1591), Cro. Eliz. 244 ; 78 E. R. 500.

Annotations :—Refd. Gibbons v. Davies (1693), Comb. 242. Mentd. Reynolds v. Woolmer (1672), Freem. K. B. 41.

480. — — Implied covenant.]—A bond to perform all covenants, etc., in a lease is forfeited by the breach of an implied covenant.—*NOKES' CASE* (1599), 4 Co. Rep. 80 b ; 76 E. R. 1056 ; *sub nom. NOKES v. JAMES*, Cro. Eliz. 674.

Annotations :—Mentd. Trenchard v. Hoskins (1628), Litt. 203 ; Brown v. Brown (1661), 1 Lev. 57 ; Hayes v. Bickerstaff (1669), Vaugh. 118 ; Pomfret v. Ricroft (1669), 2 Keb. 569 ; Hacket v. Glover (1713), 10 Mod. Rep. 142 ; Pickering v. Watson (1776), 2 Wm. Bl. 1117 ; Browning v. Wright (1799), 2 Bos. & P. 13 ; Dawson v. Dyer (1833), 5 B. & Ad. 584 ; Line v. Stephenson (1838), 4 Bing. N. C. 678 ; Messent v. Reynolds (1846), 3 C. B. 194 ; Doughty v. Bowman & Fulford (1848), 12 Jur. 182 ; Monypenny v. Monypenny (1861), 9 H. L. Cas. 114 ; Dennett v. Atherton (1872), L. R. 7 Q. B. 316 ; Baynes v. Lloyd, [1895] 2 Q. B. 610 ; Stephens v. Junior Army & Navy Stores, [1914] 2 Ch. 516.

481. — — Compromise—Premises let by assignor.]—The assignee of a lease executed a bond to indemnify the original lessees against the

covenants contained in the original lease. He afterwards left the country ; the house was left untenanted, & the original lessees were obliged to pay the rent reserved. The assignee, having subsequently returned to England, made a compromise with them for the sum then due in respect of his non-performance of the covenants, & shortly afterwards went abroad, & the original lessees demised the house to a person who continued in possession until the end of the term :—*Held* : such mode of dealing with the premises did not give the assignee any title in equity to relief against the legal effect of his bond.—*ANDERSON v. BAILEY* (1826), 1 Russ. 313 ; 38 E. R. 121, L. C.

482. Sale of house to A.—Sale to B.—Subsequent repurchase.]—If a man be bound by his bond, to sell a house to A., & afterwards before any sale by him made to A. he sells the same house to B., by such sale the bond is forfeited, & that is so, notwithstanding afterwards he repurchases the same house again.—*ANON.* (1611), 1 Bulst. 117 ; 80 E. R. 813.

483. Quiet enjoyment—Interference.]—Where a lessor is bound that his lessee shall take, reap & carry his corn peaceably without interruption, if the lessor comes upon the land & says to the lessee that he shall not reap any corn there, but otherwise does not disturb him, it is a forfeiture of the bond.—*ANON.* (1584), Godb. 22 ; 78 E. R. 14.

484. Payment of annuity during occupation—Surrender of land.]—A bond to pay an annuity to A. if the obligor or his assigns, shall, or may, occupy the lands let to him, the obligor, by B. is forfeited by non-payment to A., although the obligor has surrendered the lands to B.—*FORD v. HOLLINGBOROUGH* (1593), Cro. Eliz. 313 ; 78 E. R. 563 ; *sub nom. FOORD v. HOLBORROW*, Owen, 104.

485. Lessee to give up possession—Refusal.]—A lessee for years was bound in a bond to give up possession of the land demised to the lessor, or his assigns, at the end of the term. The lessor assigned over his interest, & the assignee required the lessee to perform the condition, who replied that he did not know whether or not he were the assignee, & thereupon refused :—*Held* : he had broken the condition.—*ANON.* (1618), Poph. 136 ; 79 E. R. 1238.

486. Removal of manure.]—A tenant executed a bond to his landlord, conditioned that it should be void, if he should spread all the manure then collected in the midden-stead or any other part of the farm on the land, & should not sell, cart, or convey away any manure from the farm. The tenant's stock upon the farm having been sold by auction, two of the cows, which were bought by W., were permitted by the tenant to stay upon the premises for some weeks. W. brought all their food daily from his own farm, & took away the manure made by them :—*Held* : the condition of the bond was broken, as the manure so taken away was made on the land, & ought to have been spread

PART VII. SECT. 2, SUB-SECT. 5.

n. Agreement to settle land—Whether non-performance cancels agreement.]—If a man agree to settle his estate in a particular manner, & give a bond for performance of the agreement, he cannot forfeit the bond & get rid of the agreement, though the estate be worth more than the amount of the bond ; & if the bond is to secure his not doing an act, he cannot, by forfeiting it, enable himself to do the act.—*FRENCH v. MACALE* (1842), 4 L. Eq. R. 573 ; 2 Dr. & War. 269.—*IR.*

o. To convey land—Tender of

*deed.]—*The obligor of a bond conditioned to convey land must prepare & tender the conveyance, unless the condition be to convey by such deed as the obligee shall require, or to execute a conveyance.—*SCOTT v. REIKIE* (1865), 15 C. P. 200.—*CAN.*

p. S. P. PRINDLE v. MCCAN (1848), 4 U. C. R. 228.—*CAN.*

q. S. P. HARRISON v. LIVINGSTON (1838), 4 Ont. Dig. 7190.—*CAN.*

r. S. P. MOUCK v. STUART (1848), 4 U. C. R. 203.—*CAN.*

s. — — — On payment of expenses.]—If the condition be to con-

vey at the expense of the obligee, the obligor must prepare the deed & tender the delivery of it to the obligee on his paying the expenses thereof.—*MCDONALD v. SNITSINGER* (1849), 5 U. C. R. 312.—*CAN.*

t. — — — Conveyance essential—Pleading.]—Declaration on a bond by defts. testator to "execute to pltf. a sufficient deed in law" of land. Plea, that defts., under a power, had executed a deed of the land :—*Held* : plea bad, for that defts. had executed a deed was no answer, without showing that they had conveyed the land.—*WISEMAN v. WILLIAMS* (1866), 17 C. P. 262.—*CAN.*

upon the land.—*HINDLE v. POLLITT* (1840), 6 M. & W. 529; 9 L. J. Ex. 288; 151 E. R. 521.

See, generally, AGRICULTURE, Vol. II., pp. 26, 27.

SUB-SECT. 6.—OF BONDS TO RENDER ACCOUNTS.

487. Neglect to pay money.]—The condition of a bond being, “to render a fair, just, & perfect account, in writing, of all sums received,” if the obligor neglect to pay over such sums, he is guilty of a breach of the condition.—*BACHE v. PROCTOR* (1780), 1 Doug. K. B. 382; 99 E. R. 247.

Annotation:—Mentd. Wilson v. Wilson (1854), 5 H. L. Cas. 40.

488. — False balance sheets.]—In an action upon a bond, the condition of which was for the honest & faithful service of a banker's clerk, three breaches were assigned, viz., general misconduct, irregular & unbusinesslike conduct, & not faithfully accounting. An arbitrator, to whom the cause was referred, found specially that, on a certain day, the clerk made an erroneous balance sheet, failing to exhibit, as it should have done, a surplus of £100, but that there was no proof that such sum came to the hands of the clerk, & also that, on another occasion, the clerk having received from a customer £213, entered it in the books of the bank as £113, exhibiting on that day's balance sheet a false & unaccounted for surplus of £100:—*Held*: the above facts did not show conclusively that the condition of the bond had been broken.—*JEPHSON v. HOWKINS* (1841), 2 Man. & G. 366; 2 Scott, N. R. 605; 133 E. R. 787.

489. — Deficiency on stock taking.]—Deft. gave a bond dated Apr. 18, 1842, to secure his faithful discharge of the duties of the office of agent for a co-operative society. By the condition, the nature of the duties was to render a true account to pltfs., as the directors, or such persons as they should appoint, of all money & other property & otherwise faithfully discharge the office. The breach assigned that deft. received from members and others, on behalf of the society, goods & chattels of the value of £2,800, & was liable to account for same, but that he did not render an account of £80 9s. parcel of the sum. The deft. alleged that he did render an account of the £80 9s., & that he did, when requested, pay over the sum. Deft. had been, from Aug., 1841, agent for the society, & his duties before & after the execution of the bond were precisely of the same description. A deficiency was discovered on taking stock in Aug., 1842, & such deficiency was £112, but in what manner, or at what time, the deficiency was occasioned, was left on the stock-taking quite uncertain. After the first stock-taking deft. remained in his office a fortnight longer, & at the end of it stock was again taken, on which second occasion the deficiency amounted to £128, making an increase in such deficiency of £16 in the interval. Upon that evidence the judge directed the jury to find a verdict for pltf. for £80 9s.,

with liberty to move to reduce it to £16, or enter a nonsuit, or verdict for deft.:—*Held*: the rule should be made absolute for reducing the verdict to £16, & the verdict could not stand, because the period of the breach of duty by deft., except as far as regarded the fortnight between the first & second taking of the stock, was left quite in uncertainty, but the stock having been twice taken while deft. remained in his office after the date of the bond, afforded some evidence of breach of duty within the condition.—*HARGREAVES v. WOOD* (1845), 5 L. T. O. S. 370.

SUB-SECT. 7.—OF BONDS RELATING TO MARRIAGE.

490. Settlement—Subsequent marriage—Of wife.]—A. on his marriage with B., entered into a bond of £1,000 to trustees to her use, in Aug., 1848, conditioned to be void, if he did not within two months settle lands on those trustees, to the use of himself & B., & their heirs, in Nov. next. Afterwards A. covenanted with one of the trustees to stand seised of those lands to the use of himself for life, remainder to B. for life, remainder to his first & tenth son in tail, remainder to his own right heirs. A. died without issue, & B., who survived many years, married C., by whom she had issue, pltf., an infant. A bill having been brought on his behalf against deft., who claimed under the heir of A., to enforce a conveyance according to the condition of the bond:—*Held*: as there was no agreement but what was in the condition of the bond, & no articles or agreement besides, & as the bond was twenty-two years old, & the above settlement had been made to one of the obligees of the same land mentioned in the condition, though not to the same uses, & as B. had never questioned it in her life, & the agreement was secured by penalty, which was relied upon, there was no reason to turn such agreement into a collateral execution by decreeing the land, & demurrer to the bill allowed.—*BAGG v. FOSTER* (1870), 1 Cas. in Ch. 188; 22 E. R. 755.

491. — Of obligor.]—Where, in a bond made in contemplation of marriage, the obligor agreed to settle all lands & hereditaments of which he should be seised during his life upon his intended wife, & the issue of the marriage, in such parts & proportions, & to such use & uses as should be thought requisite, the better to make a provision for his intended wife in case she should survive him:—*Held*: such obligor having survived his wife, by whom he had issue, & married another by whom he also had issue, would not commit a breach of the condition, if he did not make a settlement of property acquired during the second marriage upon the issue of the first.—*PREBBLE v. BOGHURST* (1817), 7 Taunt. 538; 1 Moore, C. P. 258; 129 E. R. 215; *subsequent proceedings* (1818), 1 Wils. Ch. 161, L. C.

Annotations:—Mentd. Maxwell v. Ward (1822), 11 Price, 3; *Hill v. Gomme* (1839), 5 My. & Cr. 250; *Wellesley v. Wellesley* (1839), 4 My. & Cr. 554; *Maclurcan v. Lane*, *Melhuish v. Maclurcan* (1858), 5 Jur. N. S. 56.

PART VII. SECT. 2, SUB-SECT. 6.

488 i. Neglect to pay money—Falsification of accounts.]—A clerk to an urban district council falsified the accounts before entering into a surety bond, subsequently entered into a bond, failed to account & left the country. The condition in the bond was that if he should duly & faithfully execute & discharge all the duties of the said office, etc., then, etc.:—*Held*: there was a duty on his part to submit his accounts to audit & to pay over

the sum of money that would be certified by the auditor to be due.—*TULLAMORE URBAN DISTRICT COUNCIL v. ROBINS* (1913), 48 I. L. T. 180.—*IR.*

a. — Pleading.]—In debt in bond to pltf., as treasurer, by deft., as collector of taxes, conditioned that if deft. should faithfully collect & pay over to the proper officer the taxes imposed for the then current year, & should well & faithfully comply with all the other duties of his office as specially defined in the by-laws, etc.:

—*Held*: the declaration should have alleged that the town council had imposed taxes, amount that should have been collected by deft., the by-laws defining duty, etc.—*JUDD v. PETRIE* (1856), 6 C. P. 48.—*CAN.*

b. — —.]—Condition, to account once in six months. Plea, that deft. did account, not alleging once in every six months:—*Held*: bad.—*SMALL v. BEASLEY* (1846), 3 U. C. R. 40.—*CAN.*

Sect. 2.—What amounts to performance or breach: Sub-sects. 7, 8 & 9. Sects. 3 & 4: Sub-sect. 1.]

492. — Satisfied pro tanto—Devise of lands to wife.]—A bond by a wife's father to pay £800 as her portion:—*Held*: satisfied *pro tanto* by the devise to her of copyhold lands which the husband had enjoyed.—*BRIDGES v. BERE* (1708), 2 Eq. Cas. Abr. 34; 22 E. R. 29, L. C.

493. — Estate of inheritance—Subsequent annuity.]—One on marriage gave a bond to settle an estate of inheritance of clear £100 a year, to the use of himself for life, remainder to his wife for life, remainder to the heirs of their bodies, remainder to his own right heirs. He afterwards settled [a rentcharge] a perpetual annuity, which he was entitled to, payable out of the customs at Hull:—*Held*: a performance of the agreement.—*MIDDLETON v. PRYOR* (1760), Amb. 301, 828; 27 E. R. 260, 521.

Annotation:—*Mentd.* *Turner v. Turner* (1783), 1 Bro. C. C. 315.

494. — On husband & wife—Devise to wife—Specific performance.]—A bond was given by the father of an illegitimate child to her intended husband, in contemplation of their intended marriage, in the penal sum of £2,000 conditioned to pay the husband £1,000 & interest. It was recited in the condition, that in consideration of the intended marriage, the obligor had proposed to the obligee to surrender certain copyhold property, then let on lease at a rent of £50 *per annum*, to the uses thereafter mentioned, & if such surrender should not be so made within eighteen months after the marriage, the husband & wife, or the survivor, should receive, after the death of the obligor, £1,000, & he was, in the meantime, to pay the husband & wife £50 a year for the interest thereof, until the principal sum should be fully discharged. The condition was to the effect of the recital, & that, if the estate should be so settled in substance to the use of the husband & wife for life, remainder to the survivor, remainder to their issue, & if the £1,000 & interest should be paid, or if the obligor should make such surrender in his lifetime, & pay the arrears of interest up to the time of the surrender, the obligation was to be void. The obligor died without making the surrender, having regularly paid the £50 *per annum*, & by his will he devised the copyhold estate to his daughter, the wife of the obligee:—*Held*: the bond was not forfeited by reason of the breach of the condition, as there was merely an agreement to settle the land, which was satisfied by the devise to the wife, & it was an agreement of which equity would enforce the specific performance, the penalty being only meant to secure the settlement recited in the condition.—*ROPER v. BARTHOLOMEW* (1823), 12 Price, 797; 147 E. R. 880.

495. To marry obligee—Refusal to marry.]—The condition of a bond was that the obligor would not marry any other but *pltf.*, & would pay £1,200 in case she did so, or refused to marry *pltf.*

PART VII. SECT. 2, SUB-SECT. 8.

*c. Not to sell liquor during pendency of appeal—Sale by third party.]—*During the pendency of a *certiorari* to remove a conviction of *deft.* for selling intoxicating liquors contrary to law, *deft.* was again convicted & fined; part of the amount of the fine was paid, & action was brought on a bond conditioned that *deft.* would not sell "during the pendency of the appeal" from the first conviction. There was no evidence that he had sold liquor personally, but it appeared that liquor had been sold on the premises by a woman who was not

shown to be *deft.*'s wife, child, or servant:—*Held*: the breach of the condition of the bond had not been proved.—*R. v. MCKENZIE* (1880), 1 R. & C. 488.—*CAN.*

PART VII. SECT. 2, SUB-SECT. 9.

*d. Not to alter will.]—**Deft.* gave *pltf.* a bond conditioned not to alter his will, by which, as recited in the bond, he had devised to *pltf.* land. He afterwards sold & conveyed the land to C.:—*Held*: the condition was broken.—*MCCORMICK v. McRAE* (1854), 11 U. C. R. 187.—*CAN.*

within a month after her father's death. The obligor married another man, her father being alive:—*Semble*: the bond was forfeited & the money payable.—*BOX v. DAY* (1744), 1 Wils. 59; 95 E. R. 491.

SUB-SECT. 8.—OF BONDS RELATING TO ACTIONS BROUGHT.

496. Not to continue action—Continued by attorney.]—The condition of a bond not to continue an action is not broken by the party's attorney continuing it without his privity.—*GRAY v. GRAY* (1619), Cro. Jac. 525; 79 E. R. 449.

497. To follow suit—Delay by application for injunction.]—A bond to follow a suit with effect is not forfeited by suing an injunction whereby the proceedings are delayed.—*ORMOND (DUKE) v. IRELAND* (1700), 12 Mod. Rep. 320; 88 E. R. 1350; *sub nom.* *ORMOND (DUKE) v. BRIERLY*, 12 Mod. Rep. 380; Carth. 519; Holt, K. B. 127.

Annotations:—*Refd.* *Moore v. Bownmaker* (1816), 2 Marsh. 392; *Perreau v. Bevan* (1826), 5 B. & C. 284; *Harrison v. Wardle* (1833), 5 B. & Ad. 146. *Mentd.* *Morris v. Matthews* (1841), 11 L. J. Q. B. 57.

498. To appear at certain date—Action on later date.]—A condition to render himself on Nov. 28 upon any action commenced does not oblige him to render to an action commenced after.—*STANLEY v. FEARNE* (1683), 3 Lev. 137; 83 E. R. 617.

SUB-SECT. 9.—OF MISCELLANEOUS BONDS.

499. Place of performance—Not provided for—Release to third party.]—The condition of a bond was that A. should perform an award, which was that he should release to B. all actions, etc. A. made a release to B., which he delivered to a third party for B.'s use. In debt upon the bond:—*Held*: a good performance of the condition, because no place was appointed by the arbitrators for delivery.—*ALFORD v. LEE* (1587), Cro. Eliz. 54; 2 Leon. 110; 78 E. R. 315.

Annotation:—*Refd.* *Doe d. Garnows v. Knight* (1826), 5 B. & C. 671.

500. Presentation to archdeaconry—Lapse to Crown.]—The condition of an obligation was that if S. procured a grant of the next avoidance of an archdeaconry to be made to B., so that B. at such next avoidance might present, then, etc. Afterwards by the endeavour of S. the grant of the next avoidance was made to B., but before the next avoidance the archdeacon was created a bishop, so that the presentment to that avoidance appertained to the Crown:—*Held*: the condition was not performed, by reason of the words, "so that B. might present."—*BINGHAM & SQUIRE'S CASE* (1587), 3 Leon. 151; 4 Leon. 61; 74 E. R. 599, 731.

501. Obligor's wife to devise money—Payment necessary.]—In debt on bond, conditioned that *deft.*'s wife shall devise £100, etc., it is no plea to

*e. To carry on manufactures.]—**Pltfs.* granted *deft.* a bonus to aid him in the manufacture of agricultural implements, subject to a condition that he should give a bond to be conditioned for the carrying on of such manufactures in a named factory for twenty years:—*Held*: (1) the performance contemplated by the parties to the contract to carry on manufactures was one reasonably commensurate with the capabilities of the factory; (2) on the evidence, *deft.* had failed in the performance.—*VILLAGE OF BRUSSELS CORPN. v. RONALD* (1885), 11 A. R. 605.—*CAN.*

say she did devise it, unless he show also that he paid it.—*SHERMAN v. LYLLEY* (1640), Cro. Car. 597 ; 79 F. R. 1114.

502. Money to be devised to children—Devise of land to one child.]—If a man binds himself in a bond to leave his children £200, & he leaves four children, & gives the eldest an estate in land, & to the other three £50 a piece at twenty-one, this is not a performance of the condition.—*TAYLOR v. BIRD* (1750), 1 Wils. 280 ; 95 E. R. 618.

503. Devise according to advice of third person—Sufficiency of advice.]—If a man be bound to make a sure & sufficient estate, by the advice of J. if he make an estate according to the devise of J. be it sufficient or not, lawful or not lawful, the bond is saved.—*LAMB'S CASE* (1599), 5 Co. Rep. 23 b ; 77 E. R. 85 ; *sub nom. LAMB v. BROWNWENT*, Cro. Eliz. 716.

Annotations :—Distd. Baker v. Bulstrode (1674), 2 Lev. 95. *Rafd. More v. Morecomb* (1601), Cro. Eliz. 864 ; *Holder v. Dickeson* (1673), Freem. K. B. 95 ; *Hesketh v. Gray* (1755), Say. 185 ; *Hughes v. Humphreys* (1827), 6 B. & C. 680.

504. Release to satisfaction of counsel—Presentment of document.]—On a condition to make such a release as shall satisfy pltf.'s counsel, deft. must tender a release to the counsel for his approval. If the condition is to seal such a release as pltf.'s counsel may advise, then pltf. is to procure his counsel to decree the release & then tender it to the deft. to seal.—*BAKER v. BULSTRODE* (1674), 2 Lev. 95 ; T. Raym. 232 ; 1 Vent. 255 ; 1 Mod. Rep. 104 ; 3 Keb. 273 ; 83 E. R. 466.

Annotations :—Mentd. Meriton v. Stevens (1741), Willes, 271 ; *Giles v. Grover* (1832), 9 Bing. 128.

505. Broker's duty—Acting concurrently with another broker.]—It is not a breach of the bond of a broker in the city of London to act as a broker concurrently with another.—*LONDON CORPN. v. BRANDON* (1816), 2 Stark. 14 ; Holt, N. P. 438, N. P.

Bail bonds.]—See EXECUTION.

SECT. 3.—TIME FOR PERFORMANCE.

Time of payment.]—See Sect. 2, sub-sect. 1, *ante*.

506. No date fixed—Performance of award.]—A. was bound to B. upon condition to stand to the arbitrament of certain persons, who awarded that B. should make a release to A. of all actions, debts, duties, & demands at the request of A. Afterwards A. went to B. & required him to make a release, whereupon B. said that he was unlearned, & that he would go to one to make it, & the next day after the request he sealed & delivered the release to A., who accepted it : —*Held* : notwith-

1. To take up promissory note—Giving other notes.]—R. executed a bond in favour of E. to secure a promissory note made by R. in favour of E. The condition of the bond was that if R. properly took up the note with interest, etc., the bond should be void, but otherwise of full effect. On the due date of the note R. made two promissory notes in favour of E. All interest, etc., to date was paid, & on the face of the original note was written "settled by renewal bills." E. retained the bond : —*Held* : in the circumstances the giving of the two smaller promissory notes did not amount to a proper taking up of the larger note, & the condition of the bond remained unfulfilled.—*EWERS v. OUDTSHOORN RESIDENT MAGISTRATE* (1880), F. 32.—S. AF.

PART VII. SECT. 3.

g. No date fixed—For conveyance J.—VOL. VII.

of land.]—On a bond conditioned that defts. should, on a certain day or before, if they obtained a title, convey to pltf. land in one of two counties in U.S.A. to be taken from lands to be located by defts. : —*Held* : it was deft.'s duty to convey, & not to wait till pltf. tendered a deed.—*THAYER v. STREET* (1861), 11 C. P. 243.—CAN.

h. — — — Refusal to convey.]—Pltf. declared on a bond, reciting that deft. had agreed to sell to him land for £600, of which £50 was to be paid down, & the remainder "within ten years from the date thereof," with interest thereon half-yearly ; & conditioned that deft., "on receiving the said principal money & interest at the days & times & in manner therein-before mentioned for payment thereof," should "sign, seal, deliver, & execute" unto pltf., a good, valid, & sufficient deed in fee simple of said land, & to convey the same to him free from all

standing the acceptance, the obligation was forfeited, for presently after the request B. ought to have done it in the speediest manner possible.—*ANON.* (1576), 4 Leon. 190 ; 74 E. R. 813.

507. — — — Performance of transitory or local acts—Convenient time.]—When an act by the condition of a bond to be performed to the obligee is of its nature transitory, & no time is limited, although a place be expressed, the act ought to be performed in convenient time, & when the act to be performed is of its own nature local, without express limitation of any place.

In local acts, where the concurrence of the obligor & obligee is requisite, the obligor shall have time during his life, if not hastened by request of the obligee ; but when the obligor may perform the act for the benefit of the obligee in his absence, the obligor ought to do it in convenient time. Where the concurrence, not of the obligee but of a stranger, is requisite, the obligor shall not have time to do a local act during his life, but he ought to do it in convenient time. But if the concurrence of a stranger & of the obligee be requisite, the obligee ought to hasten the performance of such local act by request.

Where the act, which an obligor ought to do, does not concern the obligee nor benefit him, but is to be done by the sole act of the obligor himself, & no time is limited for the performance, the obligor has time during his life, & the performance cannot be hastened by request. So also when the act to be done by the condition is to be done by the sole act or labour, or industry of a stranger, which in no manner concerns the obligor or obligee, or any other person, & no time is limited for the performance, it is sufficient if the act is done in the lifetime of him who ought to do it.—*BOTHY'S CASE* (1605), 6 Co. Rep. 30 b ; 77 E. R. 298.

Annotation :—Consd. Alfrey v. Blackamore (1626), 3 Bulst. 326.

508. — — — To attend for choice of arbitrators—Convenient time.]—A bond conditioned to be at such a place on such a day to choose arbitrators, etc., is not performed unless the obligor attends there at such a convenient time before the end of the day that the arbitrament may be made.—*EDMUNDS v. MARKS* (1597), Cro. Eliz. 549 ; 78 E. R. 795.

See, also, Nos. 420, 421, ante.

SECT. 4.—EXCUSES FOR NON-PERFORMANCE.

SUB-SECT. 1.—NON-FULFILMENT OF CONDITION PRECEDENT.

See Sect. 1, ante.

incumbrances. The breach assigned was, that although pltf. had paid the £50, & £250 on account of interest, & was at all times ready & willing, & offered to pay deft. the balance of principal & interest, on receiving from him such deed, yet that deft. could not & would not give him said deed or any title to said land : —*Held* : the condition being to convey on receiving the purchase money within ten years, deft. could not be compelled to convey before the last day of that time, or at least not without notice of the intention to pay at an earlier day, & a tender accordingly.—*BURNS v. BOYD* (1860), 19 U. C. R. 547.—CAN.

k. — — — Reasonable time.]—Debt on bond conditioned to make a deed of 200 acres : —*Held* : the obligor was bound to make a deed within a reasonable time.—*ROGERS v. LAKE* (1852), 9 U. C. R. 264.—CAN.

Sect. 4.—Excuses for non-performance: Sub-sect. 2, A B.

SUB-SECT. 2.—IMPOSSIBILITY OF PERFORMANCE.
generally, CONTRACT.

A. Originally and Subsequently.

509. Originally—Bond absolute.]—Where the condition of a bond is originally impossible the bond is absolute.—ANON. (1489), Y. B. 4 Hen. 7, fo. 3, pl. 7; 5 Nev. & M. K. B. 378, n.

510. ——— Bond treated as single.]—A. was bound to B. in an obligation to stand to the arbitrament of C. so that the arbitrament should be made before 15 Mich., & that the obligor should have fourteen days' notice of it. The 15 Mich. was fourteen days before the date of the obligation, & so the notice was impossible to be performed:—*Held*: the obligation was good & the condition void.—ANON. (1448), Jenk. 116; 145 E. R. 82, Ex. Ch.

511. ———.]—If the condition be impossible, the bond is single.—WOOD & AVERY'S CASE (1589), 2 Leon. 189; 74 E. R. 467.

512. ———.]—A bond with a condition *ab initio* impossible is a single bond.—PULLEIN v. BENSON (1698), 1 Ld. Raym. 349; 91 E. R. 1130.

513. ———.]—Obligation to do an impossible thing is single.—WALL v. GROVET (1700), 12 Mod. Rep. 418; 88 E. R. 1421.

514. ——— Condition incorporated with obligation.]—Where a condition underwritten or indorsed is for performance of a condition which is impossible, only the condition is void, the bond being valid as a single bond, but where the condition is incorporated with the obligation, the bond is wholly void.—PULLERTON v. AGNEW (1703), 1 Salk. 172; 91 E. R. 159.

Annotation:—*Refd.* Duvergier v. Fellows (1828), 5 Bing 248.

515. Subsequently.]—Where the condition of a bond subsequently becomes impossible by the act of the obligor, or of a stranger, the bond is forfeited. Where it becomes impossible by the act of the obligee, the bond is saved.—ANON. (1489), Y. B. 4 Hen. 7, fo. 3, pl. 7; 5 Nev. & M. K. B. 378, n.

516. ——— Person to be named in will—Omission of name.]—A bond was conditioned for payment of £10 to him whom the obligee should name by his last will. The obligee by his will named exors., but did not name any person certain to take his £10:—*Held*: his exors. were not entitled to the £10.

If I be bound to pay £10 to the assignee of the obligee, & his assignee makes an exor., & dies, the exor. shall not have the £10. But if I be bound to pay £10 to the obligee, or his assignees, there the exor. shall have it, because it was a duty in the obligee himself (COKE, C.J.).—MEADE'S CASE (1612), Godb. 192; 78 E. R. 117.

Annotation:—*Consd.* Buckland v. Barton (1793), 2 Hy. Bl. 136.

517. ——— Refusal—Death.]—If a man be bound, that S., a stranger, shall enfeof the obligee, & he refuses to take it, he shall take no advantage of this; but if the condition was to enfeof a stranger who refuses to take it, this is a forfeiture; & if a man be bound that another shall pay so much to S. at Mich. next, & he dies before, this ought to be paid to his exors. If a man be bound

to build a house for another before such time, & he which is bound dies before the time, his exors. are bound to perform this (COKE, C.J.).—QUICK & HARRIS v. LUDBORROW (1615), 3 Bulst. 29; 81 E. R. 25.

Annotation:—*Refd.* Siboni v. Kirkman (1836), 1 M. & W. 418.

B. Alternative Conditions.

518. One alternative impossible.]—Where one, under a condition in a bond, has election to do one of two things, if by default of a stranger, or of himself, or of the obligee, or by act of God, he is rendered unable to do one of them, then he must do the other.—MOORE & BAKER v. MORECOMBE (1601), Moore, K. B. 645; 72 E. R. 813; *sub nom.* MORE & BAKER v. MORECOMB, Cro. Eliz. 864.

Annotation:—*Mentd.* Vinler v. Joyner (1679), Freem. K. B. 269.

519. ———.]—Condition of two parts in the disjunctive, & one part becomes impossible to be done, yet the other must be performed according to the subsequent matter.—SHIPLEY v. CHAPPEL (1688), 3 Mod. Rep. 232; 87 E. R. 150.

520. ———.]—The penalty of a bond is not saved, although one part of a disjunctive condition cannot be performed.—DRUMMOND v. BOLTON (DUKE) (1755), Say. 243; 96 E. R. 867.

521. ———.]—Where the condition of a bond is for the performance of one of two things, the fact that one becomes impossible is no reason for not performing the other.—DA COSTA v. DAVIS (1798), 1 Bos. & P. 242; 126 E. R. 882.

Annotations:—*Distd.* Atkinson v. Baynton (1835), 1 Bing. N. C. 444. *Consd.* Barkworth v. Young (1856), 4 Drew. 1.

522. ——— Act of God.]—A. was bound to stand to the award of two arbitrators, who awarded that he should pay to a stranger, or his assigns, £200 before such a day. The stranger died before the day, & B. took letters of administration:—*Held*: The money should be paid to the administrator, for he was an assignee, & so if the word "assigns" had been left out.—ANON. (1588), 3 Leon. 212; 74 E. R. 640.

Annotation:—*Refd.* Lynch & Templeman v. Clemence (1699), 1 Lut. 571.

523. ———.]—*Qu.*: whether a condition in the alternative is broken, if one part becomes impossible by the act of God.—TROPPE v. BEDINGFIELD (1592), Cro. Eliz. 277; 78 E. R. 532.

524. ———.]—Where the condition of a bond consists of two parts in the disjunctive, & both are possible at the time of the bond made, & afterwards one of them becomes impossible by the act of God, the obligor is not bound to perform the other part.—LAUGHTER'S CASE (1595), 5 Co. Rep. 21 b.; 77 E. R. 82; *sub nom.* EATON v. LAUGHTER, Cro. Eliz. 398; Poph. 98; *sub nom.* EATON'S CASE, Moore, K. B. 357.

Annotations:—*Consd.* Eaton v. Butter (1629), Palm. 552; Baskett v. Baskett (1677), Freem. K. B. 228; Studholme v. Mandell (1697), 1 Ld. Raym. 279. *Dbtd.* Anon. (1697), 1 Salk. 170; Drummond v. Bolton (1755), Say. 243. *Consd.* Jones v. How. (1850), 9 C. B. 1. *Dbtd.* Barkworth v. Young (1856), 4 Drew. 1. This proposition is too broadly laid down by Lord Coke as appears from the case itself & from subsequent decisions (KINDERSLEY, V.C.); Wood v. Bate (1628), Palm. 513; Jones v. How (1848), 7 Hare, 267; McIlquham v. Taylor, [1895] 1 Ch. 53.

525. ———.]—There is a difference between disjunctive absolute & disjunctive contingent, as if a man be bound to pay £10, or to

PART VII. SECT. 4, SUB-SECT. 2.—A.

1. Subsequently—To deliver goods—Goods destroyed by fire.]—Deft. executed a bond, conditioned that goods should be forthcoming for the purpose of seizure & sale under a chattel.

Before the day of payment arrived the goods were destroyed by fire, & an action having been commenced against deft. on this bond, he pleaded the fact of such destruction without any default on his part:—*Held*: bad

for not negating any default on the part of the mortgagor.—BOSWELL v. SUTHERLAND (1883), 8 A. R. 233; 32 C. P. 131.—CAN.

See, also, Part VII., Sect. 4, Sub-sect. 2, C.

enfeoff one upon the return of S. from Rome, there if S. die before he return from Rome, then the obligation is saved, although the £10 be never paid; but if it be a voluntary act, as to pay you £10, or to enfeoff you before Mich., there if the obligor die before Mich., his exors. ought to pay the money (POPHAM, C.J.).—ANON. (1601), Gouldsb. 192; 75 E. R. 1086.

526. ———.]—The condition in an obligation was that whereas it was intended that J. should marry, or that if A. survived J. & did not receive within two years after the death of J. £200 either by his last will or by the custom of London, the obligor would pay £100 within one year after the two years. The marriage took place, & A. survived J., but died within the two years after his death:—*Held*: the condition was disjunctive, & performance having become impossible by the act of God as to one part of the condition, the obligor was not bound at all.—WOOD v. BATES (1628), W. Jo. 171; Palm. 513; 82 E. R. 91.

527. ———.]—Debt for £20 on condition that A. should pay £7 9s. 4d. on such a day to pltf., or personally appear on Jan. 23 in the house of B. precisely at 10 o'clock in the morning. Deft. pleaded that A. on Jan. 23, & before & after was so ill by the visitation of God that she could not go to B.'s house:—*Held*: though the condition was disjunctive & one part impossible, the other ought to be performed, & judgment should be given for pltf. for the reason chiefly that the appearance was to be by a stranger & not by the obligor himself.—TOPHAM v. PANNEL (1680), T. Raym. 373; 83 E. R. 194.

528. ———.]—Where the condition was to make A. a lease for life, or pay him £100, & A. died:—*Held*: his exors. should have the £100.—ANON. (1697), 1 Salk. 170; 91 E. R. 157.

Annotations:—*Consd.* Barkworth v. Young (1856), 4 Drew. 1; McIlquham v. Taylor, [1895] 1 Ch. 53. *Refd.* Hodgson v. Rawson (1747), 1 Ves. Sen. 44.

Act of God generally, see Nos. 532 *et seq.*, *post*.

529. ——— **Act of obligee.**]—Where the condition of a bond was that "the obligor should either make such an assurance as the obligee's counsel should advise within six months, or else pay £300":—*Held*: it was a good defence to say that the obligee's counsel did advise no assurance within six months.—BASKETT v. BASKETT (1677), 1 Freem. K. B. 228; 2 Mod. Rep. 200; 89 E. R. 163; *sub nom.* BASSETT v. BASSETT, 1 Mod. Rep. 264.

530. ———.]—A bond for payment of £40 was conditioned that "if deft. should work out the £40 at the usual prices in packing, when pltf. should have occasion for himself or his friends to employ him therein, or otherwise should pay the £40, then the bond to be void." In an action on the bond, deft. pleaded that he was always ready to have wrought out the £40, but that pltf. never employed him:—*Held*: a bad plea, because deft. did not aver that pltf. had any occasion to make use of him, & it was in pltf.'s election either to have work or money & not having employed him that was a request in law,

and he had thereby determined his election to have the money.—WRIGHT v. BULL (1678), 2 Mod. Rep. 304; 86 E. R. 1086.

531. ———.]—On a disjunctive condition if the obligee prevent the performance of one branch, the obligor shall be excused from performing the other.—STUDHOLME v. MANDELL (1697), 1 Ld. Raym. 279; 1 Lut. 688; 91 E. R. 1083.

Annotations:—*Consd.* Esposito v. Bowden (1855), 4 E. & B. 963; McIlquham v. Taylor, [1895] 1 Ch. 53. *Refd.* Barkworth v. Young (1856), 4 Drew. 1.

Act of parties generally, see Nos. 538 *et seq.*, *post*.

C. Act of God.

532. General rule.]—Where by the act of God, the performance of the condition of a bond becomes impossible, the bond is not forfeited.—HULBERT v. WATTS (1696), 1 Ld. Raym. 112; 91 E. R. 971.

533. Payment by day certain—Death of obligor—Award.]—Deft. was bound by bond to pltf. that J. should perform the award of C. The award was that J. should pay £20 at the Feast of the Annunciation & £10 at Mich. J. paid the £20, but died before Mich.:—*Held*: the bond was forfeit.—KINGWELL & CHAPMAN'S CASE (1577), 2 Leon. 155; 74 E. R. 438; *sub nom.* KINGUEL v. KNAPMAN, Cro. Eliz. 11.

Annotations:—*Fold.* Joyner v. Vyner (1680), T. Raym. 415. *Refd.* Bradbury v. Morgan (1862), 7 L. T. 104. *Mentd.* Boson v. Sandford (1689), 1 Show. 101.

534. ——— **Liability of executors.**]—The condition of a bond was, that if the obligor, by Nov. 10, did not legally prove money paid, then if he paid the money on the 10th, the bond should be void:—*Held*: the bond was not discharged by the death of the obligor before the day, for the exors. were bound to perform it.—VINIER v. JOYNER (1679), 1 Freem. K. B. 269; 89 E. R. 193; *affd.* S. C. *sub nom.* JOYNER v. VYNER (1680), T. Raym. 415.

Annotation:—*Refd.* Bradbury v. Morgan (1862), 7 L. T. 104.

535. ——— **Death of beneficiary.**]—Where a master binds himself to pay his apprentice, his exors. or assigns, a sum of money at the end of his apprenticeship, & the apprentice dies at the end of six years, the money is not payable.—CHEYNEY v. SELL (1607), 1 Brownl. 97; 123 E. R. 689.

Payment generally, see Sect. 2, *ante*.

536. Enfeoffment of two persons before certain day—Death of one—Rights of survivor.]—Where a person was bound to enfeoff two others before a certain day, & one of them died before the day:—*Held*: he was discharged from his obligation & not bound to enfeoff the survivor.—BROWN'S CASE (1550), Benl. 8; Ben. & D. 35; 73 E. R. 937.

537. Reimbursement out of third party's estate—Death of third party after approval—No authority to sell.]—A. advanced money to B., taking from him a bond, with a condition to be void, if C. should enable A. to repay himself by the sale of stock belonging to C., or otherwise. C. died, having approved of the advance of money by A.

PART VII. SECT. 4, SUB-SECT. 2.—C.

532 i. General rule.]—To an action upon an obligation, impossibility by act of God of performance of the condition is a good defence.—LEITRIM (EARL) v. STEWART (1870), 1 R. 5 C. L. 27.—IR.

m. Appearance in court—Death of person.]—The condition of an undertaking was that A. would appear in ct. whenever he was required so to do; he died before the time of appear-

ance had arrived:—*Held*: the event which occurred put an end to the obligation.—NABIN CHANDRA HAZARI v. MRITUNJOY BARRIK (1913), 17 C. W. N. 1241.—IND.

n. Production of prisoner—Death of prisoner.]—When a person who has been let out on bail commits suicide, the sureties are discharged from their obligation to produce him.—NRISINGHA DEB CHATTERJEE v. KING EMPEROR (1912), 16 C. W. N. 550.—IND.

o. Rendering accounts—Illness of obligor.]—To a suggestion of breaches on a bond, entered into by a collector, for the due collection of public moneys, deft. pleaded that by reason of complete paralysis he was rendered permanently incapable of collecting the said moneys, or of appointing a deputy to collect them. On demurrer:—*Held*: the defence was bad.—BELFAST BANKING CO. v. HAMILTON (1883), 12 L. R. Ir. 105.—IR.

Sect. 4.—Excuses for non-performance: Sub-sect. 2, C., D., E. & F. Part VIII. Sect. 1.]

to B., but without having given A. a due authority for the sale of the stock, & made A. his exor.:—*Held*: the ct. would not restrain A. from proceeding on the bond against B.—*RITCHIE v. MILROY* (1823), 1 L. J. O. S. Ch. 226.

As regards alternative conditions.]—See Nos. 518 et seq., ante.

D. Act of Parties.

538. Obligee—Payment prevented by covin.]—It is no defence to debt on bond, that as the obligor was going to pay it, he was prevented by the covin of pltf.—*MORRIS v. LUTTEREL* (1599), Cro. Eliz. 672; 78 E. R. 910.

539. — Surrender of copyholds—Copyholds forfeited for arrears of rent.]—Where the condition of an obligation was that the obligor should surrender a copyhold & suffer the obligee & his heirs peaceably to enjoy the land without interference, & the copyhold was after a time forfeited, because the obligee was in arrears with the rent:—*Held*: the obligor was discharged from his obligation, because by his own act the obligee had occasioned the forfeiture.—*ANON.* (1537), 1 Dyer, 30 a; 73 E. R. 66.

Annotations:—Reid. Young v. Raincock (1849), 7 C. B. 310. *Mentd. Tarling v. Baxter* (1827), 6 B. & C. 360.

540. — To procure marriage—Frustration by obligee.]—On a bond conditioned to procure a marriage, if the obligee do any act to frustrate the performance, the obligor is not liable, but he must show that he endeavoured to procure it.—*BLANDFORD v. ANDREWS* (1599), Cro. Eliz. 694; 78 E. R. 930.

Annotations:—Reid. Lancashire v. Kellingworth (1701), 12 Mod. Rep. 529; *Jones v. Barkley* (1781), 2 Doug. K. B. 684.

541. — Place of payment not stated—Obligee beyond seas—Pleading.]—Debt on bond to pay money. The bond did not name the place where payment was to be made. Deft. pleaded that pltf. was beyond the seas on the day of payment, but did not say that he was still ready, etc.:—*Held*: the plea was bad.—*HOBSON v. RUDGE* (1661), 1 Sid. 30, 82 E. R. 951.

—*See, also, No. 410, ante.*

542. Obligor—General rule.]—If the obligor in a bond upon condition renders the performance of the condition impossible, the bond is forfeited.—*HULBERT v. WATTS* (1696), 1 Ld. Raym. 112; 91 E. R. 971.

543. — Obligee discharged from condition precedent.]—Where the obligor has by his own act disabled himself from performing the condition as he might have done when the bond was made, there is a forfeiture, & the obligee is dispensed

from performing a condition precedent to the obligation of the obligor.—*SCOT v. MAINY* (1596), Poph. 109; 79 E. R. 1217.

—*See, also, No. 515, ante.*

E. Act of Third Parties.

544. Void award.]—The condition of an obligation was to stand to an arbitrement. An arbitrement was made which was void:—*Held*: the obligation was also void, for the condition was possible & became impossible by the act of the arbitrator.—*ANON.* (1448), Jenk. 116; 145 E. R. 82, Ex. Ch.

545. Appearance to justify claim prevented.]—On a bond reciting that pltf. had distrained sheep of deft. in a place where deft. claimed common, the condition was that in consideration of pltf. delivering up the sheep deft. would appear at the next ct., & make appear that he had common, it is no defence he was prepared to make appear, but that the steward hindered him, for deft. has taken upon himself to make it appear & he was at his peril to procure the steward to admit him.—*BUTCHER v. VANE* (1666), 1 Lev. 191; 83 E. R. 363.

546. Resignation of living not accepted by bishop.]—If an obligor undertake for the act of a stranger, he must procure the act to be done.

The condition of a bond was that deft. would within a specified time resign his vicarage, to which he had been presented by pltf., into the hands of the bishop, in order that pltf. might present anew. In an action on the bond deft. pleaded that he had offered to resign the vicarage into the hands of the bishop, who refused to accept it:—*Held*: that was no defence.—*HESKETH v. GRAY* (1755), Say. 185; 96 E. R. 846.

Annotations:—Reid. Worsley v. Wood (1796), 6 Term Rep. 710. *Mentd. Hughes v. Humphreys* (1827), 6 B. & C. 680.

547. Enfeoffment refused by stranger.]—It is said in Co. Litt. that if a man be bound in an obligation to A., conditioned to enfeoff B., a stranger, & B. refuse, the obligation is forfeited, for the obligor has taken upon him to make the feoffment. The reason of this is clear. If a man undertakes what he cannot perform he shall answer for it to the person with whom he undertakes (*LORD KENYON, C.J.*).—*BLIGHT v. PAGE* (1801), 3 Bos. & P. 295, n.; 127 E. R. 163, N. P.

Annotations:—Reid. Sjoerds v. Luscombe (1812), 16 East. 201. *Mentd. Touteng v. Hubbard* (1802), 3 Bos. & P. 291; *Beale v. Thompson* (1803), 3 Bos. & P. 405; *Barret v. Dutton* (1815), 4 Camp. 333; *Teutonia, The* (1871), L. R. 3 A. & E. 394; *Jackson v. Union Marine Insce.* (1874), L. R. 10 C. P. 125; *Barrie v. Peruvian Corp'n.* (1896), 13 T. L. R. 101; *Ralli v. Compania Naviera Sota y Aznar*, [1920] 2 K. B. 287.

See, also, No. 515, ante.

PART VII. SECT. 4, SUB-SECT. 2.—E.

p. Conveyance of land prevented by act of council—Land converted into highway.]—Debt on bond, conditioned to make to pltf. a good & sufficient deed, clear of all incumbrances, of a strip of land within eight years. Plea, that within the said eight years the council of L. established a public road over the strip, whereby deft. has been prevented:—*Held*: no defence; deft. should have conveyed such interest as he could.—*CÆSAR v. NORTON* (1852), 9 U. C. R. 100.—CAN.

q. Cutting wood not permitted by stranger.]—Debt on bond conditioned that "deft. should permit pltf. to cut down & carry away all the firewood from lands, without let, suit, hindrance, etc." Plea, that deft. always permitted, etc. Replication, that deft. conveyed the land in fee to a stranger,

who would not permit pltf. to cut the wood, etc.:—*Held*: bad.—*FOWKE v. FOTHERGILL* (1835), 4 O. S. 185.—CAN.

r. Delivery of goods prevented by stranger.]—A plea that after making the bond, & before suit, & before defts. had been called upon to return the goods, the landlord of the execution debtor seized them on a distress for rent, & took them out of defts.' control, wherefore they were unable to return them:—*Held*: no defence.—*RAPELJE v. FINCH* (1856), 14 U. C. R. 249.—CAN.

s. Payment of money prevented by robbery.]—To a declaration on a bond, conditioned for the performance by deft. of the duties of Collector of Rates, & the immediate payment over to the County Treasurer of such rates whenever the sums received amounted

to \$100, deft. pleaded, that while the Collector was travelling on the Queen's highway with the sum of \$336 lawfully in his possession for the purpose of paying it over to the County Treasurer, he was, without any fault or want of diligence, forcibly & feloniously robbed of said sum:—*Held*: the plea was good.—*R. v. CAMERON* (1878), 3 R. & C. 55.—CAN.

t. —.]—Bond of pay clerk, conditioned, when so required, to account in writing for all moneys, etc., & to pay the moneys due on the balance of such account to the obligee. The clerk was necessarily travelling on the public way in discharge of his duty, with the money on his person, & was robbed:—*Held*: the acts of strangers to the bond could not discharge the obligor.—*HORNSBY v. SLACK* (1850), 1 I. C. L. R. 126; 3 Ir. Jur. 80.—IR.

F. Act of Law or State.

548. Act of State—Payment out of profits of office—Office abolished—Subsequent revival.]—A bond was entered into before the Civil War, conditioned to pay £40 *per annum* for twelve years, out of the profits of an office, which was taken away during the Commonwealth. The obligor having been sued on the bond & the office having been revived, he exhibited his bill to be relieved against the bond. The obligee contended that as the office continued some part of the twelve years the Commonwealth existed, & had been revived, the obligor ought to pay the £40 *per annum*, for twelve years or his suit be dismissed:—*Held*: the obligor should pay the £40 *per annum*, for so many years as the office continued, & thereupon the bond should be delivered up.—*LAWRENCE v. BRASIER* (1686), 1 Cas. in Ch. 72; 22 E. R. 701, L. C.

Annotation:—*Refd.* Law v. Law (1735), Cas. temp. Talb. 140.

549. Act of law—Rendering accounts—Change of authority.]—By a local turnpike Act the treasurer of the S. turnpike roads, when required, to account to the trustees & pay the balance to them. Debt on bond, dated 1822, conditioned that J., treasurer of the S. turnpike roads, should account & pay according to the directions of the local Act, & of Turnpike Roads Act, 1822 (c. 126). Plea, that so much of 1822 Act as was referred to in the condition was repealed by Turnpikes Act, 1823 (c. 95), & that J. duly accounted & paid up to the time of the repeal. Replication, assigning breaches, (1) that J. received money & did not account for it, though, after the repeal of 1822 Act, he was required by the trustees to render an account

to persons appointed by them to receive it; (2) that J. received money which he had not paid over & which still remained in his hands:—*Held*: (1) so much of the condition as related to accounting under 1822 Act having become impossible by the act of the Legislature, the obligation, so far as related to that, was saved, but, so far as related to accounting under the local Act, the condition remained possible; (2) the first breach was bad, as the local Act did not require the treasurer to account to persons appointed by the trustees, & 1822 Act, which did so require, was repealed; (3) the plea was bad, as not showing that the condition was performed as far as was still possible after the repeal of 1822 Act.—*DAVIS v. CARY* (1850), 15 Q. B. 418; 20 L. J. Q. B. 48; 15 L. T. O. S. 560; 14 J. P. 623; 15 Jur. 310; 117 E. R. 517.

Annotation:—*Refd.* Brown v. London Corpn. (1861), 9 C. B. N. S. 726.

550. ——— Annuity payable from tolls—Control of tolls transferred.]—To an action on a bond, the condition of which bound defts. to pay an annuity to pltf. out of tolls collected on the river Thames, the plea was that Thames Conservancy Act, 1857, had transferred all control of the tolls to a new corpn., called the conservators of the river Thames:—*Held*: (1) the plea was good, & performance of the condition had become impossible by the act of law; (2) the fact of the corpn. having been parties to the Acts for settling the conservancy of the river Thames did not render them liable.—*BROWN v. LONDON CORPN.* (1862), 13 C. B. N. S. 828; 31 L. J. C. P. 280; 8 Jur. N. S. 1103; 10 W. R. 522; 143 E. R. 327, Ex. Ch.

Part VIII.—Amount Recoverable on Breach of Condition.

SECT. 1.—PENALTY AND COSTS.

551. General rule—Action on bond.]—The obligee of a bond for £1,000 penalty had obtained judgment for that amount. He had already received several sums in part payment:—*Held*: though the principal & interest exceed the penalty, yet including what had been paid he should recover no more than the penalty.—*STEWART v. RUMBALL* (1705), 2 Vern. 509; 23 E. R. 926.

552. ———.]—Where a bond is forfeited in the lifetime of testator, the penalty is the legal debt, & on the issue what is due must cover so much assets, but on a bond where the day of payment is not come, the assets only can be covered for the sum in the condition.

Where an extrix. pleads the penalties of three bonds, & the jury by special verdict find assets in one entire sum, if the ct. are of opinion that the penalties of two of the bonds are to be considered as the debt due, but that the third shall cover no more than the sum really due upon it,

they may deduct such penalties & sum due out of the assets found, & give judgment for pltf. to recover the rest.—*BANK OF ENGLAND v. MORICE* (1736), 2 Stra. 1028; 2 Barn. K. B. 183; Lee temp. Hard. 219; 93 E. R. 1012; *subsequent proceedings, sub nom.* MORRICE v. BANK OF ENGLAND (1736), Cas. temp. Talb. 217, L. C.; *affd. sub nom.* BANK OF ENGLAND v. MORICE (1737), 2 Bro. Parl. Cas. 465, H. L.

Annotations:—*Refd.* Marriott v. Thompson (1739), Willes, 186. *Mentd.* Smith v. Haskins (1742), 2 Atk. 385; Martin v. Martin (1749), 1 Ves. Sen. 211; Anon. (1758), 2 Keny. 294; Alder v. Chip (1759), 2 Burr. 755; Paxton v. Douglas (1803), 8 Ves. 520; Perry v. Philips (1804), 10 Ves. 34; Jackson v. Leaf (1820), 1 Jac. & W. 229; Clarke v. Ormonde (1821), Jac. 108; Lee v. Park (1836), 1 Keen, 714; Dollond v. Johnson (1854), 2 Sm. & G. 301; Macrae v. Smith (1856), 2 K. & J. 411.

553. ———.]—A bond creditor is not entitled to recover beyond the penalty of his bond.—*KNIGHT v. MACLEAN* (1792), 3 Bro. C. C. 496; Dick. 516; 29 E. R. 664, L. C.

Annotations:—*Consd.* Clarke v. Soton (1801), 6 Ves. 411. *Refd.* Tew v. Winterton (1792), 3 Bro. C. C. 489; Hefford v. Alger (1808), 1 Taunt. 218.

BROWN v. PAXTON (1860), 19 U. C. R. 238.—CAN.

PART VIII. SECT. 1.

551 i. General rule—Action on bond.]—Pltf. suing on a bond is entitled to a verdict for the penalty, but the ct. will not allow him to recover more than the actual damages, if assessed.—*HELEY v. COUSINS* (1873), 34 U. C. R. 63.—CAN.

551 ii. ———.]—A judgment creditor, who has received money on account from the receiver, will not be considered as if he had been in

PART VII. SECT. 4, SUB-SECT. 2.—F.

a. Act of law—Completion of work at fixed time—Injunction.]—A co. was bound to complete work by a fixed date & due performance of the agreement was secured by a bond. The work was stopped owing to an injunction against the co., & though the injunction was afterwards dissolved, the co. were unable to complete by the stipulated time. In an action on the bond:—*Held*: non-performance was excused by the injunction.—*A.-G. OF BRITISH COLUMBIA v. CANADIAN PACIFIC RY. CO.* (1889), 1 B. C. R. pt. 2, 350.—CAN.

b. ——— To remain within prison limits—Speaker's warrant to attend as witness before House of Assembly.]—To an action on a bond, deft. pleaded that he, by virtue of a warrant of the Speaker of the House of Assembly, was required to attend as a witness before the house, & that to obey the warrant he left the limits & remained away ten days:—*Held*: no defence, as it was not shown that the Speaker knew deft. to be on the limits, or what occasion there was for requiring his attendance, or that any process had issued by which he was placed in custody of an officer while absent.—

Sect. 1.—Penalty and costs. Sect. 2.]

554. — — — — —.]—Bond creditors are only entitled to prove for the amount of the penalties in their bonds.—*CLOWES v. WATERS* (1852), 21 L. J. Ch. 840; 16 Jur. 632; *sub nom.* *COLES v. WATERS*, 19 L. T. O. S. 371.

555. — — — — — Interest on note of hand.]—When debt. is charged in execution with the penalty of a bond, it may be reduced to the principal & interest, & interest on a note of hand, for which no damages were given by the verdict, shall not be covered by the penalty.—*AMERY v. SMALDRIDGE* (1771), 2 Wm. Bl. 760; 96 E. R. 444.

556. — — — — — Security for damages.]—In debt for a penalty, for non-performance of covenants, judgment on demurrer may be entered up for the penalty, in like manner as before 8 & 9 Will. 3, c. 11, but then it can stand only as a security for the damages sustained.—*GOODWIN v. CROWLE* (1775), 1 Cowp. 357; 98 E. R. 1128.

Annotation:—Refd. *Hardy v. Bern* (1794), 5 Term Rep. 636.

557. — — — — — Rent during term.]—Deft. had entered into a bond in the penal sum of £600 conditioned (*inter alia*) for payment of a yearly rent of £570 by another person:—*Held*: defts. were not liable for all the payments of rent during the term, which was for twenty-one years, but only to the amount of the penal sum.—*WHITE v. SEALY* (1778), 1 Doug. K. B. 49; 99 E. R. 35.

Annotations:—Dbtd. *Lonsdale v. Church* (1788), 2 Term Rep. 388. *Consd.* *Knight v. Maclean* (1792), 3 Bro. C. C. 496.

558. — — — — — Arrears of annuity.]—If an instalment of an annuity secured by bond be not paid on the day, the bond is forfeited, & the penalty is the debt in law.—*JUDD v. EVANS* (1795), 6 Term Rep. 399; 101 E. R. 616.

559. — — — — —.]—In an action for the administration of the estate of a deceased person deft., as extrix., claimed to retain out of the assets in her hands £1325, the arrears of an annuity of £100 a year granted by deceased to her father & secured by a bond in the penalty of £500:—*Held*: she was only entitled to the extent of the penalty of the bond.—*MACKWORTH v. THOMAS* (1800), 5 Ves. 329; 31 E. R. 613, L. C.

Annotations:—Expld. *Jewdine v. Agate* (1829), 3 Sim. 129. *Consd.* *Hatton v. Harris*, [1892] A. C. 547.

560. — — — — — Replevin bond.]—The two sureties in a replevin bond are together liable only to the amount of the penalty in the bond, & the costs of the suit on the bond.—*HEFFORD v. ALGER* (1808), 1 Taunt. 218; 127 E. R. 816.

Annotations:—Folld. *Hall v. Goodricke* (1835), 2 Scott, 363. *Refd.* *Ward v. Henley* (1827), 1 Y. & J. 285.

561. — — — — —.]—Replevin bonds are not an exception to the rule that, on a bond, pltf. cannot recover more than the penalty & costs of suit on the bond, & proceedings in such suit may be stayed on payment of the penalty & costs, though pltf.'s costs in the replevin suit much exceed the penalty.—*BRANSCOMBE v. SCARBROUGH, BRANSCOMBE v. HEATH* (1844), 6 Q. B. 13; 13 L. J. Q. B. 247; 3 L. T. O. S. 159; 8 Jur. 688; 115 E. R. 5.

Annotation:—Refd. *Wall v. Rederiaktiebolaget Luggude*, [1915] 3 K. B. 66.

562. — — — — — Against subsequent incumbrancer.]—Where judgment had been recovered on a bond for £1,000, conditioned to secure £500 & 6 per cent. interest, & a decree was made in

possession, & is not entitled to more than the penal sum in his bond, though there is much more due to him.—*TRAPAUD v. CORMICK* (1825), 1 Hog. 277.—*IR.*

d. Exceptions—Future support.]—The liability of the obligor in a bond in a fixed penal sum conditioned for the payment of future maintenance is not limited to & is not satisfied by

1853 that the debt, with interest "until paid," was a charge upon debtor's lands, and the lands having been sold, the Land Judge of the Ch. Div. in Ireland, ordered the debt to be paid, with interest, notwithstanding the amount exceeded the penal sum mentioned in the bond:—*Held*: (1) the land ought not to have been extended beyond the penalty in the bond; (2) there was an obvious error in the decree of 1853, & the decree should be corrected by inserting the words, "the principal sum & interest not to exceed the amount of the penalty on the bond."—*HATTON v. HARRIS*, [1892] A. C. 547; 62 L. J. P. C. 24; 67 L. T. 722; 1 R. 1, H. L.

Annotations:—Mentd. *Milson v. Carter*, [1893] A. C. 638; *Stewart v. Rhodes*, [1900] 1 Ch. 386.

563. — — — — — When stay granted.]—Upon payment into ct. of the whole penalty of a bond with costs, the obligor is discharged.—*BRANGWIN v. PERROT* (1778), 2 Wm. Bl. 1190; 96 E. R. 701.

Annotation:—Refd. *Shutt v. Procter* (1816), 2 Marsh. 226.

564. — — — — —.]—In debt on bond with condition to account for money to be received, the ct. will not stay proceedings upon paying the penalty into ct., because damages may be recovered beyond that amount.—*LONSDALE (LORD) v. CHURCH* (1788), 2 Term Rep. 388; 100 E. R. 209; *subsequent proceedings* (1790), 3 Bro. C. C. 41.

Annotations:—Dbtd. *Branscombe v. Scarbrough* (1844), 6 Q. B. 13. *Refd.* *Clark v. Gray, Marsden v. Gray* (1805), 2 Smith, K. B. 622. *Mentd.* *Wilde v. Clarkson* (1795), 6 Term Rep. 303; *Clarke v. Seton* (1801), 6 Ves. 411; *Hefford v. Alger* (1808), 1 Taunt. 218.

565. — — — — —.]—The ct. will order satisfaction to be entered on the record in an action on a bond of indemnity, on deft.'s paying the penalty of the bond & the costs of the action.—*WILDE v. CLARKSON* (1795), 6 Term Rep. 303; 101 E. R. 566.

Annotations:—Refd. *Clarke v. Seton* (1801), 6 Ves. 411; *Hefford v. Alger* (1808), 1 Taunt. 218; *Shutt v. Procter* (1816), 2 Marsh. 226; *Branscombe v. Scarbrough* (1844), 13 L. J. Q. B. 247.

566. — — — — —.]—The ct. will stay proceedings in an action on a bond on payment of the penalty & costs.—*SHUTT v. PROCTER* (1816), 2 Marsh. 226.

Annotation:—Distd. *Davies v. Arnott* (1825), 3 Bing. 154.

567. — — — — — Replevin bond.]—*BRANSCOMBE v. SCARBROUGH, BRANSCOMBE v. HEATH*, No. 561, *ante*.

Compare, also, cases in Sect. 4, post.

— **As regards interest.]**—*See Sect. 2, post.*

See, also, Nos. 283, 289, 292, 296, ante.

568. Exceptions.]—In 1638, those, under whom deft. claimed a debt of £1300 principal money then lent, acknowledged a judgment for £2000 penalty, defeasanced for payment of the principal money with interest. Deft. for several years kept pltf. out of his debt, by fencing with prior incumbrances, which were in fact satisfied, & by setting up a pretended entail, which on a trial at law was found against him. Pltf. had exhibited a former bill, & thereby only prayed, that deft. might come to an account & accept what, if anything, should be found due to him on those prior incumbrances, & that pltf. might be let into a satisfaction of his debt, but did not pray further, as he might have done, that if deft. should be found to have raised or received more than was due to him, he might pay over the surplus to pltf. Upon the account taken in the cause it was found that deft. was overpaid with a

payment of the amount of the penalty, & the obligee has the right to sue for support as it accrues from time to time.—*BAKER v. TRUSTS & GUARANTEE Co.* (1898), 29 O. R. 456.—*CAN.*

surplus of £4000. Pltf.'s present bill was, that he might have that money towards his debt, & be satisfied his principal money with interest & costs. Deft. pleaded the former bill brought by pltf., & the proceedings thereon, & that after the account taken in the former cause, pltf. had proceeded at law, & revived his judgment by *sci. fa.* & taken execution by *elegit*, & that thereupon deft. had brought the whole penalty of the bond into the Ct. of Common Pleas, & insisted that a ct. of equity ought not to charge him beyond the penalty of the judgment:—*Held*: the plea should be allowed, principally because pltf. after the account taken in the former cause had surceased his prosecution in the ct. of equity, & proceeded at law & taken forth execution, & having elected to proceed at law by a remedy which charged a moiety of the lands only, he could not afterwards seek a decree in equity for the same debt, which would charge the person & the whole estate.

Equity may, & in many cases does, carry on the debt beyond the penalty of the security, as where the party has been delayed by injunction of this ct., & the like; but where it has been so done, it has been always against pltf., when he has come for relief, but there is no precedent where pltf. in this ct. shall charge deft. beyond the penalty & further than he could charge him at law (*per CUR.*).—*HALE v. THOMAS* (1686), 1 Vern. 319; 2 Cas. in Ch. 182, 186; 23 E. R. 515, L. C.

569. —.]—Applt. entered into a bond of £140 penalty, conditioned for payment of £72 on Apr. 20, 1676, & by reason of several promises & delays of payment, it was not put in suit till many years later. Upon a declaration applt. pleaded payment at the day, & after issue joined, & notice of trial, upon some discovery of a defect in the evidence to prove the bond, a motion was made to alter the plea, which was refused. Thereupon a bill was preferred in Ch., on suggestion that applt. had never executed the bond, or that it was obtained by fraud, & that there was no consideration for same. Upon the hearing of the cause it was ordered that applt. should not be relieved, save against the penalty of the bond, & that it should be referred to one of the masters to compute the principal money & interest due thereon, & to tax for resp. his costs both at law and in that ct., & that what should be found due for the principal, interest & costs, should be paid by applt. at such time & place as the master should appoint, who computed the principal & interest at £154, the costs at £67. It having been objected that the order being to save against the penalty, no more ought to have been decreed:—*Held*: notwithstanding that, when same was referred to a master to tax principal & interest, the order bound the party to pay both, though it amounted to more than the penalty, & the meaning of the first part was only to relieve against the penalty in case the principal & interest came to less than the penal sum, especially same coming to be heard upon cross bills, & as the case was circumstanced, after such delay & such pleading in the Ct. of K. B.—*DUVALL v. TERREY* (1694), Show. Parl. Cas. 15; 1 E. R. 11.

g. —.]—In an action on a bond conditioned for maintenance, where the breach assigned is refusal to maintain, pltf. may recover the whole penalty as damages.—*BARTHELOTTE v. MELANSON* (1902), 35 N. B. R. 652.—CAN.

PART VIII. SECT. 2.

573 i. *Whether recoverable—After payment of principal.*—Pltfs. sued for

interest on two bonds, made by defts. Jan. 27, 1855, for the payment to pltfs., or order, of the principal money named on Nov. 1, 1855, together with interest thereon. Defts. paid the principal Jan. 29, 1861, with interest up to Nov. 1, 1855, but had not paid interest after that day:—*Held*: interest was recoverable.—*MCDONALD v. GREAT WESTERN RY. Co.* (1861), 21 U. C. R. 223.—CAN.

f. *After due date of bond.*—

Annotations:—*Consd.* *Pulteney v. Warren* (1801), 6 Ves. 73; *Grant v. Grant* (1827), 3 Russ. 598. *Refd.* *Clarke v. Seton* (1801), 6 Ves. 411. *Mentd.* *Brown v. Newall* (1837), 2 My. & Cr. 558; *East India Co. v. Campion* (1837), 11 Bli. N. S. 158.

570. —.]—In an action on a bond, damages may be recovered for more than the amount of the penalty.—*LONSDALE (LORD) v. CHURCH* (1788), 2 Term Rep. 388; 100 E. R. 209; *subsequent proceedings* (1790), 3 Bro. C. C. 41.

Annotations:—*Dbtd.* *Wilde v. Clarkson* (1795), 6 Term Rep. 303. *Consd.* *Clarke v. Seton* (1801), 6 Ves. 411. *Dbtd.* *Hefford v. Alger* (1808), 1 Taunt. 218; *Branscombe v. Scarbrough* (1844), 6 Q. B. 13. *Refd.* *Clark v. Gray*, *Marsden v. Gray* (1805), 2 Smith, K. B. 622.

571. — *Delay caused by obligor.*—In a ct. of equity, a debt, secured by bond, may be carried beyond the penalty of the bond, if debtor has by injunction restrained the creditor from proceeding at law, & there has been no misconduct on the part of the creditor.—*GRANT v. GRANT* (1827), 3 Russ. 598; 5 L. J. O. S. Ch. 145; 38 E. R. 699; *subsequent proceedings* (1828), 5 Russ. 189; (1830), 3 Sim. 340.

Annotations:—*Refd.* *East India Co. v. Campion* (1836), 6 L. J. Ch. 37; *Re Sparke & Bridges, Ex p. Day* (1863), 9 L. T. 350. *Mentd.* *Brown v. Newall* (1837), 2 My. & Cr. 558.

572. — *Collateral agreement.*—Obligees in a bond, which recited an agreement by the obligor to make up the income of the obligees to £200 a year:—*Held*: entitled to be paid out of the assets of deceased obligor a sum exceeding the penalty of the bond, on the ground that wherever there was a distinct agreement that a thing should be done notwithstanding the agreement appeared in the form of a bond with a penalty, the ct. would consider that the recital in the condition of the bond was evidence of the agreement & would not limit the relief it gave to the amount of the penalty.—*JEUDWINE v. AGATE* (1829), 3 Sim. 129; 57 E. R. 948.

— *As regards interest.*—See Sect. 2, *post*.

Relief against penalty.—See Sect. 4, *post*.

SECT. 2.—INTEREST.

573. *Whether recoverable—After payment of principal.*—Where the obligee of a bond receives the whole principal after it is payable, he cannot recover interest in an action on the bond, as *solvit post diem* is a good plea.—*DIXON v. PARKES* (1794), 1 Esp. 109, N. P.

Annotation:—*Refd.* *Francis v. Crysell* (1822), 1 Dow. & Ry. K. B. 546.

574. — *When not expressly reserved.*—Interest, though not expressly reserved, is due on a bond dated on a day certain in a penal sum conditioned for payment of a lesser sum generally, without naming any day of payment.—*FARQUHAR v. MORRIS* (1797), 7 Term Rep. 124; 101 E. R. 889.

Annotation:—*Consd.* *Re Dixon*, *Heynes v. Dixon*, [1900] 2 Ch. 561.

575. — *Single bond.*—Proceedings on a single bond may be stayed by the ct., on payment by the obligor of principal & costs without interest.—*HOGAN v. PAGE* (1798), 1 Bos. & P. 337; 126 E. R. 937.

In a suit upon a bond, when the genuineness of the bond & deft.'s liability under it are clearly established, pltf. is entitled to interest from the time deft. declined payment of the sum due upon the bond.—*GUNGA BISHUN TEWARRY v. ROY MOHUN LOLL MITTER* (1864), W. R. 291.—IND.

g. — *Interest expressly provided for.*—A bond, which had been executed Dec., 1881, contained a

Sect. 2.—Interest.]

576. — Voluntary bond—Payable on contingency.]—A bond conditioned for payment of a specified sum to A. after the death of B. & C. & the survivor of them, will bear interest after the death of B. & C., although the engagement was perfectly voluntary, & although the principal was payable on a contingency.

One issue in such case having been taken on the plea of payment, according to the condition of the bond, deft. is not entitled to a verdict on that issue, on proof of payment of the principal without interest. *Qu.* whether in such case after payment of the principal, an action can be maintained for the interest only.—**HELLIER v. FRANKLIN** (1816), 1 Stark. 291, N. P.

577. — After date fixed.]—In 1852 the trustees of a marriage settlement lent the trust fund in cash to the husband on the security of his bond in a penal sum, conditioned for repayment to the trustees of the sum advanced with interest at 4 per cent. *per annum* six months after date. The bond contained no stipulation in terms for payment of interest beyond the six months:—**Held**: (1) the bond, being a penalty bond, was an interest-bearing security carrying interest, though not mentioned beyond the date fixed for payment of the debt; (2) 4 & 5 Anne, c. 3, ss. 12, 13, merely recognised & confirmed the doctrine, previously established by the Ct. of Equity, that, in the case of a bond with a penalty, the true intent of the penalty was to secure payment, not only of the stated principal money & interest on the day fixed, but also of subsequent interest down to the actual payment of the principal, although the bond contained no stipulation for interest beyond the day fixed. Under that Act the interest is payable as interest, & not as damages for non-payment on the day fixed.

The nature of single & penalty bonds, & the liability to interest on them respectively, discussed.—**Re DIXON, HEYNES v. DIXON**, [1900] 2 Ch. 561; 69 L. J. Ch. 609; 83 L. T. 129; 48 W. R. 665; 44 Sol. Jo. 515, C. A.

Annotation:—Reid. Re Drax, Savile v. Drax, [1903] 1 Ch. 781.

578. — Payable “by way of penalty.”]—A., B., & C. gave a bond to D., reciting that A. having received from D. a sum of money in the East Indies, had these drawn bills of exchange on a house in England payable to D., & that the obligors had agreed with D. if the bills should not be accepted & paid, that they would pay the amount thereof, with interest from the day of their respective dates “by way of penalty,” with a condition to be void if the bills should be accepted & paid according to the tenor thereof:—**Held**: interest from the date of the bills was a penalty

stipulation that interest should be paid Apr. 11 every year, & that the principal sum borrowed should be repaid Dec., 1884. Repayment not having been so made, a suit was brought to recover the principal sum together with interest up to the date of plaint:—**Held**: inasmuch as the bond contained a stipulation for the payment of interest annually & there was nothing in it to suggest that the liability should cease on the day upon which the principal was repayable, interest could be recovered.—**JIVANNA PANDITHAR v. APPALU** (1899), 1 L. R. 22 Mad. 339.—**IND.**

h. — Post obit bond.]—The creditor in a personal bond bound himself to repay the principal sum after the death of a certain third party, “& the legal interest of the said principal sum from & after the

date of the bond to the foresaid term of payment, & yearly & termly thereafter, during the non-payment thereof.” No interest was paid on the bond during the life of the third party:—**Held**: interest was not exigible on the bond till the death of the third party; but although not exigible, it was due.—**WATT v. BURNETT'S TRUSTEES** (1839), 2 Dowl. (Ct. of Sess.) 132.—**SCOT.**

k. — Bond as collateral security.]—Interest cannot be recovered on a bond given to secure the payment of instalments of stock in a joint stock co., under 5 Will. 4, c. 48, though the bond is in a penal sum conditioned to secure the payment of a lesser sum at a certain day.—**ST. JOHN BRIDGE CO. v. WOODWARD** (1840), 1 Kerr, 29.—**CAN.**

576 i. When not expressly re-

& not liquidated damages, & that on non-payment of the bills D. was entitled to recover no more than the amount of them with interest from the time of their becoming due.—**ORR v. CHURCHILL** (1789), 1 Hy. Bl. 227; 126 E. R. 131.

579. — Indemnity bond—Against costs, expenses, etc.—Neglect in suing sureties.]—Deft. conveyed an estate to pltf. with a covenant for quiet enjoyment, & also gave an indemnity bond with sureties against “all costs, claims, demands, damages & expenses whatsoever.” Pltf. having been obliged to pay various sums for arrears of an annuity charged on the estate, sued deft. on the bond to recover back the amounts paid with interest, & the jury found that pltf. had been negligent in not suing the sureties on the bond at the time the payments were made:—**Held**: assuming that interest might be recovered under the name of damages on such a bond the finding prevented pltf. from recovering the interest, for if the money had been promptly obtained from the surety & promptly repaid out of deft.'s estate, no interest might have become due at all.—**ANDERTON v. ARROWSMITH** (1839), 2 Per. & Dav. 408.

Annotation:—Reid. Petre v. Duncombe (1851), 2 L. M. & P. 107.

580. — Fidelity bond—Against loss or damage—Liability of surety.]—A trustee in bkpcy. & his surety entered into a bond with the Board of Trade in £500, afterwards reduced to £100 for the due performance by the trustee of his duties as trustee, subject to a condition avoiding the bond if the trustee should “well & sufficiently perform & execute all & singular the duties required of him” as trustee by Bkpcy. Acts, 1883 (c. 52), & 1890 (c. 71), or if he should fail therein & the surety should “make good any loss or damage occasioned by any such default to the estate of bkpt.” The trustee improperly retained for some years a sum of money exceeding £50, & on his default being discovered, he was removed from his office, & pursuant to Bkpcy. Act, 1883, s. 7 (6), he was surcharged with interest at the rate of 20 per cent. *per annum* on the sum he had improperly retained. The trustee made good the sum he had improperly retained, but did not pay the interest with which he had been surcharged:—**Held**: the interest surcharged was in the nature of a penalty & was not a measure of the loss or damage to the estate occasioned by the default of the trustee, & the surety was not liable under the terms of the bond to pay to the Board of Trade the penal interest or any part of it.—**BOARD OF TRADE v. EMPLOYERS' LIABILITY ASSURANCE CORPN., LTD.**, [1910] 2 K. B. 649; 79 L. J. K. B. 1001; 102 L. T. 850; 26 T. L. R. 511; 54 Sol. Jo. 581; 17 Mans. 273, C. A.

Fidelity bonds generally, *see* GUARANTEE.

served—Voluntary bond—To defeat settlement.]—A settlor endeavoured unsuccessfully to set aside a deed of settlement, & afterwards executed a voluntary bond for payment of money to A., the object of the execution of the bond being to defeat *pro tanto* the settlement:—**Held**: interest upon the amount of such a bond would not be allowed, the bond not containing an express provision therefor.—**TRUSTEES, EXECUTORS & AGENCY CO., LTD. v. THORPE** (1900), 26 V. L. R. 99.—**AUS.**

l. — Lost bond.]—Where a bond is lost & there is no evidence of a contract to pay interest although judgment has been entered up, the claim for interest will be refused altogether.—**Re AGOINS** (1851), 18 L. T. O. S. 159.—**IR.**

581. Whether recoverable beyond penalty—General rule.]—Interest on a bond was decreed to be paid, although it exceeded the penalty of the bond.—*ELLIOT v. DAVIS* (1718), Bunb. 23; 2 Eq. Cas. Abr. 533; 145 E. R. 581.

*Annotation:—*Refd. *Lonsdale v. Church* (1788), 2 Term Rep. 388.

582. ———.]—Creditors by bond:—*Held*: entitled to interest only to the extent of the penalty.—*GROSVENOR v. COOK* (1757), Dick. 305; 21 E. R. 286.

*Annotations:—*Refd. *Knight v. Maclean* (1792), Dick. 516; *Creuze v. Lowth* (1793), 4 Bro. C. C. 316.

583. ———.]—Bond creditors cannot have interest beyond the penalties of their bonds.—*GIBSON v. EGERTON*, *BUMSTED v. STILES* (1769), Dick. 408; 21 E. R. 328, L. C.

*Annotation:—*Refd. *Knight v. Maclean* (1792), Dick. 516.

584. S. P. KETTLEBY v. KETTLEBY, RUNDLE v. PETTIT (1775), Dick. 514; 21 E. R. 369, L. C.

*Annotations:—*Refd. *Knight v. Maclean* (1774), Dick. 516; *Lloyd v. Hatchett* (1795), 2 Anst. 525. *Mentd.* *Burke v. Jones* (1813), 2 Ves. & B. 275.

585. ———.]—Interest on an old bond cannot be computed beyond the penalty.—*Tew v. WINTERTON (EARL)*, *FORSTER v. WINTERTON (EARL)* (1792), 3 Bro. C. C. 489; 1 Ves. 451; 29 E. R. 660, L. C.

*Annotations:—*Refd. *Knight v. Maclean* (1792), Dick. 516; *Clarke v. Seton* (1801), 6 Ves. 411; *R. v. Mainwaring* (1815), 2 Price, 67. *Mentd.* *Hovey v. Blakeman* (1799), 4 Ves. 596; *Booth v. Leicester* (1838), 3 My. & Cr. 459; *Lainson v. Lainson* (1853), 22 L. T. O. S. 150; *Torre v. Browne* (1855), 5 H. L. Cas. 556; *Mackintosh v. G. W. Ry. Co.* (1865), 4 Giff. 683; *Hill v. South Staffordshire Ry. Co.* (1874), L. R. 18 Eq. 154.

586. ———.]—The master in computing interest on a bond is not to go beyond the penalty.—*KNIGHT v. MACLEAN* (1792), 3 Bro. C. C. 496; Dick. 516; 29 E. R. 664, L. C.

*Annotations:—*Refd. *Tew v. Winterton* (1792), 2 Bro. C. C. 399; *Clarke v. Seton* (1801), 6 Ves. 411; *Hefford v. Alger* (1808), 1 Taunt. 218.

587. ———.]—A bond and judgment thereon had been assigned by the obligee. The master allowed interest on the total debt only up to the date of the assignment:—*Held*: interest must be calculated up to the date of the master's report, so long as it did not exceed the penalty.—*SHARPE v. SCARBOROUGH (EARL)* (1797), 3 Ves. 557; 30 E. R. 1153, L. C.

588. ———.]—No interest allowed beyond the penalty of a bond, except in special circumstances.—*CLARKE v. SETON* (1801), 6 Ves. 411; 31 E. R. 1119.

*Annotations:—*Refd. *Campbell v. Graham* (1831), 1 Russ. & M. 453; *Hatton v. Harris*, [1892] A. C. 547.

589. ———.]—In an action of debt on a bond to secure repayment of money with interest,

pltf. can only recover to the amount of the penalty, with 1s. for detention of the debt.—*HELLEN v. ARDLEY* (1827), 3 C. & P. 12, N. P.

*Annotation:—*Consd. *Branscombe v. Scarbrough*, *Branscombe v. Heath* (1844), 6 Q. B. 13.

590. ———.]—In a suit upon a bond, given to secure an annuity, the ct. may decree payment of the arrears of the annuity, with interest from the respective times at which it became due, but not beyond the amount of the penalty of the bond.

Civil Procedure Act, 1833 (c. 42), s. 28, giving interest on "debts or sums certain," does not apply to such a case.—*CROSSE v. BEDINGFIELD* (1841), 12 Sim. 35; 10 L. J. Ch. 219; 5 Jur. 836; 59 E. R. 1043.

*Annotation:—*Refd. *Re Powell's Trust* (1852), 10 Haro. 131.

See, also, cases in Sect. 4, sub-sect. 1, *post*.

591. ——— Collateral security given.]—If one by will, or deed, subject his lands for payment of his debts, & there is a debt due by bond, the interest of which has outrun the penalty, it shall not carry interest beyond the penalty, for the design of subjecting the lands was not to increase the debt, but to give a further security; but if the devisee, or trustee, neglects to pay in a reasonable time, he shall, after such neglect, pay interest beyond the penalty (*LORD COWPER, C.*).—*ANON.* (1707), 1 Salk. 154; 1 Eq. Cas. Abr. 288; 91 E. R. 142, L. C.

*Annotations:—*Mentd. *Vaughan v. Guy* (1729), 1 Barn. K. B. 271; *Burke v. Jones* (1813), 2 Ves. & B. 275.

592. ——— Mortgage.]—Although equity cannot carry interest higher than the penalty of a bond, yet when it is tacked to another security, as when there is a mtge. from the obligor to the obligee for securing other sums of money, equity will not suffer the mtgor. to redeem, unless he will pay the interest which is over & above the penalty of the bond.—*PEERS v. BALDWIN* (1709), 2 Eq. Cas. Abr. 611; 22 E. R. 513.

593. ———.]—A mtgee. had also a bond, on which the interest due exceeded the penalty. The mtgor. conveyed the equity of redemption for the use of his creditors, directing that the bond should be paid first. The mtgee. having commenced a foreclosure suit, the creditors filed a bill to redeem:—*Held*: in taking the account of what was due to the mtgee. he could not claim any interest on the bond beyond the penalty.—*LLOYD v. HATCHETT* (1795), 2 Anst. 525; 145 E. R. 955.

594. ———.]—Interest was allowed beyond the penalty of a bond upon a mtge. for the same debt, though by a surety.—*CLARKE v.*

581 i. Whether recoverable beyond penalty—General rule.]—Action on bond payable by instalments. Judgment was entered for the penalty:—*Held*: pltf. could recover only the penalty, & might not charge interest on the penalty, or amounts remaining due thereon.—*RANDALL v. BURTON* (1860), 4 P. R. 9.—*CAN.*

581 ii. ———.]—Pltf. on a bond of indemnity cannot recover interest in the nature of damages beyond the amount of the penalty.—*McMAHON v. INGERSOLL* (1842), 6 O. S. 301.—*CAN.*

581 iii. ———.]—If judgment has been obtained upon a bond in a penalty, the creditor may, after the first execution has been executed, issue a new *levari* for the interest accruing due between the date of the first & second *levari*, provided that the entire amount levied does not exceed the penalty of the bond.—*STERLING v. WYNNE* (1834), 1 Jo. Ex. Ir. 51.—*IR.*

581 iv. ———.]—On a bond the ct. always refuses to give interest beyond the penalty although it is a security of a higher nature than a simple contract debt bearing interest, on which interest to any amount may be recovered.—*ELLIOT v. TYNTE* (1814), Beat. 478.—*IR.*

581 v. ———.]—Declaration in a decree that a bond should be paid with interest, from a specified date:—*Held*: not sufficient to exclude the general rule, that the interest should not exceed the penalty.—*PURCELL v. BLENNERHASSETT* (1848), 10 I. Eq. R. 470.—*IR.*

581 vi. ——— Part payment.]—When the amount of principal & interest due on a bond has reached the penalty, & a part payment is afterwards made, interest is not again payable.—*GREGG v. GLOVER* (1842), 5 I. Eq. R. 127; Fl. & K. 614.—*IR.*

o. ——— Payments made of interest

as such.]—After a decree for administration a receiver who had been appointed to collect the rents of the landed property of deceased, & to keep down the interest on the incumbrances, & who was also a mtgee. in possession, was left undisturbed in possession by the ct. One of the incumbrances was a bond debt, on which judgment had been entered, & the judgment was registered as a mtge. against the lands. Interest was paid by the receiver for a number of years to the bond creditor, & accounts were passed in the suit, & embodied in the final decretal order, showing that the payments were appropriated to interest, & that the principal sum was due to the bond creditor at the date of the final order. Further payments were made, all expressly on account of interest, down to Jan., 1897. The total amount of the payments exceeded the penalty of the bond. All creditors prior to the bond creditor had been paid off, when some

Sect. 2.—Interest. Sects. 3 & 4: Sub-sect. 1.]

(1810), 17 Ves. 106; 34 E. R.

41.

Annotations:—*Consd.* Hughes v. Wynne (1832), 1 My. & K. 20; Matthews v. Keble (1867), L. R. 4 Eq. 467. *Refd.* Grant v. Grant (1830), 3 Sim. 340. *Mentd.* Re European Central Ry. Co., *Ex p.* Oriental Financial Corp'n. (1876), 4 Ch. D. 33.

595. — Bond as collateral security.]—Where a bond is only collateral security interest may be carried beyond the principal.—*KERWIN v. BLAKE* (1721), 2 Eq. Cas. Abr. 533; 22 E. R. 449.

596. — Neglect to demand payment.]—A ct. of equity will not carry interest beyond the penalty of a bond, where the demand is stale, & appears to have been neglected for many years.—*GALWAY (TOWN) v. RUSSELL* (1721), 4 Bro. Parl. Cas. 523; 2 Eq. Cas. Abr. 533; 2 E. R. 357, H. L.

597. — Action on judgment.]—In an action on a judgment recovered on a bond interest may be recovered in damages beyond the penalty of the bond.—*M'CLURE v. DUNKIN* (1801), 1 East, 436; 102 E. R. 169.

Annotations:—*Consd.* Ibbotson v. Fenton (1837), 6 Ad. & El. 772. *Refd.* Clarke v. Seton (1801), 6 Ves. 411.

598. — Bankrupt's estate—Surplus.]—Where bkpt.'s estate is sufficient to pay all, with a large surplus, creditors by bond shall not be allowed interest beyond their penalties.—*BROMLEY v. GOODERE* (1743), 1 Atk. 75; 26 E. R. 49, L. C.

Annotations:—*Consd.* Gibson v. Egerton (1769), Dick. 408; *Ex p.* Morris (1790), 1 Ves. 132. *Refd.* Butcher v. Churchill (1808), 14 Ves. 567; Bower v. Marris (1841), Cr. & Ph. 351. *Mentd.* *Ex p.* Bevan (1804), 10 Ves. 107; *Ex p.* Hill (1804), 11 Ves. 646; *Ex p.* Barfit (1806), 12 Ves. 15; *Saxton v. Davis* (1811), 18 Ves. 72; *Thompson v. Derham* (1842), 1 Hare, 358.

599. — — —.]—Where, in a creditors' administration suit, bond creditors had been allowed by the master their principal & interest to the extent of the penalties of the bonds, & had received an apportionment upon the sums so amounting to the penalties, upon further funds becoming available for the creditors:—*Held*: the bond creditors were entitled to subsequent interest on the sums remaining due in the conditions of the bonds, provided that such interest, together with the sums remaining due, did not exceed the penalties in the bonds.—*WALTERS v. MEREDITH* (1838), 3 Y. & C. Ex. 264; 160 E. R. 700.

600. — Interest provided for in bond.]—In debt on bond in the penalty of £120 conditioned for repayment of the same sum with lawful interest:—*Held*: it being expressly provided by the bond that it should carry interest, interest was recoverable beyond the penalty, to the amount of the damages laid in the declaration.—*FRANCIS v. WILSON* (1824), Ry. & M. 105, N. P.

Annotation:—*Consd.* Branscombe v. Scarbrough, Branscombe v. Heath (1844), 6 Q. B. 13.

601. — — —.]—Under a trust contained in a deed to pay all sums of money due & secured by bond to persons named therein, together with interest, then due & to become due thereon respectively, interest cannot be recovered beyond the penalty of the bond.—*HUGHES v. WYNNE* (1832), 1 My. & K. 20; 2 L. J. Ch. 28; 39 E. R. 588.

further lands were sold, the proceeds of which came to be allocated. The bond creditor claimed to be paid the principal, & the interest accrued since Jan., 1897:—*Held*: the payments having been made as interest, & applied as such, & the amount of the interest due at any one time, together with the principal, never having reached the penalty, the rule which prevents a bond creditor from being paid more than the amount of the

penalty did not apply.—*KNIFE v. BLAIR*, [1900] 1 L. R. 372.—*IR.*

598 i. — Bankrupt's estate—Surplus.]—Where there is a large surplus in bkpcy., after paying such creditors as prove the full amount of their original debts, they will be allowed to prove for interest accruing after the bkpcy., where there is a contract to pay interest, but on all bond debts that interest shall not exceed the

Annotations:—*Folld.* Clowes v. Waters (1862), 21 L. J. Ch. 840. *Refd.* Matthews v. Keble (1867), L. R. 4 Eq. 467.

602. — — — Proof for further interest.]—

Where proof is in respect of a debt secured by bond, the general rule in bkpcy. is that a specialty creditor cannot have interest beyond the penalty contained in his security, but up to the penalty of the bond he will be entitled to interest at the rate secured by the bond. For interest beyond the penalty he may come in with creditors whose debts do not carry interest.—*Re SPARKE & BRIDGES, Ex p. DAY* (1863), 9 L. T. 350.

Proof in bkpcy. for interest generally, see *BANKRUPTCY & INSOLVENCY*, Vol. IV., pp. 305 *et seq.*

603. — — —.]—Testator directed that his trustees should apply as much as might be necessary of the income of his residuary personal estate for the maintenance of his son, a lunatic, for life, & upon further trust to invest any surplus, & to treat it as part of testator's personal estate, & after his son's death he gave his personal estate to his son's children, & in default of issue to two other persons. By a codicil he directed that two bond debts, & all other debts which should be due from B., one of the residuary legatees, should not be payable unless & until his share of the residue should become vested, & that the amount of the debts & interest should then be deducted from his share:—*Held*: B. must be charged with the full amount of interest on the two bonds from their respective dates, although the amount of interest, together with the principal, exceeded the penalty of the bonds.—*MATHEWS v. KEBLE* (1868), 3 Ch. App. 691; 37 L. J. Ch. 657; 19 L. T. 246; *sub nom.* MATTHEWS v. KEBLE, 16 W. R. 1213, L. J.

Annotations:—*Mentd.* *Re* Walker, Walker v. Walker (1886), 54 L. T. 792; *Re* Mason, Mason v. Mason, [1891] 3 Ch. 467.

604. Default in payment—Principal not due—Stay of proceedings.]—If default be made in payment of the interest on a bond, the principal whereof is not yet due, the ct. will not stay proceedings on payment of the interest & costs. *Seemle*: they would restrain the execution to the interest & costs.—*TIGHE v. CRAFTER* (1810), 2 Taunt. 387; 127 E. R. 1128.

Annotation:—*Distd.* Smith v. Bond (1833), 10 Bing. 125.

605. Debt to Crown.]—The Crown is not entitled to interest on the whole sum liquidated by the Deputy Remembrancer's report, made on reference to him, to ascertain what is due to the Crown for principal & interest on a forfeited bond, where the funds in ct., out of which it is to be ultimately paid, are the produce of the sale of real estates, seized under an extent at the instance of the Crown.—*R. v. MAINWARING* (1815), 2 Price, 67; 146 E. R. 23.

Annotations:—*Mentd.* A.-G. v. Norstedt (1816), 3 Price, 97; Wall v. A.-G. (1822), 11 Price, 643.

SECT. 3.—DAMAGES.

generally, DAMAGES.

606. In general.]—"Damages" includes both debt & costs.—*ASHMORE v. RYPLEY* (1617), Cro. Jac. 420; 79 E. R. 359.

amount of the penalties.—*Re AGOINS* (1851), 18 L. T. O. S. 159.—*IR.*

598 ii. — — — Stay of proceedings.]—Interest beyond the penalty of the bond, not allowed to the assignee of a judgment, although he had been restrained by an injunction for a short time from proceeding at law.—*DENNY v. ENNISILLKEN* (1825) 2 Mol. 535.—*IR.*

607. How determined—On breach assigned—Not for debt.]—Debt for a penalty in articles of agreement. The jury ought to assess damages upon the breach assigned, according to 8 & 9 Will. 3, c. 10, & shall not find the debt, or a *venire facias de novo* shall be awarded.—*DRAGE v. BRAND* (1768), 2 Wils. 377; 95 E. R. 871.

*Annotations:—*Consd. *Doe d. Jersey v. Smith* (1819), 1 Brod. & Bing. 97; *Gillingham v. Waskett* (1824), 13 Price, 434. *Reid. Hardy v. Bern* (1794), 5 Term Rep. 636; *Davies v. Arnott* (1825), 10 Moore, C. P. 539; *Ranson v. Dundas* (1837), 3 Scott, 501.

608. — Penalty measure of damages.]—A. bound himself under a penalty to indemnify B. against a bond, by which B. was bound to C., if the money were not paid to C. by A. before a certain day:—*Held*: B., in an action on the bond, for not indemnifying him, was entitled to recover the full amount of the penalty of the bond, that being the only measure of damages.—*WOOD v. WADE* (1817), 2 Stark. 167, N. P.

609. — Stock to be replaced—Depreciation—Value at time of transfer & interest.]—If a transfer of stock by way of loan is made upon bond, not naming a penal sum but with a condition to replace the stock six months after the date, & in the meantime to pay interest at 5 per cent., & the stock is not replaced, & is depreciated, the obligee is entitled to the value of the stock at the time of the transfer, with interest at 5 per cent., credit being given for any payments on account of the principal.—*FORREST v. ELWES* (1799), 4 Ves. 492; 31 E. R. 252.

*Annotation:—*Distd. *Barnard v. Young* (1810), 17 Ves. 44.

610. — Resignation of living—Refusal to resign—Value of advowson.]—A bond was conditioned for the resignation of a living, which deft., when requested, had refused to resign:—*Held*: he being a wrongdoer, the jury were not bound, in assessing the damages, to confine themselves to the diminution of the value of the advowson to pltf. by deft.'s life interest, nor in estimating the annual proceeds to deduct the curate's stipend.—*SONDES (LORD) v. FLETCHER* (1822), 5 B. & Ald. 835; 106 E. R. 1306; *subsequent proceedings, sub nom. FLETCHER v. SONDES* (1827), 1 Bli. N. S. 144, H. L.

*Annotations:—*Distd. *Hawkins v. Coulthurst* (1864), 5 B. & S. 343. *Dbtd. Walton v. Tucker* (1880), 45 J. P. 23. *Consd. Addis v. Gramophone Co.*, [1909] A. C. 488.

Proof of.]—See Part XII., Sect. 5, *post*.

SECT. 4.—RELIEF AGAINST PENALTY.

SUB-SECT. 1.—APART FROM STATUTE.

611. When granted—Tender of principal, interest & costs.]—Pltf. being in execution upon a judgment obtained on a bond, the principal sum & interest & costs were tendered to the obligee, but he would not discharge pltf. out of execution without paying the whole penalty of the bond. Pltf. exhibited his bill to be relieved against the penalty which he had paid to the obligee:—*Held*: he must refund the overplus of the money.—*FRIEND v. BURGH* (1679), *Cas. temp. Finch*, 437; 23 E. R. 238.

PART VIII. SECT. 3.

q. How determined—Performance of award—Amount awarded.]—When arbitrators, after a revocation, make an award which is unimpeached, the amount awarded is a proper measure of damages in an action on the arbn. bond.—*HATHEWAY v. CLIFF* (1851), 2 All. 267.—CAN.

PART VIII. SECT. 4, SUB-SECT. 1.

r. When granted—Unconscionable

*bargain.]—*The son of a wealthy father, but greatly in need of money, executed a bond to secure money borrowed, with interest which amounted to 37 per cent. The bond further contained a stipulation that the borrower should not be empowered to repay the money within three years. And if he did pay within three years, he should nevertheless be obliged to pay three years' interest at the rate mentioned:—*Held*: the bargain was an unconscionable bargain against which the ct. might properly

Stay of proceedings—Counter-bond or collateral agreement.]—The ct. will never give leave to bring principal & interest into ct. & stay proceedings, when the suit is upon a counter-bond, or when there is any pretence of a collateral agreement.—*COKE v. HEATHCOT* (1701), 12 Mod. Rep. 598; 88 E. R. 1544.

613. — Statute of Limitations.]—Proceedings shall be stayed in an action upon a money bond on payment of principal, interest, & costs, without compelling deft. to waive the benefit of Stat. Limitations in respect of a simple contract demand pltf. makes on him.—*ORCHARD v. IRELAND* (1704), 2 Ld. Raym. 1033; 92 E. R. 186.

614. — Proceedings in an action of debt upon bond stayed, upon payment of principal, interest, & costs.]—*BUCKLER v. ASH* (1735), *Lee temp. Hard.* 124; 95 E. R. 78.

See, also, cases in Sect. 1, ante.

615. — After judgment.]—After judgment in debt upon bond, the ct. will not make a rule upon pltf. to take his principal, interest, & costs. In such case, pltf. ought to have his full costs out of the penalty.—*LE SAGE v. PERE* (1702), 7 Mod. Rep. 114; 87 E. R. 1132.

616. — Part payment by obligor.]—Pltf. at law is right in suing upon the whole penalty, though only part of the debt remain due; & so it is in the case of a common money bond, & an obligee, though only part is unpaid, may bring an action on the whole penalty, but then the obligor is right in bringing a bill to be relieved on paying the principal, interest, & costs; & if the obligee will put in a bad answer, & insist on more than is really due, he shall lose his costs in equity, though entitled to them at law.—*FORWARD v. DUFFIELD* (1747), 3 Atk. 555; 26 E. R. 1119, L. C.

617. — Annuity arrears.]—The whole penalty shall not be levied on an annuity bond & judgment, but only the arrears then due, & the judgment shall stand as a security for future arrears.—*OGILVIE v. FOLEY* (1776), 2 Wm. Bl. 1111; 96 E. R. 656.

*Annotations:—*Consd. *Booth v. Leicester* (1838), 3 My. & Cr. 459. *Mentd. Collins v. Yewens* (1839), 8 L. J. Q. B. 332.

618. — Replacement of stock with bonus.]—Where a bond is given by the borrower of a sum of stock, to secure replacement of the stock, & payment in the meantime of sums equal to the interest & dividends, & a bonus is afterwards declared upon the stock, if the borrower makes default in performing the condition of the bond the lender has an equity to be placed in the same situation as if the stock had remained in his name, & is entitled to replacement of the original stock increased by the amount of the bonus, & to dividends in the meantime, as well upon the bonus as upon the original stock, & a ct. of equity will only grant relief against the penalty of the bond on those terms.—*VAUGHAN v. WOOD* (1833), 1 My. & K. 403; 2 L. J. Ch. 107; 39 E. R. 734.

619. How given—Restraint of action—Jurisdiction.]—The practice of a ct. of law compelling pltf. not to take execution beyond his real debt does

give relief.—*BALKISHAN DAS v. MADAN LAL* (1907), 1 L. R. 29 All. 303.—IND.

s. — Increased rate after default.]—A stipulation in a bond, for increased interest from the date of default, may be a stipulation by way of penalty, & cts. are competent to grant equitable relief against such stipulation, independently of statute.—*ABDUL GANI v. NANDLAL* (1902), 1 L. R. 30 Calc. 15.—IND.

Sect. 4.—Relief against penalty: Sub-sects. 1 & 2

not oust the jurisdiction of the Ct. of Ch. in awarding an injunction to restrain an action at law on the bond.—*CODD v. WOODEN* (1790), 3 Bro. C. C. 73; 29 E. R. 415, L. C.

620. — Trial to ascertain damage—Reference to arbitration countermanded.]—Parties to a suit entered into a bond with £200 penalty to stand to an award. Afterwards one of them countermanded the reference:—*Held*: equity could relieve against the penalty by an injunction, & a trial should be directed as to damages.—*WILSON v. BARTON* (1672), Nels. 148; 21 E. R. 812.

621. — Penalty to secure collateral object.]—Where the penalty of a bond is only to secure the enjoyment of a collateral object, equity will grant an injunction against a suit for the recovery of the penalty, & an issue *quantum damnificatus* to try the real damage, even after a verdict has been obtained for the full amount of the penalty.—*SLOMAN v. WALTER* (1783), 1 Bro. C. C. 418; 28 E. R. 1213, L. C.

Annotations:—*Consd.* *Astley v. Weldon* (1801), 2 Bos. & P. 346; *Shackle v. Baker* (1808), 14 Ves. 468; *Law v. Redditch L. B.*, [1892] 1 Q. B. 127; *Re Dixon, Heynes v. Dixon*, [1900] 2 Ch. 561. *Reid.* *Clark v. Watkins* (1863), 1 New Rep. 227; *Protector Endowment Loan & Annuity Co. v. Grice* (1880), 5 Q. B. D. 592.

622. — Performance of contract.]—Where a bond in £9,000 was given for performance of a contract to build a bridge, an injunction was granted to restrain an action on the bond, & an issue *quantum damnificatus* ordered, the sum mentioned in the bond being a penalty.—*ERRINGTON v. AYNESLY* (1788), 2 Bro. C. C. 341; *Dick*. 692; 29 E. R. 191.

Annotation:—*Mentd.* *Flint v. Brandon* (1803), 8 Ves. 159.

623. — To ascertain amount due—Unsettled accounts.]—On a bill by pltf., who while lodging at an hotel, & seriously ill, executed a bond to the landlord for £1,000 payable at six months' date, to secure money paid & advanced for pltf. for hotel charges, the landlord undertaking to rectify all errors in the accounts, the ct. restrained an action at law on the bond, pltf. giving judgment for the amount of the claim.—*EDWARDS-WOOD v. BALDWIN* (1863), 4 Giff. 613; 9 L. T. 474; 9 Jur. N. S. 1280; 66 E. R. 851.

624. When refused — Damages exceeding penalty.]—Equity will not interfere with a judgment on a bond, if it appears that in fact the damages exceed the penalty.—*DAVENPORT v. LONGUEVILLE* (1661), 1 Rep. Ch. 196; 21 E. R. 548.

625. —]—D., exor. of C., employed as a master of a ship by the East India Co., covenanted with them that he would pay a certain mulct for every cloth carried, etc., in the ship, & took deft. to be his mate, who made an agreement *mutatis mutandis* with D., & gave a bond of £50 for the due performance of his part. Deft. without D.'s knowledge carried so many cloths as the mulct came to £70, which the co. deducted out of the master's wages, & the £50 bond would not satisfy. On a bill for relief & discovery of testator's estate, a demurrer by deft., on the ground that relief of more than the security by the bond was not proper in equity, was allowed.—*DAVIS v. CURTIS* (1674), 1 Cas. in Ch. 226; 22 E. R. 773.

626. — Indemnity against adverse claims.]—A bond of indemnity given to protect a purchaser of land against adverse claims threatened at the time of the purchase:—*Held*: valid to the full amount of the penal sum named in it, notwithstanding such penal sum greatly exceeded the

original purchase-money, there being no equity in the circumstances to justify an interference with the legal right, & the purchaser having in discharge of the claim & expenses incident thereto expended a larger sum than the full amount of the penal sum named in the bond.—*OSBORNE v. EALES* (1864), 2 Moo. P. C. C. N. S. 125; 12 W. R. 654; 15 E. R. 849, P. C.

627. — Liquidated damages—Agreement in restraint of trade.]—Deft. & B., being in partnership as surgeons, agreed to assign a portion of their business to pltf. for £150. A bond was entered into between them, by the condition of which it was declared that if deft. or B. should practise, etc., within one mile of W., or should within three years attend any of the patients of pltf., or should induce any of the patients of pltf. to employ or consult deft. or any other medical practitioner, or should induce any other practitioner to set up in practice within such distance of one mile, or should carry on the business of a chemist or druggist within W., or if B. should underlet or assign his term in his house at W. to any physician, or should permit any person carrying on such profession to reside in the house, "then, & in any or either of the cases, if deft. or B., their exors. or administrators, or either of them, did and should forthwith well & truly pay unto pltf. £300 the bond should be void." Deft. committed a breach of the bond by practising within one mile of W.:—*Held*: pltf. was entitled to recover the whole £300.—*MERCER v. IRVING* (1858), E. B. & E. 563; 27 L. J. Q. B. 291; 31 L. T. O. S. 197; 5 Jur. N. S. 143; 6 W. R. 661; 120 E. R. 619.

628. — Money lent—Repayable by instalments—Default in payment.]—Pltfs. lent money to S. upon his bond, under which the principal was to be paid in five years by instalments, in case debtor should so long live, the instalments being calculated so as to cover the principal of the loan, interest thereon, the expenses of negotiating it, & a margin representing a premium for the insurance of debtor's life. The condition of the bond made it void, (1) if the instalments were regularly paid till the expiration of the five years, or till the death of debtor, whichever should first happen, (2) if all the instalments which would have become payable at the expiration of the five years, if debtor lived so long, were at any time paid up, the balance of instalments being at once payable on the failure of any single instalment. Deft. as surety executed the bond, & default having been made in payment of one instalment, pltfs. brought an action claiming the entire balance of unpaid instalments:—*Held*: the amount claimed was not a penalty & could be recovered.—*PROTECTOR ENDOWMENT LOAN & ANNUITY CO. v. GRICE* (1880), 5 Q. B. D. 592; 49 L. J. Q. B. 812; 43 L. T. 564; 45 J. P. 172, C. A.

Annotation:—*Mentd.* *Northampton v. Pollock* (1890), 45 Ch. D. 190.

629. — Mortgage bond—Payment by instalments—Default in payment.]—A provision in a mtge. bond for enforcing payment of the whole sum due, in the event of a default in paying any one of the instalments secured by the bond is not a penalty, & no relief will be granted against it.—*WALLINGFORD v. MUTUAL SOCIETY* (1880), 5 App. Cas. 685; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81, II. L.

Annotations:—*Mentd.* *Edmunds v. Wallingford* (1885), 14 Q. B. D. 811; *Speers v. Daggors* (1885), Cab. & El. 503; *Purkiss v. Low* (1886), 3 T. L. R. 63; *Gunga Narain Gupta v. Tiluckram Chowdhry* (1888), L. R. 15 Ind. App. 119; *Steadman v. Hakim* (1888), 58 L. J. Q. B. 57; *Manger v. Cash* (1889), 5 T. L. R. 271; *Lawrance v. Norreys* (1890), 15 App. Cas. 210; *Arnold & Butler v. Bottomley*, [1908] 2 K. B. 151.

630. — Security for services & behaviour—Action necessary to ascertain damages.]—A bond was given by pltf. to deft., a hair merchant, as a security for pltf.'s service & behaviour in Flanders as deft.'s agent for buying hair, & as a security for his performance of the agreement pltf. deposited £100 in deft.'s hands. He bought only £5 worth of hair, and returned to England before the time agreed:—*Held*: a decree for payment of the penalty of the bond could not be made by a ct. of equity, but an action at law must be directed to try how far deft. had been damnified by pltf.'s non-performance of the service.—**BENSON v. GIBSON** (1746), 3 Atk. 395; 26 E. R. 1027, L. C.

SUB-SECT. 2.—BONDS WITHIN 4 & 5 ANNE, C. 3, AND COMMON LAW PROCEDURE ACT, 1860 (c. 126), s. 25.

NOTE.—The above Acts are referred to in this Sub-sect. as 1705 Act & 1860 Act respectively. The chapter of the former Act is that given in the official Chronological Table & Index of the Statutes, & not that given in Ruffhead's edition.

631. What are—Payment by instalments.]—A bond conditioned for payment of money by instalments is within 1705 Act.—**BONAFOUS v. RYBOT** (1763), 3 Burr. 1370; 97 E. R. 878.

*Annotations:—*Dbtd. **Preston v. Dania** (1872), L. R. 8 Exch. 19. *Consd.* **Re Dixon, Heynes v. Dixon**, [1900] 2 Ch. 561.

632. — — —.]—A money bond payable by instalments is not within either 1705 Act, s. 13, or 1860 Act, s. 25.—**PRESTON v. DANIA** (1872), L. R. 8 Exch. 19; 42 L. J. Ex. 33; 27 L. T. 612; 21 W. R. 128.

*Annotations:—*Consd. **Re Dixon, Heynes v. Dixon**, [1899] 2 Ch. 561. *Refd.* **Gerrard v. Clowes**, [1892] 2 Q. B. 11.

633. — — — Whole sum due on default.]—Proceedings on bond for payment of money by instalments, & on default to stand in force for the whole sum due, shall not be stayed upon payment of the instalments in arrear, such a bond not being within 1705 Act.—**GOWLETT v. HANFORTH** (1774), 2 Wm. Bl. 958; 96 E. R. 565.

634. — — — Payment on contingency.]—To an action of debt on bond, by the exor. of the obligee in trust, deft. in his plea set out the condition whereby the bond was to be void, if the obligor, after his marriage, should die in the lifetime of his intended wife, & his heirs, exors., etc., should within six months after his decease pay to the obligee £1,500 in trust for the intended wife of the obligor, but, if the wife should die in the lifetime of the obligor, the bond was to be void, if he should pay to the persons to whom his intended wife, by any will, writing, etc., should give or bequeath all or any part of the £1,500. *Seemle*: this was a bond conditioned for payment of money upon a contingency, & not within 1705 Act.—**ENGLAND v. WATSON** (1842), 9 M. & W. 333; 1 Dowl. N. S. 398; 11 L. J. Ex. 102; 6 Jur. 763; 152 E. R. 142. *Annotation:—*Refd. **Hodgkinson v. Wyatt** (1843), 13 L. J. Q. B. 73.

635. — — — Stay of proceedings.]—The ct. will not interfere, under 1705 Act, s. 13, to stay the proceedings in an action upon a bond, where it is at all doubtful that the payment stipulated by the

condition, is not subject to a contingency.—**ROBINSON v. BROWN** (1846), 3 C. B. 54; 7 L. T. O. S. 183; 136 E. R. 22; *subsequent proceedings*, 3 C. B. 754.

636. — — — Indemnity of parish against maintenance of bastard child.]—A bond to save the parish harmless from keeping a bastard child is not within 1705 Act.—**COOKE v. PETTIT** (1753), 2 Wils. 5; 95 E. R. 655.

637. — — — Post obit bond.]—*Seemle*: a post obit bond, upon which a forfeiture has taken place, is within 1705 Act.—**MURRAY v. STAIR** (EARL), (1823), 2 B. & C. 82; 3 Dow. & Ry. K. B. 278; 107 E. R. 313.

*Annotations:—*Consd. **England v. Watson** (1842), 6 Jur. 763. *Refd.* **Smith v. Bond** (1833), 10 Bing. 125. *Mentd.* **Spicer v. Burgess** (1834), 1 Cr. M. & R. 129; **Bowker v. Burdekin** (1843), 11 M. & W. 128; **Davis v. Jones** (1856), 17 C. B. 625; **Gudgen v. Besset** (1856), 6 E. & B. 986; **Cumberlege v. Lawson** (1857), 1 C. B. N. S. 709; **Wallis v. Littell** (1861), 5 L. T. 489; **Gerrard v. Clowes**, [1892] 2 Q. B. 11; **London Freehold & Leasehold Property Co. v. Saffield**, [1897] 2 Ch. 608; **Strickland v. Williams** (1898), 68 L. J. Q. B. 241.

638. Relief on payment.]—1705 Act relieves only on payment of the whole principal.—**LAND v. HARRIS** (1722), 1 Stra. 515; 93 E. R. 670.

*Annotation:—*Consd. **Preston v. Dania** (1872), 42 L. J. Ex. 33.

639. — — —.]—A bond was conditioned for payment of a gross sum absolutely at a day certain. Before that day the parties agreed for payment by instalments, & for defeasance of the bond, conditionally on punctual payment of the instalments & on deft. living until all the days fixed for payment were past. Deft. paid two instalments at the due dates & part of a third; at a later date he paid the whole interest due on the whole debt up to that time:—*Held*: deft. was not entitled to a stay of proceedings on payment of the instalments already due & interest thereon, & unless deft. paid the whole sum he could not be relieved from the penalty of the bond.—**BONAFOUS v. RYBOT** (1763), 3 Burr. 1370; 97 E. R. 878.

*Annotations:—*Dbtd. **Preston v. Dania** (1872), L. R. 8 Exch. 19. *Consd.* **Re Dixon, Heynes v. Dixon**, [1900] 2 Ch. 561.

640. — — —.]—On an action brought on a bond dated on a day certain in a penal sum conditioned for payment of a lesser sum generally, without naming any day of payment, the ct. will refer it to the master to compute principal, interest, & costs thereon, & on payment of same stay the proceedings by virtue of 1705 Act.—**FARQUHAR v. MORRIS** (1797), 7 Term Rep. 124; 101 E. R. 889.

*Annotation:—*Refd. **Re Dixon, Heynes v. Dixon**, [1900] 2 Ch. 561.

641. — — — Payment into court.]—By 1705 Act in an action on a penal bond, if deft. at any time pending the action bring into ct. the principal & interest due upon it & all the costs in law & equity which have been incurred, the ct. may discharge deft. from the bond.—**HARROLD v. CLOTWORTHY** (1606), Cro. Jac. 126; 79 E. R. 110.

*Annotation:—*Refd. **Horne v. Lewin** (1701), 1 Ld. Raym. 639.

642. — — —.]—If in an action upon a bond deft. pays money into ct. under 1705 Act, s. 13, he shall not pay the costs incurred for the same cause in other cts.—**SISNEY v. NEVINSON** (1726), 2 Stra. 699; 93 E. R. 792.

*Annotation:—*Mentd. **Saltern v. Wynne** (1737), 2 Stra. 1072.

643. — — —.]—In debt on bond:—*Held*:

PART VIII. SECT. 4, SUB-SECT. 2.

641 i. Relief on payment—Payment into court.]—45 Anne, c. 3, s. 13, gives to the ct. an equitable jurisdiction, to be summarily exercised, to allow deft., in an action on a bond, to pay the amount due into ct., & in case the amount is in dispute, to refer the matter to the prothonotary for a

report thereon. The prothonotary may also be ordered to report upon facts necessarily involved in the question of the amount due.—**EALLES v. DANGAR** (1849), 1 Legge, 490.—**AUS.**

*t. Performance of duties—No breaches assigned—Setting aside verdict.]—*To a declaration in debt as upon a common money bond, *non est factum*

was pleaded. Pltfs. obtained a verdict. The bond was conditioned for due performance of the duties of a poor-law clerk:—*Held*: that pltfs. did not assign breaches of the condition was no ground for setting aside the verdict.—**CASTLEREA UNION v. DILLON** (1849), 12 I. L. R. 465; 1 Ir. Jur. 229.—**IR.**

Sect. 4.—Relief against penalty: Sub-sects. 2 & 3.] upon bringing in what was due upon the condition with costs, all proceedings should be stayed, though the whole conditional sum was not offered to be brought in.—**MAIN v. SOMNER** (1730), 1 Barn. K. B. 429; 94 E. R. 288.

644. — Payment after due date—Tender & refusal.]—By 1705 Act, s. 12, where debt is brought on any single bill or on any judgment, if the money due thereupon have been paid, such payment may be pleaded in bar; & so of a bond conditioned to pay money, though the money were not paid at the day and the place, yet if it were paid at a subsequent day, debt. may plead it in bar, but debt. cannot plead a tender & refusal of principal & interest at a subsequent day in bar, for that is not within the equity of the Act, for such construction would be prejudicial, as it would empower the obligee at any time without notice to take in his money.—**UNDERHILL v. MATTHEWS** (1715), Bull. N. P. 167, N. P.

645. — —.]—To an action on a bond conditioned for payment to third persons:—**Held: solvit post diem** was a good plea, within 1705 Act.—**GIDDINGS v. GIDDINGS** (1756), 1 Keny. 335; 96 E. R. 1012.

Annotation:—Mentd. **Robinson v. Raley** (1757), 1 Burr. 316.

646. — — Default in payment of interest—Principal not due.]—On a declaration on a bond conditioned for payment of a sum of money at the expiration of seven years & interest in the interval half-yearly, debt. cannot plead payment of money into ct. under 8 & 9 Will. 3, c. 11, s. 8, & 1705 Act, s. 13, where the breach assigned is non-payment of interest, the principal not having become due.

On such declaration, debt. may, under 1705 Act, s. 12, plead *solvit post diem* to the interest alone.—**HODGKINSON v. WYATT** (1843), 1 Dow. & L. 668; 13 L. J. Q. B. 73; 8 Jur. 216.

Annotation:—Refd. **Marriage v. Marriage** (1845), 1 C. B. 761.

647. — — — Pleading.]—A bond was given for the penal sum of £4,000, the condition of which recited that the obligor was indebted to the obligee in £2,000, & that the obligee had agreed to accept interest for same at 5 per cent., during the lives of the obligee & another party, in full satisfaction of the debt, provided same was regularly paid: it then set out that if the interest was paid half-yearly in July & Jan., the bond was to be null & void, but in case of failure for twenty-eight days next after each half-yearly payment had become due, same having been demanded, the bond to be in full force, & in case of failure in making the payments within the respective times, the bond or payments made under it should not be taken in discharge of any part of the £2,000, but same should, immediately after such default, become payable under the bond. To an action on the bond, debt. pleaded, as to one of the half-yearly payments, that payment had not been demanded on the day when it became due or at any time within twenty-eight days, but that debt., after the expiration of the twenty-eight days & before the commencement of the suit, paid it to pltf., & that no other sum was due:—**Held:** the plea was bad as a plea of *solvit post diem* under 1705 Act, because if the principal sum had become payable under the bond, payment of it should have been pleaded, & if it had not become payable, debt. should have shown in his plea that it had not, which he had not done.—**MARRIAGE v. MARRIAGE** (1845), 1 C. B. 761; 14 L. J. C. P. 244; 5 L. T. O. S. 197; 9 Jur. 581; 135 E. R. 742.

Annotation:—Consd. **Husband v. Davis** (1851), 10 C. B. 646.

648. — Part payment after due date.]—A plea of part payment *post diem*, to debt on bond, is a good plea, under 1705 Act, s. 12, after verdict.—**HUSBAND v. DAVIS** (1851), 10 C. B. 645; 2 L. M. & P. 50; 20 L. J. C. P. 118; 138 E. R. 256.

649. — What amounts to payment—Judgment entered under warrant of attorney—Warrant of attorney set aside—Refund of proceeds of execution.]—To an action on a joint & several bond in the penal sum of £2,800 given by debt., J., & M., conditioned for payment of £1,400, debt. pleaded (1) that the sum mentioned in the bond was secured by a warrant of attorney of even date therewith upon which judgment was to be forthwith entered up, given by J. to pltf., & that J. after the day conditioned for payment of the principal sum, paid same with interest, to pltf.; (2) that pltf. sued J. for detention of the money in the declaration mentioned in respect of the bond, that he obtained judgment, & took in execution goods of J. to the amount of £1,417; (3) that at the time of entering into the bond, J., & debt. & M. as his sureties, executed a warrant of attorney, upon which pltf. was authorised to enter up judgment forthwith for £2,800 for securing payment of the £1,400, but execution should not issue except in case of default being made, that pltf. afterwards sued J. for the debt of £2,800, that J. became bkpt., that pltf. omitted to file the warrant of attorney as required by 3 Geo. 4, c. 39, that certain goods of J. were taken in execution under the judgment so obtained; & that thereby pltf. suspended his remedy against the principal & discharged debt., the surety. Replication to the second plea, that, by reason of the omission to file the warrant of attorney, pltf. was compelled to refund to the assignees of J. the proceeds of the execution. Similar replications to the first and third pleas:—**Held:** the facts disclosed by the pleadings afforded no defence at law to the action, because the warrant of attorney having been set aside by the assignees of J. could not be treated as payment within 1705 Act.—**PARKER v. WATSON** (1853), 8 Exch. 404; 22 L. J. Ex. 167; 155 E. R. 1405.

Annotation:—Mentd. **Greenough v. M'Clelland** (1860), 6 Jur. N. S. 772.

SUB-SECT. 3.—BONDS WITHIN 8 & 9 WILL. 3, c. 11.

650. In general.]—The Act is remedial for the purpose of recovering successive breaches to the extent of the penalty.—**MACKWORTH v. THOMAS** (1800), 5 Ves. 329; 31 E. R. 613, L. C.

Annotations:—Consd. **Jendwine v. Agate** (1829), 3 Sim. 129; **Hatton v. Harris**, [1892] A. C. 547.

651. What are—Payment by instalments—Whole sum due on default.]—A bond for payment of money by instalments, & on default to stand in force for the whole sum due, is not within the Act.—**GOWLETT v. HANFORTH** (1774), 2 Wm. Bl. 958; 96 E. R. 565.

652. — —.]—A bond, conditioned for payment of a certain sum by instalments, is within the Act, s. 8.—**WILLOUGHBY v. SWINTON** (1805), 6 East, 550; 102 E. R. 1398.

Annotations:—Consd. **Smith v. Bond** (1833), 10 Bing. 125. **Mentd.** **Murray v. Stair** (1823), 2 B. & C. 82; **Kepp v. Wiggett** (1847), 4 C. B. 678.

653. — Payment at future date—With interest periodically—Default in payment of interest.]—A bond was conditioned for payment of a principal sum in 1820, with interest in the meantime half-yearly. An action having been brought for the penalty upon a breach of the condition in non-payment of half a year's interest on

Sept. 29, 1817 :—*Held* : (1) the Act, s. 8, did not prevent judgment from being entered up for the full penalty in such a case ; (2) although the non-payment of interest was due to a slip the ct. would not stay the proceedings before judgment on payment of the interest due & costs. *Qu.* : to what extent the ct. might relieve deft. against the consequences of such judgment.—*VAN SANDAU v.* (1817), 1 B. & Ald. 214 ; 106 E. R. 79.

Annotations :—*Consd.* *Smith v. Bond* (1833), 10 Bing. 125. *Mentd.* *Simmons v. S. E. Ry. Co.* (1861), 7 Jur. N. S. 849.

654. ————*]*—On a bond with a penalty conditioned for payment of money at a given day, & interest in the meantime, with a stipulation that on any default in paying the interest, the whole sum should be demandable, the obligee, on the interest falling into arrear, brought an action to recover the whole principal & interest :—*Held* : the case was not within the Act, s. 8, & pltf. was entitled, after verdict, to have judgment & execution for the whole principal sum, & not merely for the arrears of interest.—*JAMES v. THOMAS* (1833), 5 B. & Ad. 40 ; 2 Nev. & M. K. B. 663 ; 2 L. J. K. B. 207 ; 110 E. R. 707.

655. ——— *Payment of lesser sum.*—A bond conditioned to be void upon payment of a lesser sum by instalments is within the Act.—*PRESTON v. DANIA* (1872), L. R. 8 Exch. 19 ; 42 L. J. Ex. 33 ; 27 L. T. 612 ; 21 W. R. 128.

Annotations :—*Consd.* *Re Dixon, Heynes v. Dixon*, [1899] 2 Ch. 561. *Refd.* *Gerrard v. Clowes*, [1892] 2 Q. B. 11.

656. ——— *Bail bond.*—Bail bonds are not within the Act.—*SELBY v. SERRES* (1801), 1 Tidd's Practice, 8th ed., p. 633.

Bail bonds generally, see *EXECUTION*.

657. ——— *Bond by petitioning creditor.*—*Scmble* : a bond given to the Lord Chancellor by the petitioning creditor of bkpt. under 5 Geo. 2, c. 30, s. 23, was not within the Act, s. 8.—*SMITHEY v. EDMONSON* (1802), 3 East, 22 ; 102 E. R. 504.

Annotation :—*Mentd.* *Re Miller, Ex p. Bumford* (1816), 2 Madd. 1.

658. ——— *Annuity.*—*COLLINS v. COLLINS* (1759), 2 Burr. 820 ; 2 Keny. 530 ; 97 E. R. 579.

Annotations :—*Apld.* *Walcot v. Goulding* (1799), 8 Term Rep. 126. *Consd.* *Mackworth v. Thomas* (1800), 5 Ves. 329.

Apld. *Willoughby v. Swinton* (1805), 6 East, 550. *Consd.* *Smith v. Bond* (1833), 10 Bing. 125 ; *Rodgers v. Maw* (1846), 15 M. & W. 444. *Refd.* *Lonsdale v. Church* (1788), 2 Term Rep. 388 ; *Lee v. Lester* (1849), 7 C. B. 1008 ; *Johnson v. Diamond* (1855), 11 Exch. 73 ; *Cope v. Bennett* (1911), 55 Sol. Jo. 521. *Mentd.* *Attwooll v. Attwooll* (1853), 2 E. & B. 23.

659. ——— *R. S. C., Ord. 13 & Ord. 14.*—The indorsement on a writ claimed £500, as the principal sum due on a bond conditioned for payment by the obligor to pltf. of an annuity of £26 during the life of a child, & until she should attain the age of sixteen years, by specified quarterly payments, & alleged that two of such payments were due and unpaid :—*Held* : pltf. was not entitled to proceed under Ord. 14, r. 1, to obtain final judgment, but was limited to the procedure specified in the Act, s. 8, and Ord. 13, r. 14.—

PART VIII. SECT. 4, SUB-SECT. 3.

660 i. *What are—Liquidated sum—Rules of court.*—A. entered into a bond in the following terms : " I am held & firmly bound to R. in £100 for every month or part thereof during which R., his exors., administrators, or assigns, shall carry on business at B. or within eight miles from B.," etc. The condition of the bond provided that if A. did not do any act in opposition to R.'s business within eight miles of B. the bond should be void & of no effect. A. committed breaches in three consecutive months, & R. sued on the bond & recovered judgment for £300 as liquidated damages :—

Held : the bond was within 8 & 9 Will. 3, c. 11, s. 8, & within the rules of ct.—*MOORE v. ORFORD* (1908), 27 N. Z. L. R. 577.—N.Z.

660 ii. ———*]*—H. guaranteed the payment of a co.'s overdraft at a bank to the extent of £1,500, & the co. executed a bond to H. for £3,000 subject to a condition that if the co. "shall at any time upon a demand in writing signed by H. do all acts, matters, & things necessary to obtain the cancellation of the said guarantee . . . then the above-written bond shall be null & void, but otherwise shall remain in full force & virtue." The co. subsequently went into liquidation,

TUTHER v. CARALAMPI (1888), 21 Q. B. D. 414 ; 23 L. J. N. C. 123 ; 59 L. T. 141 ; 52 J. P. 616 ; 4 T. L. R. 759 ; *sub nom.* *JUTHER v. CARALAMPI*, 37 W. R. 94, D. C.

Annotation :—*Refd.* *Gerrard v. Clowes*, [1892] 2 Q. B. 11.

660. ——— *Liquidated sum—R. S. C., Ord. 14.*—was executed by deft. for payment of £100 to pltf. The condition of the bond was that if deft. should at all times thereafter, in obedience to a perpetual injunction granted by the High Ct. of Justice, refrain from trespassing on pltf.'s lands therein mentioned, or the walls, gates, or fences thereof, or inclosing same, & from pulling down or removing or otherwise injuring same, or inciting others to commit any such trespasses, the obligation should be void. Deft. committed a breach of the injunction :—*Held* : the sum secured by the bond was a liquidated sum, to the recovery of which the procedure of Ord. 14, r. 1, was applicable.

On investigation of the bond it turns out not to be within the Act (*COLLINS, L.J.*).—*STRICKLAND v. WILLIAMS*, [1899] 1 Q. B. 382 ; 68 L. J. Q. B. 241 ; 80 L. T. 4 ; 15 T. L. R. 131, C. A.

Annotation :—*Mentd.* *Re White & Arthur* (1901), 84 L. T. 594.

661. ——— *Award.*—Leave given to pltf. in debt on bond conditioned to perform an award, after judgment for him upon a plea of judgment recovered, to execute a writ of inquiry upon the Act, s. 8, after a writ of error allowed, & to sign a new judgment on the terms of paying costs & putting deft. in *statu quo*, etc.—*HANBURY v. GUEST* (1811), 14 East, 401 ; 104 E. R. 656.

662. ——— *Post obit bond.*—A *post obit* bond, upon which a forfeiture has taken place, is not within the Act, s. 11.—*MURRAY v. STAIR (EARL)* (1823), 2 B. & C. 82 ; 3 Dow. & Ry. K. B. 278 ; 107 E. R. 313.

Annotations :—*Consd.* *Gerrard v. Clowes*, [1892] 2 Q. B. 11. *Refd.* *Smith v. Bond* (1833), 10 Bing. 125. *Mentd.* *Spicer v. Burgess* (1834), 1 Cr. M. & R. 129 ; *England v. Watson* (1842), 6 Jur. 763 ; *Bowker v. Burdekin* (1843), 11 M. & W. 128 ; *Davis v. Jones* (1856), 17 C. B. 625 ; *Gudgen v. Besset* (1856), 6 E. & B. 986 ; *Cumberlege v. Lawson* (1857), 1 C. B. N. S. 709 ; *Wallis v. Littell* (1861), 5 L. T. 489 ; *London Freehold & Leasehold Property Co. v. Suffield*, [1897] 2 Ch. 608 ; *Strickland v. Williams* (1898), 68 L. J. Q. B. 241.

663. ——— *Performance of collateral agreement.*—A bond substantially conditioned for the performance of an agreement is within the Act, s. 8.—*HURST v. JENNINGS* (1826), 5 B. & C. 650 ; 8 Dow. & Ry. K. B. 424 ; 108 E. R. 242.

Annotations :—*Consd.* *Shaw v. Worcester* (1830), 6 Bing. 385. *Distd.* *Smith v. Bond* (1833), 10 Bing. 125. *Consd.* *Power v. Lowe* (1855), 26 L. T. O. S. 188. *Refd.* *Ranson v. Dundas* (1837), 3 Scott, 501.

664. ——— *Administration bond.*—An administration bond entered into with the President of the Probate Divorce & Admiralty Div. of the High Ct. in the usual form to secure the due administration of the estate of a deceased person is a bond within the Act.—*COPE v. BENNETT* (1911), 55 Sol. Jo. 521 ; *subsequent proceedings*, [1911] 2 Ch. 488.

& the bank called upon H. to pay the amount guaranteed by him :—*Held* : the bond was not within 8 & 9 Will. 3, c. 11, s. 8.—*Re VEREX, BARKER, & FINLAY, LTD.* (1909), 29 N. Z. L. R. 199.—N.Z.

a. *Setting aside verdict—No breaches assigned.*—In debt on bond, where breaches have not been suggested or assigned in the replication, & the bond comes clearly under 8 & 9 Will. 3, c. 11, it is irregular to take a verdict for the penalty, & the verdict may be set aside.—*BROCK DISTRICT COUNCIL v. BOWEN* (1850), 7 U. C. R. 471.—CAN.

Part IX.—Assignment.

SECT. 1.—EQUITABLE ASSIGNMENT.

See, generally, CHOSSES IN ACTION ; GIFTS.

665. In general.]—A bond is assignable *scilicet* the parchment & seal, but not the debt, which is a chose in action.—**CHAMBERS v. COOKER** (1658), 2 Sid. 85 ; 82 E. R. 1271.

666. Upon trust—Notice of trust—Payment to one trustee.]—Money held in trust for the separate use of a *feme covert* was lent by the trustees on bond. The trust was declared in the bond, & the bond kept by the *feme*:—*Held*: this was equivalent to an equitable assignment of the bond, & a payment by the obligor to one of the trustees without production of the bond was not a good payment.—**BALDWIN v. BILLINGSLEY** (1705), 2 Vern. 539 ; 23 E. R. 950.

667. Payments by order of trustee.]—An obligor of a bond, after notice that it had been assigned on trusts, of the particulars of which there was no proof of his being cognisant, made payments to parties not entitled thereto, some by order of the trustee, & some to the extrin. of the obligee, without such order:—*Held*: the obligor was not responsible to the *cestui que trust* for the former, but was liable to repay the latter.—**ROBERTS v. LLOYD** (1840), 2 Beav. 376 ; 48 E. R. 1227.

Annotation:—**Mentd.** Church v. Marsh (1843), 2 Hare, 652.

668. ——— Subsequent incumbrancers.]—A., a *feme sole*, held a bond of M. & Co. for £8,000 & interest. Upon her marriage with H., the bond, with other personal property, was assigned to trustees for the separate use of A., etc., & one of the co-obligors had notice of that settlement. By a separate deed, not referring to the other, the real property of A. was settled upon similar trusts. H., having got possession of the bond, treated with B. for a loan of money, & proposed to deposit the bond as a security, representing that it belonged to him *jure mariti*, & producing the settlement of the realty, which he stated to B. to be the only settlement. B., without previous inquiry of the obligor or the wife, advanced his money upon the acceptance of H. & the deposit of the bond, with an undertaking by H. to assign the bond when required. The acceptance being dishonoured a year afterwards B. gave notice to M. & Co. of his claim. The trustees also claiming the bond, M. & Co. filed their bill of interpleader:—*Held*: (1) the trustees had the better equity, for previous notice of the first assignment to one of several co-obligors, who was alive at the date of the second assignment, was sufficient to protect the trustees from the claim of the subsequent incumbrancer, with notice to all, and that though the bond were joint and several ; (2) it was not necessary that the notice should be given for the particular purpose ; (3) the question was one of priority of notice, & whether the second incumbrancer made previous inquiries or not was immaterial, if at the time there was no subsisting

notice of a prior incumbrance.—**MEUX v. BELL** (1841), 1 Hare, 73 ; 11 L. J. Ch. 77 ; 6 Jur. 123 ; 66 E. R. 955.

Annotations:—**Reid.** Stocks v. Dobson (1853), 4 De G. M. & G. 11. **Mentd.** Langton v. Horton (1842), 1 Hare, 549 ; Meek v. Kettlewell (1842), 11 L. J. Ch. 293 ; Pinkett v. Wright (1842), 2 Hare, 120 ; Etty v. Bridges (1843), 2 Y. & C. Ch. Cas. 486 ; Kekewich v. Manning (1851), 1 De G. M. & G. 176 ; Ward v. Duncombe, [1893] A. C. 369 ; Re Wasdale, Brittin v. Partridge, [1899] 1 Ch. 163 ; Re Dallas (1903), 52 W. R. 313.

669. ——— Real & personal estate charged with payment—Rights of assignee.]—In 1806 a bond was executed by A. in favour of B., & by a contemporaneous settlement it was settled by B., the obligee, upon certain trusts. By his will, dated in 1812, A. charged his real & personal estate with payment of the bond debt. He shortly afterwards died. Pltf. claimed, as assignee of the bond, a valid equitable lien on the obligor's real estate in respect of the bond debt & interest. The defence was that the obligor died possessed of personal estate amply sufficient to pay the bond debt & interest, & that pltf.'s predecessors in title ought to have obtained payment out of such personal estate, & that not having done so, they waived their right to have recourse to the real estate:—*Held*: pltf. was entitled to a valid charge in equity for the amount of the bond & interest upon the real estate of the obligor.—**JUSTICE v. FOOKS** (1887), 57 L. T. 868.

670. Donatio mortis causâ—Without consideration.]—The obligee in a bond gave it to her niece, & afterwards, in her last illness & five days before her death, signed a memorandum, purporting to be an immediate & absolute assignment of the bond to her:—*Held*: (1) the transaction could not be considered as a *donatio mortis causâ*, as there was no evidence to show at what time or in what circumstances the bond first came into the niece's possession, & as the assignment was immediate and unconditional ; (2) it could not take effect as a gift, for delivery of a bond did not confer on the donee a right to recover, & equity would not assist the donee of a bond to recover the amount of it, if the gift was made without consideration.—**EDWARDS v. JONES** (1835), 7 Sim. 325 ; 4 L. J. Ch. 163 ; 58 E. R. 862 ; *affd.* (1836), 1 My. & Cr. 220, L. C.

Annotations:—**Reid.** Moore v. Moore (1874), L. R. 18 Eq. 474 ; Re Shield, Pethybridge v. Burrow (1885), 53 L. T. 5. **Mentd.** Boatson v. Beatson (1841), 12 Sim. 281 ; M'Fadden v. Jenkyns (1842), 1 Hare, 458 ; Meek v. Kettlewell (1843), 1 Ph. 342 ; Ward v. Audland (1845), 8 Beav. 201 ; Kekewich v. Manning (1851), 1 De G. M. & G. 176 ; Price v. Price (1851), 14 Beav. 598 ; Bridge v. Bridge (1852), 16 Beav. 315 ; Staniland v. Willott (1852), 3 Mac. & G. 664 ; Donaldson v. Donaldson (1854), Kay, 711 ; Voyle v. Hughes (1854), 2 Sm. & G. 18 ; Pownall v. Anderson (1856), 2 Jur. N. S. 857 ; Re Richardson, Shillito v. Hobson (1885), 30 Ch. D. 396.

SECT. 2.—ASSIGNMENT SUBJECT TO EQUITIES.

See, also, CHOSSES IN ACTION.

671. General rule.]—An assignee of a bond

been made over to C. though not formally assigned to him:—*Held*: C. was to be considered as having taken a regular assignment of the bond.—**DULI CHAND v. MONOHUR LALL UPADHYA** (1878), 2 C. L. R. 18.—**IND.**

*d. Whether obligor's consent essential.]—*The obligor's consent is not necessary to the assignment of a common money-bond.—**KRISTNA CHETTI v. BALARAMA CHETTI** (1863), 1 Mad. 139.—**IND.**

PART IX. SECT. 1.

*b. Absence of formal assignment—Effect.]—*Pltf. purchased from C. a mill privilege, with a right to overflow land belonging to deft., & abstained at deft.'s instance from obtaining from C. an assignment of a bond securing the right so to flood deft.'s land. In a proceeding afterwards taken by pltf. to compel deft. specifically to perform the contract contained in the bond:—*Held*: the want of a formal assignment

of the bond could not be raised as an objection to pltf.'s right to recover.—**RITCHIE v. DRAIN** (1878), 25 Gr. 322.—**CAN.**

*c. ———.]—*A. pledged lands to B., & thereafter granted a lease of the same lands to C. Shortly before the granting of the lease, A. executed a single mtge. of the same lands to D. The consideration-money given by C. for the lease had been expended in paying off B.'s mtge., & the bond had

must take it subject to the same equity as it was in the obligee's hands.—*COLES v. JONES* (1715), 2 Vern. 692; 23 E. R. 1048, L. C.

Annotations:—*Distd.* *Watson v. Mid. Wales Ry. Co.* (1867), L. R. 2 C. P. 593. *Reid.* *Keys v. Williams* (1839), 3 Y. & C. Ex. 462.

672. — Set-off by obligor.]—A. being bound in a bond to B., the bond was assigned by B. to C. in satisfaction of a debt due from B. to C. B. became bkpt., & C. not being able to sue at law in B.'s name, brought a bill against A. to be paid the money due on the bond:—*Qu.*: whether A. out of the money due on the bond could retain a debt due to himself from B.—*PETERS v. SOAME* (1701), 2 Vern. 428; 23 E. R. 874.

Annotations:—*Mentd.* *Young v. Bank of Bengal* (1836), 1 Deac. 622; *Freeman v. Lomas* (1851), 9 Hare, 109.

673. Bond void in equity.]—A bond which is void in equity against the obligor is subject to the same equity in the hands of an assignee.

A son on his marriage was to have £3,000 portion with his wife, & privately without notice to his parents who treated for the marriage, gave a bond to the wife's father to pay back £1,000 of the portion seven years afterwards:—*Held*: the bond was void in equity, & would not be made better by being assigned to creditors.—*TURTON v. BENSON* (1719), 10 Mod. Rep. 445; 1 P. Wms. 496; Prec. Ch. 522; 1 Stra. 240; 2 Vern. 764; 88 E. R. 803, L. C.

Annotations:—*Reid.* *Watson v. Mid. Wales Ry. Co.* (1867), L. R. 2 C. P. 593. *Mentd.* *Harvey v. Ashley* (1748), 3 Atk. 607; *Lane v. Page* (1754), Amb. 233; *Froysell v. Lewelyn* (1821), 9 Price, 122; *Moore v. Jervis* (1845), 2 Coll. 60; *Mangles v. Dixon* (1852), 3 H. L. Cas. 702.

674. Bond voidable in equity—Partnership instalments—Dissolution of partnership—Cancellation of bond.]—An attorney prevailed on a young man, about to be admitted, to become his partner in business for a certain term, and to pay him, as a consideration, a considerable sum of money, a part to be paid on the execution of the articles, & the remainder by yearly instalments. During the term the attorney sued out, in the character of petitioning creditor, a commission of bkpcy. against his partner, whereby on his being declared bkpt., the partnership was necessarily dissolved:—*Held*: the ct. would not allow a *bond fide* creditor, to whom the bond to pay the instalments had been assigned as a security for his debt, to put it in suit, because all equities followed the bond in such hands, & the bond must be delivered up to be cancelled.—*HAMIL v. STOKES* (1817), 4 Price, 161; Dan. 20; Wils. Ex. 39; 146 E. R. 426, Ex. Ch.

Annotation:—*Mentd.* *Freeland v. Stansfield* (1854), 2 Sm. & G. 479.

675. — Rescission of sale contract—Deposit paid in bonds.]—W. having agreed to purchase the A. estate, mines, etc., of B. for £250,000, payable by instalments, with the assistance of three other persons, under an arrangement with them, formed a co. to work the mines, borrowing of one of them £10,000 to pay the deposit. W. then contracted to resell to the co. for £350,000, also payable by instalments; £75,000 in bonds of the co., & the rest in cash in four sums. W. paid £50,000 to B. out of £75,000, which he had received from the co. & the co. then refused to complete, alleging a deficiency of 500 acres. W. communicated that to B., & both agreed to throw off £50,000, but the co. refused the offer, & gave notice to rescind. W. then brought an action against B. for £50,000, & £100,000 damages, but it was compromised for £50,000, & the contract

between W. & B. cancelled. The co. being ordered to be wound up, a bill was filed by the official liquidator for a return of the bonds, & to restrain their negotiation:—*Held*: the relief sought as to the bonds was unnecessary, being mere chuses in action, & the transferees having no greater right against the co. than the transferor.—*ABERAMAN IRONWORKS v. WICKENS* (1868), L. R. 5 Eq. 485; 18 L. T. 305; *Revsd.* without touching this point 4 Ch. App. 101.

Annotations:—*Mentd.* *Fenwick v. Bulman* (1869), L. R. 9 Eq. 165; *Goodford v. Stonehouse & Nailsworth Ry. Co.* (1869), 38 L. J. Ch. 307; *Torrance v. Bolton* (1872), L. R. 14 Eq. 124; *Mycock v. Beatson* (1879), 13 Ch. D. 384; *Fleming v. Loe*, [1901] 2 Ch. 594.

676. — Bond given without consideration—Promise to pay assignee on forbearance to sue—Rights of obligor.]—G., an officer in the army, gave to J., a barrister, without consideration, a bond for £1,000, & at the same time, at J.'s request, he wrote & gave to J. a letter to the effect that the bond was given for the purpose of enabling J. to raise money. Three years afterwards J., who had in the meantime told G. that G. was under no liability for him, assigned the bond for valuable consideration to B., to whom he also gave G.'s letter. B. having demanded payment, G. promised to settle the bond as soon as he should come into some property which was the subject of a pending suit, & upon the faith of that promise B. abstained from suing G. on the bond until after G. had instituted a suit against J. & B. to cancel the bond:—*Held*: (1) although G. gave the bond with the intention that it should be used as a negotiable instrument, yet as there was nothing on the face of the bond to show such intention, B. took it subject to the equities between G. & J., & could not be allowed to enforce it against G.; (2) G.'s promise having been made in ignorance of his right to restrain B. from suing him on the bond, did not preclude him from enforcing that right.—*GRAHAM v. JOHNSON* (1869), L. R. 8 Eq. 36; 38 L. J. Ch. 374; 21 L. T. 77; 17 W. R. 810.

677. Bond deposited as security.]—B. entered into a bond to H. & took a counter bond. H. deposited B.'s bond with C. as a security. A bill filed by C. against B. & H., that B. might pay him out of the debt to H., dismissed.—*CATOR v. BURKE* (1785), 1 Bro. C. C. 434; 28 E. R. 1222, L. C.

Annotations:—*Distd.* *Keys v. Williams* (1839), 3 Y. & C. Ex. 462; *Payne v. Mortimer* (1859), 4 De G. & J. 447. *Mentd.* *Mangles v. Dixon* (1852), 3 H. L. Cas. 702.

678. Post obit bond—Right of reversioner to re-open settled accounts.]—The assignee of a *post obit* security takes it with notice of all its legal incidents, including the right of the reversioner to open settled accounts between himself & the original mtgor. Recitals in the mtgo deed of an account settled are not binding on the reversioner even as against sub-mtgees.—*TOTTENHAM v. GREEN* (1863), 1 New Rep. 466; 32 L. J. Ch. 201.

679. — Given for gaming debt—Contrary to recital.]—Debtor executed a *post obit* bond for payment of a sum of money. The bond recited that debtor owed money to the obligee. The bond was assigned to a third party, who took the assignment upon the faith of debtor's tacit representation that the debt was due as recited in the bond. Debtor afterwards conveyed & assigned his estate & effects to trustees for the benefit of his creditors, & subsequently instituted a suit for performance of the trusts of the deed. The

consideration was given for it.—*COOKE v. DONEGAL (MARQUIS)* (1863), 16 Ir. Jur. 41.—IR.

PART IX. SECT. 2.

e. Post obit bond—Proof of consideration.]—The assignees of a *post obit* bond take it with notice of all its incidents; & in order to establish its validity they must show that a fair

Sect. 2.—Assignment subject to equities. Sect. 3.]

transferee of the bond applied to be allowed to prove, but was opposed by debtor, & his claim was disallowed on the ground that the bond was originally given for a gambling debt:—*Held*: the debt was provable, for pltf. could not be allowed to set up, as against an innocent transferee, a state of circumstances inconsistent with representations made by debtor before the transfer, & upon the faith of which the transfer was taken, the only evidence in support of the allegation that the debt was a gambling transaction being that of pltf., who was not a trustworthy witness.—*HAWKER v. HALLEWELL* (1856), 25 L. J. Ch. 558; 27 L. T. O. S. 211; 2 Jur. N. S. 794; 4 W. R. 631, L. JJ.; *affg.* 3 Sm. & G. 194.

Annotation:—*Mentd.* *Turner v. Ince* (1859), 5 Jur. N. S. 1072.

680. Lloyd's bond—Set-off—After notice of assignment.]—Defts. bound themselves to pltf. by Lloyd's bonds, to pay certain sums of money & interest at the expiration of a year. A few days afterwards defts. granted pltf. a lease. Pltf. then assigned away the bonds. In an action brought by pltf. for the benefit of the assignees on the bonds, defts. claimed to be entitled to set off arrears of rent which had accrued due from pltf. under the lease after such assignment & notice thereof:—*Held*: defts. were not so entitled either at law or in equity.—*WATSON v. MID WALES RY. CO.* (1867), L. R. 2 C. P. 593; 36 L. J. C. P. 285; 17 L. T. 94; 15 W. R. 1107.

Annotations:—*Reid.* *Higgs v. Assam Tea Co.* (1869), L. R. 4 Exch. 387; *Christie v. Taunton, Delmard, Lane, Re Taunton, Delmard, Lane*, [1893] 2 Ch. 175. *Mentd.* *Harter v. Coleman* (1882), 19 Ch. D. 630; *Re Milan Tram. Co., Ex p. Theys* (1882), 22 Ch. D. 122; *Newfoundland Government v. Newfoundland Ry. Co.* (1888), 13 App. Cas. 199.

681. Transfer of rolling stock—Interpleader.]—A railway co. gave a Lloyd's bond to their contractor, who handed it to pltf. to secure an advance of £10,000 then made to him by pltf. Pltf. having, in the name of the obligee, brought an action against the co. upon the bond, it was compromised before judgment on the terms that the co. should transfer to him the whole of their rolling stock as security. The rolling stock was transferred, but was subsequently seized by deft., an execution creditor of the co. On the trial of an interpleader issue between pltf. & deft.:—*Held*: (1) no evidence was admissible to impeach the original legality of the bond; (2) the conveyance of the rolling stock by the co. to pltf. was valid as against deft.—*BLACKMORE v. YATES* (1867), L. R. 2 Exch. 225; 36 L. J. Ex. 121; 16 L. T. 288; 15 W. R. 750.

Annotation:—*Reid.* *Stagg v. Medway (Upper) Navigation Co.*, [1903] 1 Ch. 169.

682. — Agreement between obligor & obligee—Assignee for value without notice—Estoppel.]—Declaration against a railway co. on a money bond. Plea, on equitable grounds, that by deed between pltf. & defts. it was agreed that when certain instalments which, under the terms of the deed, were to be paid in shares of defts. became due, defts. should, in addition thereto, pay to pltf. such further sums in Lloyd's bonds as should be equivalent to 75 per cent. of the nominal value of such shares, & that pltf. should pay the Lloyd's bonds & interest when they became due, & indemnify defts. against all loss, & that the bond in suit was a Lloyd's bond delivered to pltf. in pursuance of the agreement. Replication, that pltf. assigned the bond for a valuable con-

sideration to third persons, of which defts. had notice, that the third persons never had any knowledge of the deed between pltf. & defts., & that the action was brought in pltf.'s name as trustee for the third persons, who were the beneficial owners of the bond:—*Held*: the agreement in the plea must mean that the bond was to be delivered to pltf. for the purpose of raising money on it, & the replication was a good answer to the plea, as it showed that the object for which defts. had given the bond had been carried out, & that pltf. was suing only as trustee.—*DICKSON v. SWANSEA VALE RY. CO.* (1868), L. R. 4 Q. B. 44; 38 L. J. Q. B. 17; 19 L. T. 346; 17 W. R. 51.

Annotations:—*Reid.* *Higgs v. Assam Tea Co.* (1869), L. R. 4 Exch. 387; *Re Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim* (1883), 24 Ch. D. 85.

683. — For surrender of contract—Purchaser for value without notice—Rights of liquidator of company—Estoppel.]—Lloyd's bonds payable in three years, with interest in the meantime, were given by a co. to their contractor as compensation for the surrender of the contract. Two of the bonds were purchased for value from the contractor, without notice of the arrangement between him & the co. The bonds & the transfers were registered in the co.'s books. The transferee sued the co. for eighteen months' interest, & recovered the amount due. Subsequently proceedings at law were taken against the co. to recover principal & interest, & judgment was entered up by consent against the co., which was then ordered to be wound up:—*Held*: whether the bonds were valid or invalid in the hands of the contractor, the official liquidator was precluded by the subsequent conduct of the co. from questioning their validity in the hands of a purchaser for value without notice.—*Re SOUTH ESSEX ESTUARY CO., Ex p. CHORLEY* (1870), L. R. 11 Eq. 157; 40 L. J. Ch. 153; 19 W. R. 430.

Annotations:—*Foll.* *Re South Essex Estuary Co., Carey's Claim*, [1873] W. N. 17. *Consd.* *Re Hercules Insee., Brunton's Claim*, (1874), L. R. 19 Eq. 302.

684. S. P. Re SOUTH ESSEX ESTUARY CO., CAREY'S CLAIM, [1873] W. N. 17.

Annotation:—*Reid.* *Re Hercules Insee., Brunton's Claim* (1874), 44 L. J. Ch. 450.

See, further, RAILWAYS & CANALS.

685. Bond of company—Notice of assignment—Equities between obligors & obligee—Purchaser for value without notice—Estoppel.]—An insurance co. having power to issue bonds & other securities, issued to S. a bond conditioned to be void on payment to him, his exors., administrators & assigns, of £250 on a future day. The bond was assigned for value to B., & notice of the assignment given at the office of the co. & accepted, but the assignment was never registered. No inquiry was made as to the validity of the instrument before B. took the assignment. Before the bond fell due, the co. went into liquidation:—*Held*: the co. had, by accepting notice of the assignment, precluded themselves from setting up against the assignee equities between them & the original obligor attaching to the instrument itself.—*Re HERCULES INSURANCE CO., BRUNTON'S CLAIM* (1874), L. R. 19 Eq. 302; 44 L. J. Ch. 450; 31 L. T. 747; 23 W. R. 286.

686. Voluntary bond—Assignee for value—Ranking against assets.]—The assignee for value of an equitable interest in the money payable under a voluntary bond:—*Held*: entitled to rank as a specialty creditor for value against the assets of the obligor.—*PAYNE v. MORTIMER* (1859), 4 De G. & J. 447; 28 L. J. Ch. 716; 33 L. T. O. S.

293; 5 Jur. N. S. 749; 7 W. R. 646; 45 E. R. 173, L. JJ.

Annotations:—*Reid*. Halifax Joint Stock Banking Co. v. Gledhill, [1891] 1 Ch. 31. *Mentd.* *Re* Williams & Parry's Contract (1895), 72 L. T. 869.

687. India bond—Obtained by fraud—Restraint of payment.]—Held: the Ct. of Ch. had jurisdiction to restrain the India Co. from paying the money secured by their bonds to a person who had wrongfully obtained possession of them, or to any other person than the lawful owner of them.—*GLASSE v. MARSHALL* (1845), 15 Sim. 71; 15 L. J. Ch. 25; 60 E. R. 543.

SECT. 3.—RIGHTS AND LIABILITIES AFTER ASSIGNMENT.

See, generally, CHOSSES IN ACTION.

688. Release by obligee.]—If the obligor of a bond, after notice of its being assigned, take a release from the obligee, & plead it to an action brought by the assignee in the name of the obligee, the ct. will set the plea aside, nor will they in such circumstances allow the obligor to plead payment of the bond.—*LEGH v. LEGH* (1799), 1 Bos. & P. 447; 126 E. R. 1002.

Annotations:—*Mentd.* *Alner v. George* (1808), 1 Camp. 392; *Arton v. Booth* (1820), 4 Moore, C. P. 192; *Barker v. Richardson* (1827), 1 Y. & J. 362; *Gibson v. Winter* (1833), 5 B. & Ad. 96; *Rankin v. Hamilton* (1850), 15 Q. B. 187; *Southwell v. Scotter* (1880), 49 L. J. Q. B. 356.

689. Covenant by obligee not to sue.]—A covenant not to sue upon a bond during the life of the obligor, & that if any person to whom the obligee should assign the bond should recover the principal, the obligee would pay the obligor during his life interest on the amount recovered:—Held: no bar to an action by an assignee of the bond in the name of the obligee.—*MORLEY v. FREAR* (1830), 6 Bing. 547; 4 Moo. & P. 305; 8 L. J. O. S. C. P. 176; 130 E. R. 1391.

690. Assignee suing in own name.]—B. entered into a bond to H. & took a counter bond. H. deposited B.'s bond with C. as a security:—Held: a bill filed by C. against B. & H., that B. might pay him out of the debt to H., must be dismissed, but after such dismissal he might bring his action in the name of H.—*CATOR v. BURKE* (1785), 1 Bro. C. C. 434; 28 E. R. 1222, L. C.

PART IX. SECT. 3.

688 i. Release by obligee.]—Pltf., having a bond for a deed from W., assigned the same to C. by way of security only:—Held: a quit claim deed by which C. conveyed to K., did not place K. in any better position than his assignor.—*GRAHAM v. CHALMERS* (1859), 7 Gr. 597.—*CAN.*

1. Estoppel of assignor.]—Certain bonds belonging to the estate of D., deceased, had been exhibits & marked as such in a case in ct., & were afterwards lost & advertised for. About ten years afterwards W., the administrator of the estate, had the bonds in his possession as such, & pledged them to

a broker for advances on his own account, the bonds then being long past due, but payment being provided for under statutory authority:—*Held:* neither the advertisement nor the marks upon the bonds, nor the broker's knowledge of the agent's insolvency, were notice to the pledgee of defects in the pledgor's title; & that the owners of the bonds, having by their act enabled their agent to transfer them by delivery, were estopped from asserting their title to the detriment of a bond fide holder.—*YOUNG v. MACNIDER* (1895), 25 S. C. R. 272.—*CAN.*

g. —.]—Applt., a woman married out of community, without

Annotations:—*Reid*. *Keys v. Williams* (1839), 3 Y. & C. Ex. 462; *Mangles v. Dixon* (1852), 19 L. T. O. S. 260. *Mentd.* *Payne v. Mortimer* (1859), 4 De G. & J. 447.

691. — Assignee of Scotch bond.]—The assignee of a Scotch bond may maintain an action of *assumpsit* in England in his own name against the obligor.—*INNES v. DUNLOP* (1800), 8 Term Rep. 595; 101 E. R. 1565.

Annotation:—*Mentd.* *Crouch v. Credit Foncier of England* (1873), L. R. 8 Q. B. 374.

692. — Equitable mortgage as collateral security.]—Where the assignee of a bond debt had obtained from his debtor an equitable mtge. by way of collateral security, & such security having been sold under a decree of a ct. of equity, the produce of the sale was insufficient for payment of the full amount of the debt:—Held: the creditor was not entitled to have the balance paid him under an order of the ct., but must resort to his remedy at law, by bringing an action on the bond in the name of the assignor. *Semble:* where a bond has been the subject of assignment, a ct. of equity will exercise jurisdiction, in special cases, to order payment to the creditor of the money due upon the bond:—*Qu.*: whether it will make such an order in the absence of the assignor.—*KEYS v. WILLIAMS* (1839), 3 Y. & C. Ex. 462; 3 Jur. 950; 160 E. R. 784.

693. — Transfer under Companies Clauses Consolidation Act, 1845 (c. 16).]—The transferee of a bond, transferred to him under the above Act, is the party in whose name an action upon the bond must be brought.—*VERTUE v. EAST ANGLIAN RYS. CO.* (1850), 5 Exch. 280; 1 L. M. & P. 302; 6 Ry. & Can. Cas. 252; 19 L. J. Ex. 235; 155 E. R. 120; *sub nom.* *MILLS v. EAST ANGLIAN RY. CO.*, 15 L. T. O. S. 116.

694. Admission of satisfaction—Deposit as security—Collusion—Action for delivery up.]—In 1869, B. gave a bond to H. for payment of money in 1874, with interest in the meantime. B. & H. both admitted that the bond was satisfied in July, 1870, but before complete satisfaction H. had deposited the bond with his bankers, who claimed a lien, & expressed an intention of suing at law on the bond when it should become due. The bankers had given no notice to B. of the deposit until after the alleged satisfaction, but they charged collusion between B. & H.:—Held: in 1873, a bill would not lie for delivery up of the bond.—*BINNS v. FISHER* (1873), 43 L. J. Ch. 188. *Annotation*:—*Reid*. *Neate v. Denman* (1874), 43 L. J. Ch. 409.

renouncing the *beneficia* to which a married woman is entitled, ceded a bond, passed in her favour, to V., the cession being absolute in form, but being made in reality as security for her husband's indebtedness to V. The latter in turn ceded it to resp. bank as security for an overdraft, resp. being unaware of the real nature of applt.'s cession:—*Held:* applt. having clothed V. with apparent power of dealing with the bank as he had done, was estopped as against the bank from relying upon the *beneficia* & from denying that her cession had not been an absolute one.—*HARTOGH v. NATIONAL BANK* (1907), T. S. 1092.—*S. AF.*

Part X.—Discharge.

SECT. 1.—BY PERFORMANCE OF CONDITION.

See Part VII., *ante*.

SECT. 2.—BY PAYMENT.

See Part VII., Sect. 2, sub-sects. 1, 4 & 9, *ante*.

SECT. 3.—BY ACCORD AND SATISFACTION.

See, generally, CONTRACT.

695. In general—Joint creditors.]—To an action by two obligees of a common money bond deft. pleaded accord & satisfaction by delivery of stock & goods to one of pltf. :—*Held* : (1) accord & satisfaction must be taken to be an answer to an action for a specialty debt, but according to equity joint creditors must, *prima facie*, be taken to be interested as tenants in common & not as joint tenants, & the defence was good only as concerned the claim of pltf. who was party to the accord & satisfaction ; (2) the defence was defective & should be amended.—*STEEDS v. STEEDS* (1889), 22 Q. B. D. 537 ; 58 L. J. Q. B. 302 ; 60 L. T. 318 ; 37 W. R. 378, D. C.

Annotations :—*Consd.* Powell v. Brodhurst, [1901] 2 Ch. 160. *Mentd.* Re E. W. A., [1901] 2 K. B. 642.

696. By acceptance of—Goods.]—The condition of a bond was such that, if a stranger should pay £10 to the obligee on a day certain, the bond should be discharged. Pltf. sued upon the bond & deft. pleaded that a stranger had on the day given to pltf. a horse of the value of £10, which had been accepted by pltf. in full satisfaction :—*Held* : this was a good plea, although it would have been otherwise, if payment had been due to a stranger.—*ANON.* (1543), 1 Dyer, 56 a ; 73 E. R. 124.

697. — One thing in discharge of another.]—The acceptance of one thing will not discharge an obligation to do another.

Debt upon an obligation conditioned that if he appeared before pltf. at D. such a day, then, etc. Deft. pleaded that he appeared before pltf. at S. before the day, which he accepted of, & allowed for his appearance to be at D. etc. :—*Held* : a bad plea, for the acceptance of another thing was not a discharge of the obligation.—*NORTON v. RISHDEN* (1596), Cro. Eliz. 458 ; 78 E. R. 711.

698. — Another debt.]—A bond conditioned to pay money on a contingency raises an immediate debt, & if the acceptance of another debt be pleaded in satisfaction, it must be of the money, & not of the bond.—*NEAL v. SHEAFFIELD* (1810), Cro. Jac. 254 ; 79 E. R. 217.

Annotations :—*Refd.* Preston v. Christmas (1759), 2 Wills. 86. *Mentd.* Spence v. Healey (1853), 8 Exch. 668.

699. — Agreement for annuity.]—A plea to debt on bond, that pltf. accepted a feoffment in satisfaction, is bad.

Debt upon an obligation for £80, conditioned for the performance of covenants contained in articles of agreement. Deft. pleaded that it was agreed between pltf. & deft. that he should grant an annuity of £5 out of such land for life, in discharge of that bond, which grant he made, & pltf. accepted it in discharge of that bond, etc. :—*Held* : a bad plea, for it was but a concord & verbal agreement, which could never be a discharge of a specialty.—*NOYES v. HORGOD* (1622), Cro. Jac. 649 ; 79 E. R. 561.

700. Statute staple—After day of payment. Debt. Acceptance of a statute staple after the day of payment :—*Held* : no plea.—*BRANTHWAIT v. CORNWALLIS* (1627), Cro. Car. 85 ; 79 E. R. 675.

701. — Another bond.]—The acceptance of one bond cannot be pleaded in discharge of another.—*LUTTERFORD v. LE MAYRE* (1620), Cro. Jac. 579 ; 79 E. R. 495.

702. — —.]—In debt on a bond to pay money, deft. pleaded payment of part after the bond was forfeited & as to the balance that he had given a bond to pltf. in exoneration of the bond in suit :—*Held* : the plea that deft. had given a bond in discharge of the other bond was not a good plea for they were of the same nature & one did not determine the other.—*MARSHALL v. FREAKER* (1622), Palm. 287 ; 81 E. R. 1086.

703. — —.]—Debt on a bond. Deft. pleaded acceptance of another bond in satisfaction of the first obligation :—*Held* : not a good plea.—*MAYNARD v. CRICK* (1599), Cro. Car. 86 ; 79 E. R. 675 ; *sub nom.* MANHOOD v. CRICK, Cro. Eliz. 716. *Annotation* :—*Refd.* Blythe v. Hill (1676), 1 Mod. Rep. 225.

704. — —.]—To debt upon bond against an administrator, deft. may plead that he gave another bond in his own name in discharge of the first bond.—*PRECK v. HILL* (1676), 2 Mod. Rep. 136 ; 86 E. R. 986.

705. — — Payable before first.]—An agreement to take a new bond is no bar to an action on the first, unless the second is payable before the first.—*STREET v. BUCKNER* (1671), 2 Keb. 804 ; 84 E. R. 508.

706. — — By representative of obligor.]—To debt on bond against the heir of the obligor, deft. may plead another bond given in satisfaction by the administrator of the obligor.—*BLYTHE v. HILL* (1676), 1 Mod. Rep. 225 ; 86 E. R. 844.

Annotation :—*Mentd.* Weston v. Foster (1836), 3 Scott, 164.

707. — — —.]—An obligation given by an exor. in satisfaction of an obligation given by his testator is no discharge of the latter.—*LOBLY v. GILDART* (1681), 3 Lev. 55 ; 83 E. R. 574. *Annotation* :—*Mentd.* Rippinghall v. Lloyd (1833), 5 B. & Ad. 742.

708. — — By principal debtor on death of surety.]—A father gave a bond to secure repayment, within four years, of a simple contract debt due by his son. The father died, & the creditor commenced proceedings against his estate for the recovery of the bond debt, but subsequently took a fresh bond from the son, who was the father's heir-at-law, & from the personal representative of the father, conditioned for paying the same debt by instalments, the creditor at the same time retaining the original bond :—*Held* : the original bond was discharged, on the grounds (1) the father was only surety for the son, & the creditor, by giving time to the principal debtor, had discharged the surety ; & (2) the second bond must be considered, in the circumstances, as having been given in satisfaction of the first.—*CLARKE v. HENTY* (1838), 3 Y. & C. Ex. 187 ; 2 Jur. 918.

709. — — For larger sum.]—To an action on a bond, accord & satisfaction by delivery of another bond for a larger sum, is no plea at law, but the ct. having given judgment for pltf. upon demurrer to such a plea, at the same time gave liberty to deft. to plead the same facts by way of equitable defence, & intimated that, upon a demurrer to the plea so pleaded, their judgment

would be for debt.—*PETRE (LORD) v. STUBBS* (1855), 25 L. T. O. S. 81; 3 W. R. 406.

710. — Security—For lesser sum.]—Acceptance of security for a less sum cannot be pleaded in satisfaction of a bond to pay a greater sum.—*GEANG v. SWAINE* (1687), 1 Lut. 464; 125 E. R. 244.

711. — Bill of exchange.]—A bill of exchange may be pleaded in satisfaction in an action of debt on a bond.—*HILLIARD v. SMITH* (1685), Comb. 19; 90 E. R. 317.

712. — After day of payment.]—To debt on a bond conditioned for payment of money, pleas that after the day of payment, & before action, the obligee received certain bills of exchange not yet due, on account of part of the sum due on the bond, & certain money in satisfaction of the residue:—*Held*: ill.—*WORTHINGTON v. WIGLEY* (1837), 3 Bing. N. C. 454; 5 Dowl. 504; 3 Scott, 558; 1 Jur. 183; 132 E. R. 485.

Annotations:—*Reid*. *Belshaw v. Bush* (1851), 11 C. B. 191. *Mentd.* *Husband v. Davis* (1851), 2 L. M. & P. 50; *Henderson v. Arthur*, [1907] 1 K. B. 10; *Re Defries*, *Eichholz v. Defries*, [1909] 2 Ch. 423.

713. — Maintenance—Interest.]—A. gave a woman, who cohabited with him, a bond for £2,000 & interest quarterly during her life, & after her death to her children, but from the date of the bond to the date of his death, which was four & a half years, constantly maintained her:—*Held*: the maintenance must be taken to have been in lieu of interest.—*LLOYD v. CARTER* (1740), 2 Atk. 84; 26 E. R. 452, L. C.

714. — Bill of sale—After act of bankruptcy.]—If a bill of sale of goods be given in satisfaction of a bond debt, & it is afterwards discovered that the obligor had previously committed an act of bkpcy., the obligee may abandon the bill of sale, & sue out a commission against the obligor, & a co-obligor cannot plead this bill as an accord & satisfaction.—*HALL v. SMALLWOOD* (1795), Peake, Add. Cas. 13, N. P.

715. — Shares in partnership.]—A father bound himself by bond in Nov., 1868, to pay his son £10,000 on Apr. 30, 1872. A few weeks before that day he took his son into partnership, it being provided by the articles that the capital should consist of £37,500, to be brought in by him, of which £19,000 should be considered to belong to the son. The father died intestate in May, 1876, without having paid the bond debt:—*Held*: the gift of the share in the partnership was a satisfaction of the debt under the bond.—*Re LAWES*, *LAWES v. LAWES* (1881), 20 Ch. D. 81; 45 L. T. 453; 30 W. R. 33, C. A.

Annotations:—*Reid*. *Re Vickers*, *Vickers v. Vickers* (1888), 37 Ch. D. 525. *Mentd.* *Crichton v. Crichton* (1895), 65 L. J. Ch. 13; *Re Jaques*, *Hodgson v. Bralsby*, [1903] 1 Ch. 267.

716. — Rentcharge by annuitant.]—Pltf. being about to be presented by testator to a living, which was inadequately endowed, testator in 1852 entered into a bond in the penal sum of £1,000, subject to a condition avoiding the bond in case testator, his heirs, exors. or administrators, should during pltf.'s life, if he should so long continue to be vicar of the living, pay pltf. an annuity of £80. Testator died in 1861, having in his lifetime by a deed, dated 1859, charged certain fee simple estates with a yearly rentcharge of £220,

of which £80 was to be applied for the perpetual maintenance, or augmentation of the maintenance, of the resident vicar of the living. The deed was not registered till 1876. Pltf. knew nothing of the deed until 1872; he knew that arrangements had been made for payment of the £80, but the deed itself was not communicated to him. From 1872 debts., testator's exors. & devisees, paid to pltf. £80 a year, as if that sum were payable as rentcharge, so long as the rents were sufficient, but, owing to the great depreciation in the value of land, the property on which it was charged fell in annual value. To an action on the bond the defence was that pltf. had accepted the rentcharge in satisfaction of the bond:—*Held*: (1) pltf. was entitled to treat the question whether the exors. were paying the £80 as rentcharge or annuity as one with which he had nothing to do, as it was testator's duty to make provision for the annual payment, & pltf. was only concerned to see that he got his payments half yearly; (2) pltf. had not accepted payment of the rentcharge by satisfaction of the annuity & had not equitably released the obligation under the bond.—*Re NEVILLE*, *WEBSTER v. NEVILLE* (1886), 2 T. L. R. 714.

717. By delivery up of—Another bond—In which obligee bound to obligor.]—In debt on bond, debt. may plead an accord & satisfaction by delivering up to pltf. a bond, in which pltf. was bound to him.—*MARSHALL v. JENNISON* (1680), Freem. K. B. 532; 89 E. R. 399.

718. When available—After forfeiture.]—Accord & satisfaction cannot be pleaded by exors. to a bond after it is forfeited; it should be either a release or payment.—*GROOM v. GROOM & BARNES* (1850), 14 L. T. O. S. 377.

719. — Before breach.]—Covenant by the mayor, etc., of the borough of B., on a deed, by which after reciting that the council of the borough had elected D. treasurer of the borough, debt. became surety to the corpn. for D.'s accounting to them during the whole time of D. continuing in the office, in consequence of the election, or under any annual or other future election of the council to the office. Averments that, by subsequent elections, D. was continued in his office, & did not account. Breaches, non-payment by debt. Plea that, before breach, ptfs. accepted a fresh surety bond in discharge of the deed sued on:—*Held*: bad, as pleading accord & satisfaction to a deed before breach.—*BERWICK CORPN. v. OSWALD* (1853), 1 E. & B. 295; 22 L. J. Q. B. 129; 20 L. T. O. S. 306; 17 J. P. 230; 17 Jur. 1148; 118 E. R. 447; *affd.* on another point *sub nom.* *OSWALD v. BERWICK-UPON-TWEED CORPN.* (1856), 5 H. L. Cas. 856, H. L.

Annotations:—*Reid*. *Spence v. Healey* (1853), 8 Exch. 668. *Mentd.* *Hughes v. Lumley* (1854), 4 E. & B. 358; *N. W. Ry. Co. v. Whinray* (1854), 10 Exch. 77; *Kitson v. Julian* (1855), 4 E. & B. 854; *Vansittart v. Taylor* (1855), 4 E. & B. 910; *Pybus v. Gibb* (1856), 6 E. & B. 902; *Badger v. Finch* (1857), 29 L. T. O. S. 88; *Clifton Dartmouth Hardness Corpn. v. Silly* (1857), 7 E. & B. 97; *Cambridge Corpn. v. Dennis* (1858), E. B. & E. 660; *General Steam Navigation Co. v. Rolt* (1858), 6 C. B. N. S. 550; *Baily v. De Crespigny* (1869), L. R. 4 Q. B. 180; *Collins v. Collins* (1884), 9 App. Cas. 205.

See, also, Nos. 700, 712, *ante*.

720. Presumption of.]—Upon a question of presumption of satisfaction in a hard case the Ct. of Ch. gave exors. leave to bring an action at law

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h. By acceptance of—Loan of money.]—A loan of money cannot be pleaded in satisfaction & discharge of a bond & condition.—*PRINDLE v. McCAN* (1848), 4 U. C. R. 228.—*CAN*.

7151. — Shares in company.]—

Action on a bond to pay £100 on a day named, claiming principal & interest. The defence was that, after the time of payment, pltf. agreed with debts. to accept preference shares in the debts.' co. for the amount due for principal & interest; that the shares were issued & allotted; and that debts.

were ready to give certificates of shares:—*Held*: the defence was bad, inasmuch as it did not aver any tender of the shares to pltf., nor any acceptance by him.—*MUNRO v. ATHENRY & ENNIS JUNCTION RY. CO.* (1868), L. R. 2 C. L. 477.—*IR*.

Sect. 3.—By accord and satisfaction. Sects. 4 & 5:
Sub-sect. 1.]

on a bond, but would not direct it.—**REEVES v. BRYMER** (1801), 6 Ves. 516 ; 31 E. R. 1172.

Annotations:—*Refd.* **Cross v. Sprigg** (1849), 6 Hare, 552 ; **Peace v. Hains** (1853), 11 Hare, 151 ; **Knapp v. Burnaby** (1860), 2 L. T. 83.

SECT. 4.—BY LAPSE OF TIME.

See, generally, LIMITATION OF ACTIONS.

721. Bond for three years—Whether extends longer as security.]—Security bond for three years shall extend farther.—**WILLIAMS v. JONES & A.-G.** (1729), Bunb. 275 ; 145 E. R. 672.

722. Annuity during life—Trust for limited time—Liability of trustees.]—Where a party, who by writing obligatory, without any penal sum, had bound himself to pay to A. an annuity of £20 a year for her life, devised his estates to trustees upon certain trusts, until his son should attain the age of twenty-one years:—*Held*: the estate of the trustees ceased upon the death of the son under the age of twenty-one, all the purposes of the trust being then at an end, & the trustees were only liable to pay to A. such arrears of the annuity as became due before the son's death.—**MORRANT v. GOUGH** (1827), 7 B. & C. 206 ; 1 Man. & Ry. K. B. 41 ; 6 L. J. O. S. K. B. 14 ; 108 E. R. 700.

SECT. 5.—BY RELEASE OR COVENANT NOT TO SUE.

SUB-SECT. 1.—RELEASE.

723. How made—By deed.]—Defeasance of a duty due by obligation cannot be without deed, which a writing under hand does not imply.—**BLEMERHASSET v. PIERSON** (1685), 3 Lev. 234 ; 83 E. R. 667.

Annotation:—*Consd.* **Thomson v. Brown** (1817), 1 Moore, C. P. 358.

724. ———.]—To debt on bond which contained a condition, that debt. should not open a shop within a certain distance of premises demised in a lease, debt. pleaded that he opened a shop by the license of pltf. :—*Held*: such plea was bad, on the ground that a license, after breach, was not good, unless by deed.—**SELLERS v. BICKFORD** (1817), 8 Taunt. 31 ; 1 Moore, C. P. 460 ; 129 E. R. 293.

Annotation:—*Folld.* **Cordwent v. Hunt** (1818), 2 Moore, C. P. 680.

725. ——— Whether by will.]—A release by will cannot be pleaded to a bond debt.—**PARSONS v. COWARD** (1737), *Lee temp. Hard.* 357 ; 95 E. R. 231.

726. ———.]—"I return A. his bond" in a will is not a release, but a legacy, & having lapsed, the bond remains in force against a surviving co-obligor.—**MAITLAND v. ADAIR** (1790), 3 Ves. 231 ; 30 E. R. 984, L. C. ; *affd. sub nom.* **ADAIR v. MAITLAND** (1798), 7 Bro. Parl. Cas. 587, H. L.

Annotation:—*Expld.* **Izon v. Butler** (1815), 2 Price, 34.

727. When made—Dated before bond but

delivered after.]—A release dated before, but made & delivered after an obligation does not release the obligation.—**DEBURY'S CASE** (1588), Cro. Eliz. 14 ; 78 E. R. 280.

728. To whom made—Stranger.]—The condition of a bond was that if an apprentice transported merchandise beyond the seas & made a return of them, & made an account, & paid the money upon the account within a certain time, then, etc. Afterwards the obligee released by deed to the apprentice & not to the obligor:—*Held*: by the release to the apprentice the obligation was saved, if the release were made before any forfeiture, or before any breach of the conditions by the apprentice, but if after breach the release to the apprentice did not dispense with the obligation which was made by the stranger, because an obligation once forfeited could not be saved by any release made to a stranger.—**ANON.** (1572), 3 Leon. 45 ; 74 E. R. 530.

729. By whom made—Illiterate person.]—In debt upon an obligation conditioned that pltf. should enjoy certain lands, discharged or otherwise saved harmless from all incumbrances, & that the obligor & his son should do all such acts for the better assuring of the lands, as the obligee, or his counsel, should devise, debt. pleaded that the obligee had enjoyed the lands discharged, & kept indemnified from all incumbrances, & that pltf. devised a release to be sealed by debt. & his son, which debt. sealed, but because his son could not read, he prayed the obligee to deliver it to him, to show to a man learned in the law, who might inform him if it were according to the condition, & if it were according to the condition, he would deliver it, which the obligee refused to do, wherefore debt. refused to deliver it:—*Held*: where an illiterate man was bound to make a deed, he need not execute before it were read to him, but ignorance of the legal effect of the instrument was no excuse for not sealing it in due time, & in such case he must execute it immediately when required, without taking time to advise with counsel.—**MANSER'S CASE, PAINTER v. MANSER** (1584), 2 Co. Rep. 3 a ; 4 Leon. 62 ; 78 E. R. 387 ; *sub nom.* **ANON.**, Moore, K. B. 182.

Annotations:—*Refd.* **Shulter's Case** (1611), 12 Co. Rep. 90 ; **Hunter v. Walters, Curling v. Walters, Darnell v. Hunter** (1871), 41 L. J. Ch. 175. *Mentd.* **Ley v. Luttrell** (1620), Palm. 70 ; **R. v. Longnor** (1833), 4 B. & Ad. 647.

730. Extent of—"All duties."—A release of all duties will discharge an obligor from the payment of a bond.—**ROTHERAM v. CRAWLEY** (1595), Cro. Eliz. 370 ; Owen, 71 ; 78 E. R. 617.

731. ——— "All actions excepting bond."—A release of all actions excepting one bond impliedly excepts all suits & actions concerning it.—**BROOK v. WHEELER** (1599), Cro. Eliz. 726 ; 78 E. R. 960.

732. ——— "All bonds etc."—Whether bond sued on included—Terms of release.]—In debt on bond, debt. pleaded a release, which on oyer appeared to be, that pltf. acknowledged himself satisfied, & discharged of all bonds, debts, or demands whatsoever, & that pltf. was to deliver all bonds as yet undelivered, except one yet unforfeited, & in which debt. & his brother were bound to pltf. Replication that the bond declared

PART X. SECT. 5, SUB-SECT. 1.

723 i. How made—Whether deed requisite—Pleading.]—Declaration on a bond, reciting an agreement to sell a vessel to pltf. for a sum payable by instalments, for which notes were to be given, & conditioned to convey the vessel within a specified time. Breach, refusal to convey. Plea, that, at the execution of the bond, the boat, as

pltf. knew, was mortgaged to C. to secure the same sums as the notes, & payable at the same times ; & thereupon, in consideration that the obligors would deliver the notes to C., to apply the proceeds on the mtge. when paid, & that pltf. would forbear to require the conveyance, C. agreed with pltf., with the consent of the obligors, to hold said mtge. only as a security for & until payment of the

notes, & on such payment to release the boat to pltf. : that the obligors then, at pltf.' request, & in pursuance of the agreement, transferred the notes to C., & pltf. thereupon discharged the obligors from procuring the conveyance:—*Held*: plea bad, for the discharge asserted was not alleged to be by deed.—**CORBY v. PATERSON** (1858), 15 U. C. R. 575.—**CAN.**

on, & the bond excepted were one & the same:—*Held*: (1) the words "acknowledged himself to be satisfied & discharged, etc." made a release; (2) the exception in the release extended to all the premises, & not only to the clause of delivery.—*HICKMOT'S CASE* (1610), 9 Co. Rep. 52 b; 77 E. R. 808.

Annotation:—*Reid*. *Fawcus & Hall v. Porter* (1852), 3 Car. & Kir. 309.

733. — All demands to certain date.]—By a release of all demands till Apr. 26, a bond dated that day is not released.—*NICHOLS v. RAMSEL* (1677), 2 Mod. Rep. 280; 86 E. R. 1072.
Annotation:—*Reid*. *R. v. Stevens & Agnew* (1804), 5 East, 244.

734. — "All claims & demands"—Whether indemnity bond included.]—A., the mother of B., having entered into a bond, on his behalf for £1,000, B. executed an indemnity bond, of the same date, viz., Apr. 26, 1800, in £2,000 conditioned for payment of £1,000 three months after her decease. On Feb. 9, 1801, A. made a codicil to her will, by which she relinquished two debts due from him, one of £1,000 & one of £500, & desired him to be punctual in indemnifying her estate against the £1,000 bond of Apr. 26. Three days after the execution of the codicil, A. executed a release to B., in which, after mentioning a sum of £500, for which she had his bond, & two sums of £480 & £300 due to her from B. for which she had receipts, it was expressed that she had agreed to release B. from those sums, "& of & from all or any sum or sums of money, claims, & demands, thereby secured or intended to be secured, & all other sum or sums of money, claim, & demand whatsoever," & released him from those sums & all claims on account of those sums, "or for or on account of any other matter, cause, or thing whatsoever":—*Held*: (1) the release did not extend to the indemnity bond: (2) no extrinsic evidence could be admitted to explain the intention of A. as to the release.—*BUTCHER v. BUTCHER* (1804), 1 Bos. & P. N. R. 113; 127 E. R. 401.

735. What amounts to—Question of law.]—An issue whether a certain deed was, in law, a release of the sums secured by various bonds:—*Held*: a question of law, & not of fact, & not an issue which could properly be sent to a jury for decision.—*NOEL v. ROCHFORD* (1831), 5 Bli. N. S. 667; 5 E. R. 466, H. L.

736. Covenant to take another bond.]—A covenant to take a bond in discharge of a bond is not a good plea to debt on a bond, for it is not a release.—*BABER v. PALMER* (1701), 12 Mod. Rep. 539; 88 E. R. 1504; *sub nom.* *BARBER v. PALMER*, 1 Ld. Raym. 693; 1 Salk. 178.

Annotation:—*Reid*. *Vaughan v. Browne* (1738), Andr. 328.

737. — — —.]—A bond having been given for £2,000, the obligor died, & his exor. & devisee in trust gave the obligee a fresh bond, & received back the original bond, with a memorandum indorsed upon it & signed by the obligee, in which he declared that he had accepted the fresh bond in lieu of the first:—*Held*: the obligee could only claim under the second bond, & the estate of the original obligor was discharged, so far as the obligee was concerned.—*SHORE v. SHORE* (1847),

k. What amounts to—Acceptance of resignation of office.]—Pltf. resigned his office of sheriff, & deft. was appointed in his place, & gave a bond to pltf. for the due fulfilment of a condition. Finding that the revenues were not sufficient to pay the amount, deft. resigned his office, & soon afterwards was re-appointed under a commission without any such condition:—*Held*: the Crown had the right to

permit, & did permit, deft.'s resignation & by accepting it made it effectual, & thereby discharged the condition & all liability on the bond.—*SMART v. DANA* (1905), 3 O. W. R. 89; 5 O. W. R. 387; 9 O. L. R. 427; 23 C. L. T. 170; 25 C. L. T. Occ. N. 456.—*CAN.*

l. — Pleading.]—Debt on bond given by deft. as one of five

2 Ph. 378; 17 L. J. Ch. 59; 10 L. T. O. S. 105; 11 Jur. 916; 41 E. R. 989.

738. — Partnership bond—Agreement with one partner.]—A. & B. on dissolving partnership agreed that all joint bonds entered into by them should be paid by A., to whom an allowance was made for the purpose. H., an obligee of such a bond, knowing of that, agreed with A. that the bond should bear an increase of 1 per cent. interest. Many years after A. having failed, H. brought his bill against the exor. of B. to compel him to redeem the bond:—*Held*: he should recover, for this did not amount to a release by implication of law.—*HEATH v. PERCIVAL* (1720), 1 Stra. 403; 1 P. Wms. 682; 2 Eq. Cas. Abr. 630, pl. 2; 93 E. R. 595.

Annotations:—*Distd.* *Ex p. Ruffin* (1801), 6 Ves. 119. *Consd.* *Re Walden, Ex p. Bradbury* (1839), 4 Deac. 202. *Distd.* *Re Head, Head v. Head* (1894), 63 L. J. Ch. 549. *Reid.* *David v. Ellice* (1826), 5 B. & C. 196; *Oakeley v. Pasheller* (1836), 4 Cl. & Fin. 207; *Wilson v. Lloyd* (1873), 42 L. J. Ch. 559. *Mentd.* *Brown v. Blount* (1830), 9 L. J. O. S. Ch. 74.

739. — — — Composition from new firm.]—Two partners bound themselves jointly & severally to secure partnership debts. A new partner was taken in, & one retired. The estate of the new firm was liquidated by arrangement under Bkpcy. Act, 1869 (c. 71), ss. 125, 126, & the obligees proved & joined with the creditors of the new firm in resolutions accepting a composition, payable by instalments, the deed reserving in terms the rights of creditors against sureties, though the resolutions did not:—*Held*: the obligees thereby released the retiring partner.—*WILSON v. LLOYD* (1873), L. R. 16 Eq. 60; 42 L. J. Ch. 559; 28 L. T. 331; 21 W. R. 507.

Annotations:—*Consd.* *Re Jacobs, Ex p. Jacobs* (1875), 10 Ch. App. 211. *Expld.* *Simpson v. Henning* (1875), L. R. 10 Q. B. 406. *Reid.* *Swire v. Rodman* (1876), 1 Q. B. D. 536. *Mentd.* *Ellis v. Wilnot* (1874), L. R. 10 Exch. 10; *Re Littler, Ex p. Manchester & Liverpool District Banking Co.* (1874), L. R. 18 Eq. 249; *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833.

740. — Subsequent agreement.]—To an action on a bond, deft. pleaded that after the making of the writing obligatory, an agreement was made by & between pltf. & deft., & other persons, & sealed with the seal of pltf., & that it was agreed, by the agreement, that the agreement might be pleaded by deft. in bar to all demands & proceedings with respect to the alleged claim:—*Held*: the plea ought to have set out so much of the deed as operated as a release & to have expressly averred that the deed did so operate, & the above plea was bad.—*WILSON v. BRADDYLL* (1854), 9 Exch. 718; 23 L. J. Ex. 227; 23 L. T. O. S. 81; 2 W. R. 419; 2 C. L. R. 1281; 156 E. R. 307.

741. — Payment not enforced.]—A father, on adjusting the pecuniary difficulties of his son, took a bond for the amount advanced, which was deposited in the hands of two mutual friends, & it was agreed that they should have the power within six years of directing it to be cancelled. It was proved by parol, that the bond was required as a sort of security for the future good conduct of the son, of which the father was subsequently satisfied. The father died twelve years after, the bond still remaining uncanceled:—*Held*: the

joint & several obligors, for the discharge, by A., of his duties as secretary & treasurer of a co. Plea, the directors of the co., without deft.'s consent, ordered that one of the obligors should be released, whereby such obligor was discharged:—*Held*: plea bad, as showing no release properly authorised in law.—*FARMERS & MECHANICS' BUILDING SOCIETY v. LANGSTAFF* (1859), 9 U. C. R. 183.—*CAN.*

Sect. 5.—By release or covenant not to sue: Sub-sects. 1 & 2. Sect. 6.]

obligee's conduct & mode of dealing with the bond during the whole of his life amounted in equity to a release of the debt.—*FLOWER v. MARTEN* (1837), 2 My. & Cr. 459; 6 L. J. Ch. 167; 1 Jur. 233; 40 E. R. 714, L. C.

Annotations:—*Consd.* *Cross v. Sprigg* (1849), 6 Hare, 552; *Knapp v. Burnaby* (1860), 2 L. T. 83. *Reid.* *McFadden v. Jenkyns* (1842), 1 Hare, 458; *Re Pink; Pink v. Pink*, [1912] 1 Ch. 498. *Mentd.* *Melland v. Gray* (1843), 2 Y. & C. Ch. Cas. 199; *Re Applebee, Leveson v. Beales*, [1891] 3 Ch. 422.

742. — Whether intention sufficient.]—C., who acted as the confidential adviser of testator, was the obligor in a bond to testator for £2,000 conditioned to be void on payment of that sum within six months after demand. The exors. demanded payment of C., which he resisted on the ground that what passed at an interview between himself & testator amounted to a release of all obligation, in respect of the instrument. The ct. having found that the evidence of what passed at the interview amounted to no more at the utmost than an intention to deliver up the bond as an act of bounty, which intention was never fulfilled:—*Held*: much more was necessary to establish the release of a debt, & payment of the debt decreed, with interest & costs.—*Re HOLMES' ESTATE, WOODWARD v. HUMPAGE, INSKIP'S CASE* (1861), 3 Giff. 352; 5 L. T. 382; 8 Jur. N. S. 256; 66 E. R. 445.

743. — Release of principal debtor—Release of surety.]—To an action on a bond debt. pleaded that it was the joint & several bond of himself & J., & was executed by him as surety only for J., that afterwards a composition deed was made between J. of one part & pltf. & another on behalf of all the creditors of J. of the other part, whereby J. conveyed to the parties of the second part all his estate to be administered for the benefit of his creditors "in like manner" as if J. had been adjudged bkpt., & each of the creditors released J. from his debts "in like manner as if he had obtained a discharge in bkpcy.," & that pltf. executed the deed without the consent of deft.:—*Held*: a good plea.—*CRAGOE v. JONES* (1873), L. R. 8 Exch. 81; 42 L. J. Ex. 68; 28 L. T. 36; 21 W. R. 408.

Annotation:—*Expld. & Distd.* *Ellis v. Wilmot* (1874), L. R. 10 Exch. 10.

Of joint & several bonds generally.]—See Part VI., Sect. 2, *ante*; Sects. 10, 11, *post*.

SUB-SECT. 2.—COVENANT NOT TO SUE.

744. Before fixed time.]—In debt on bond the defence was that the pltf. covenanted that he would not sue the bond before a certain date:—*Held*: this was only a covenant & should not inure as a release, for it never was the intent of the parties to make it a release.—*DEUX v. JEFFERIES* (1594), Cro. Eliz. 352; 78 E. R. 600.

Annotations:—*Consd.* *Ford v. Beech* (1848), 11 Q. B. 852. *Reid.* *Ayliff v. Scrimshire* (1688), 1 Show. 46.

745. —.]—Covenant not to sue on a bond for a certain time is not a release or defeazance.—*ALOOF v. SCRIMSHAW* (1689), 2 Salk. 573; 91 E. R. 482; *sub nom.* *AYLOFFE v. SCRIMPISHIRE*, Carth. 63; Comb. 123; *sub nom.* *AYLIFF v. SCREMSHEIRE*, 1 Show. 46; Holt, K. B. 619.

Annotations:—*Consd.* *Gibbons v. Vouillon* (1849), 8 C. B. 483; *Belshaw v. Bush* (1851), 11 C. B. 191. *Reid.* *R. v. Fauntleroy* (1824), 2 Bing. 413; *Thimbleby v. Barron* (1838), 3 M. & W. 210; *Ford v. Beech* (1848), 11 Q. B. 852.

746. Subsequent bankruptcy of obligee.]—A.,

having previously borrowed £1,000 of B., executed to him a bond for that sum, & B., two days afterwards, executed a deed, whereby he covenanted that the bond should not be enforced. Some years afterwards, B. having become bkpt., his assignees brought an action on the bond, & filed a bill to have the deed of covenant declared fraudulent:—*Held*: the ct. would not interfere against the legal operation of the deed, there being nothing to show that B. was insolvent when he executed it, & there being evidence that A. had also at that time pecuniary claims on B., & that the execution of the bond was accompanied by an agreement that payment of it should not be enforced.—*SLACK v. TOLSON* (1826), 1 Russ. 553; 38 E. R. 213.

747. What amounts to—Verbal declaration.]—A declaration by the obligee of a bond that he will never sue for the bond debt:—*Held*: not sufficient to operate as a release of the bond debt.—*REEVES v. BRYMER* (1801), 6 Ves. 516; 31 E. R. 1172.

Annotations:—*Consd.* *Cross v. Sprigg* (1849), 6 Hare, 552; *Peace v. Hains* (1853), 11 Hare, 151. *Follid.* *Knapp v. Burnaby* (1860), 2 L. T. 83.

748. — Surety.]—Testator lent W. £1,000 upon his bond, for which deft. G. & another were sureties. W., two years afterwards, compounded with his creditors, testator agreeing to become surety for their payment, & to relinquish the bond debt, with interest, & to give it up to be cancelled. Testator did not do the last act, it being alleged that he said he could not find the bond; testator subsequently, & shortly before his death, gave W. £60, telling him that such sum, & all other money which he had received from him & had not repaid, were to be considered as gifts:—*Held*: the debt remaining due at law, testator's declaration of his intention not to sue upon the bond was not sufficient to release the surety in equity.—*CROSS v. SPRIGG* (1849), 6 Hare, 552; 18 L. J. Ch. 204; 13 L. T. O. S. 505; 13 Jur. 785; 67 E. R. 1283; *reversd.* on other grounds (1850), 2 Mac. & G. 113, L. C.

Annotations:—*Consd.* *Yeomans v. Williams* (1865), L. R. 1 Eq. 184. *Reid.* *Major v. Major* (1852), 1 Drew. 165; *Peace v. Hains* (1853), 11 Hare, 151; *Re Milnes, Milnes v. Sherwin* (1885), 53 L. T. 534; *Re Pink, Pink v. Pink*, [1912] 1 Ch. 498; *Re Tinline, Elder v. Tinline* (1912), 56 Sol. Jo. 310. *Mentd.* *Knapp v. Burnaby* (1860), 2 L. T. 83; *Luxmore v. Clifton* (1867), 17 L. T. 460; *Re Applebee, Leveson v. Beales*, [1891] 3 Ch. 422.

749. —.]—Deft., a bond creditor of pltf., informally promised, on pltf.'s marriage, never to enforce it, & the marriage took effect on the faith of such assurance:—*Held*: deft. was not bound to give effect to the promise.—*JORDEN v. MONEY* (1854), 5 H. L. Cas. 185; 23 L. J. Ch. 865; 24 L. T. O. S. 160; 10 E. R. 868, H. L.; *reversd.* S. C. *sub nom.* *MONEY v. JORDAN* (1852), 2 De G. M. & G. 318, L. JJ.

Annotations:—*Consd.* *Hutton v. Rossiter* (1855), 7 De G. M. & G. 9. *Distd.* *Warden v. Jones* (1857), 23 Beav. 487. *Expld. & Distd.* *Piggott v. Stratton* (1859), 1 De G. F. & J. 33. *Distd.* *Goldicutt v. Townsend* (1860), 28 Beav. 445. *Consd.* *Loffus v. Maw* (1862), 3 Giff. 592; *Stephens v. Venables* (1862), 31 Beav. 124. *Expld.* *Smith v. Hayes* (1867), 15 W. R. 871. *Consd.* *M'Askie v. M'Cay* (1868), 16 W. R. 1187; *Williams v. Williams* (1868), 37 L. J. Ch. 854; *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), L. R. 8 H. L. 352. *Expld.* *Alderson v. Maddison* (1880), 5 Ex. D. 293; *Maddison v. Alderson* (1883), 8 App. Cas. 467. *Consd.* *Mills v. Fox* (1887), 37 Ch. D. 153; *Chadwick v. Manning*, [1896] A. C. 231. *Reid.* *Whitmore v. Mackeson* (1852), 16 Beav. 126; *Bushby v. Ellis* (1853), 17 Beav. 279; *Pulsford v. Richards* (1853), 17 Beav. 87; *Stone v. Godfrey* (1854), 5 De G. M. & G. 76; *Clelland v. Leach* (1856), 27 L. T. O. S. 59; *Monypenny v. Monypenny* (1858), 4 K. & J. 174; *Gillman & Spencer v. Carbutt* (1889), 37 W. R. 437; *Balkis Consolidated Co. v. Tomkinson*, [1893] A. C. 396; *Cave v. Crew* (1893), 68 L. T. 264; *Licenses Insee. Corp'n. & Guarantee Fund v. Lawson*

(1896), 12 T. L. R. 501; *Re Fickus, Farina v. Fickus*, [1900] 1 Ch. 331; *Whitechurch v. Cavanagh*, [1902] A. C. 117; *Cresswell v. Jeffreys* (1912), 28 T. L. R. 413. *Mentd.* *Smith v. Kay* (1859), 7 H. L. Cas. 750; *Sterry v. Combs* (1871), 25 L. T. 10.

750. ——— Followed by indorsement.]—A., being indebted to B., C., & D., three sisters who were his near relations, partly on his own account & partly as exor. of his father, executed to them a bond for £500. At the time of giving the bond A. objected to giving it, & only agreed to do so on a verbal representation that it was not intended that the bond should be enforced, unless B., C., & D. should come to want, which never happened. The bond remained in the hands of the three until the death of B., & after her death in the hands of the survivors until the death of C., & after her death in the hands of D., whose property it was at the time of her death. The bond was found to have the following indorsement on it: "This bond is never to appear against A. Witness D., C." The date of the indorsement was eleven years after the bond. The signatures "D., C.," were apparently in the same handwriting, & it was said to be that of D., but it was proved that if D. signed for C., she did so with her concurrence & approval:—*Held*: independently of the question whether the indorsement amounted to a release, there was an equity in the circumstances against enforcing the bond, & if an action were brought on the bond it ought to be restrained, & nothing was due on the bond.—*MAJOR v. MAJOR* (1852), 1 Drew. 165; 61 E. R. 414.

Annotations:—*Consd.* *Jorden v. Money* (1854), 5 H. L. Cas. 165. *Distd.* *Knapp v. Burnaby* (1860), 2 L. T. 83.

751. ——— Invalid consideration.]—To an action on a bond against debt. as exor. he pleaded for a defence, on equitable grounds, that before the making of the bond pltf. had seduced & committed adultery with the wife of debt.'s testator, & that after the making of the bond it was agreed between testator & pltf. that, in consideration that testator would not expose & make public the conduct of pltf. with regard to the seduction & adultery, pltf. would not enforce or sue on the bond:—*Held*: there was no valid consideration to support the alleged promise of pltf., & the plea was bad.—*BROWN v. BRINE* (1875), 1 Ex. D. 5; 45 L. J. Q. B. 129; 33 L. T. 703; 24 W. R. 177.

752. Joint & several bond—Covenant not to sue one—Whether others discharged.]—A perpetual covenant never to take any advantage of a deed or covenant is a release or defeasance of that deed or covenant; but if A. & C. are jointly & severally bound in a bond to E., who covenants never to sue C. upon the bond, there is no release or defeasance of the bond, as the remedy against C. is alone discharged.—*LACY v. KINNASTON* (1701), Holt, K. B. 178; 1 Id. Raym. 688; 12 Mod. Rep. 548; 3 Salk. 298; 90 E. R. 996.

Annotations:—*Appld.* *Dean v. Newhall* (1799), 8 Term Rep. 168. *Consd.* *Morley v. Frear* (1830), 6 Bing. 547. *Expld.* *Ledger v. Stanton* (1862), 2 John. & H. 687. *Refd.* *Lancaster v. Harrison* (1830), 6 Bing. 726. *Mentd.* *Hutton v. Eyre* (1815), 6 Taunt. 289; *Willis v. De Castro* (1858), 4 C. B. N. S. 216.

753. ———.]—A covenant not to sue one of the obligors is no discharge as to the rest.—*FITZGERALD v. TRANT* (1709), 11 Mod. Rep. 254; 88 E. R. 1022.

Annotation:—*Refd.* *Dean v. Newhall* (1799), 8 Term Rep. 168.

754. ———.]—In an action on a bond, framed as a joint & several bond by the debt. & two other obligors, it appeared that the other two obligors had not executed the bond, & the obligee had covenanted with debt. not to

sue him on the bond, but that by the deed of covenant debt. was estopped from denying that the other two obligors were bound:—*Held*: the covenant not to sue afforded no defence to the action.—*FITZGERALD v. CRAGG* (1705), 1 Com. 139; 92 E. R. 1003.

755. ———.]—If the obligee of a bond covenant not to sue one of two joint & several obligors, & that if he do, the deed of covenant may be pleaded in bar, he may still sue the other obligor.—*DEAN v. NEWHALL* (1799), 8 Term Rep. 168; 101 E. R. 1326.

Annotations:—*Consd.* *Hutton v. Eyre* (1815), 1 Marsh. 603; *Twopenny v. Young* (1824), 3 B. & C. 208; *Willis v. De Castro* (1858), 4 C. B. N. S. 216. *Refd.* *Hawkshaw v. Parkins* (1819), 2 Swan. 539; *Jones v. Yates* (1829), 4 Man. & Ry. K. B. 613; *Lancaster v. Harrison* (1830), 6 Bing. 726; *Gibbons v. Vouillon* (1849), 8 C. B. 483; *Ledger v. Stanton* (1862), 2 John. & H. 687.

756. ———.]—B. & debt. gave pltf. a joint & several bond for £600, the condition of which recited that B. had requested pltf. to accept bills for him, & lend him money, which pltf. had agreed to do on having the balance for the time being secured to pltf. by the joint & several bonds of B. & debt. as surety, but neither B. nor debt. were to be liable for more than £300, & declared that the condition was that, if either B. or debt. should pay such sums as should become due to pltf. by means of the acceptances or loans, the bond should be void. Afterwards, pltf., by deed poll, without the knowledge or authority of debt., released & for ever discharged B. "of & from all & all manner of action, causes of action, suits, debts, dues, sum & sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, damages, judgments, extents, executions, claims & demands whatsoever, at law & in equity," which pltf. had or might have against B. upon or by reason of any matter, cause, or thing whatsoever, "provided always, that nothing herein contained shall extend, or be deemed or construed to extend, to prevent" pltf. "from suing or prosecuting any person or persons, other than" B., his exors., etc., "who is, are, shall or may be liable or accountable to pay or make good to" pltf. "all or any part of any debt or debts, sum or sums of money, now due from" B. to pltf., "either as drawer" etc. "of any bill" etc., "or as being jointly or severally bound with" B. "in any bond or bonds, obligation or obligations, or other instrument whatsoever, or otherwise howsoever, as if these presents had not been executed, it being understood & agreed that, as regards any such suits or prosecutions, these presents shall not operate or be pleaded in bar, or as a release":—*Held*: the deed poll was not a release, but a covenant not to sue B., & pltf. was not precluded from suing debt. in respect of breaches accruing before the execution of the deed poll.—*PRICE v. BARKER* (1855), 4 E. & B. 760; 24 L. J. Q. B. 130; 25 L. T. O. S. 51; 1 Jur. N. S. 775; 3 C. L. R. 927; 119 E. R. 281.

Annotations:—*Consd.* *Duck v. Mayou*, [1892] 2 Q. B. 511. *Refd.* *Bailey v. Edwards* (1864), 4 B. & S. 761; *Bateson v. Gosling* (1871), L. R. 7 C. P. 9.

See, also, Part VI., Sect. 2, *ante*; Sects. 10, 11, *post*.

SECT. 6.—BY MARRIAGE.

See, now, Married Women's Property Acts, 1870 (c. 93), 1874 (c. 50), 1882 (c. 75), 1893 (c. 63), 1907 (c. 47).

757. Obligor & obligee.]—A widow lent £100 to A. & B., & took a note in her own name, & a

Sect. 6.—By marriage. Sects. 7 & 8.]

bond from A. & B. in a trustee's name. Afterwards she married B., who died:—*Held*: the marriage was not a release of the debt, & the bond was not extinct.—*COTTON v. COTTON & ASHTON* (1693), 2 Vern. 289; Prec. Ch. 41; 23 E. R. 787.

758. —.]—A bond entered into by husband & wife before marriage for each to bring funds into a common stock to be placed in the hands of a third party on trust:—*Held*: good after marriage.—*GIBBONS v. DAVIES* (1693), Comb. 242; 90 E. R. 454.

759. —.]—Upon a treaty of marriage, the husband gave a bond to the wife, conditioned that if he did permit her to dispose of £100, then the bond should be void. Afterwards the marriage took effect, so that the bond became void:—*Held*: there was a good agreement, & the husband should give a bond to trustees, with the same condition.—*DRAKE v. STORR (THORPE)* (1695), Freem. Ch. 205; 22 E. R. 1162.

760. —.]—Bond to pay money after marriage between obligor & obligee, the debt is only suspended by the intermarriage.—*GAGE v. ACTON* (1699), 1 Freem. K. B. 512; Carth. 511; 1 Com. 67; 1 Salk. 325; 89 E. R. 385; 1 Ld. Raym. 515; Holt, K. B. 309; *sub nom.* *CAGE v. ACTON*, 12 Mod. Rep. 288; *sub nom.* *ACTON v. PEIRCE* (1704), 2 Vern. 480; *sub nom.* *ACTON v. ACTON*, Prec. Ch. 237.

Annotations:—*Folld.* *Milbourn v. Ewart* (1793), 5 Term Rep. 381. *Refld.* *Fitzgerald v. Fitzgerald* (1868), L. R. 2 P. C. 83. *Mentd.* *Stonehouse v. Ilford* (1706), 1 Com. 145; *Purdew v. Jackson* (1824), 1 Russ. 1; *Honner v. Morton* (1828), 3 Russ. 65; *Davis v. Gyde* (1835), 2 Ad. & El. 623; *Paine v. Emery* (1835), 4 L. J. Ex. 250; *Hartley v. Manton* (1843), 13 L. J. Q. B. 61; *Rogers v. Acaster* (1851), 14 Beav. 445; *Duberley v. Day* (1852), 16 Beav. 33; *Jones v. Davies* (1860), 5 H. & N. 766.

761. —.]—A bond conditioned for payment of money after the obligor's death, made to a woman in contemplation of the obligor's marrying her, & intended for her benefit if she should survive, is not released by their marriage; & if the marriage be pleaded in bar to an action of debt on the bond against the heir of the obligor, a replication stating the purposes for which the bond was made will be good, for they are consistent with the bond & condition.—*MILBOURN v. EWART* (1793), 5 Term Rep. 381; 101 E. R. 213.

Annotations:—*Mentd.* *Duberley v. Day* (1852), 16 Beav. 33; *Fitzgerald v. Fitzgerald* (1868), L. R. 2 P. C. 83.

See, further, HUSBAND & WIFE.

SECT. 7.—BY CANCELLATION.

762. What amounts to—Joint & several bond—One seal torn off.]—If three persons seal & deliver a joint & several bond, the tearing of the seal of one of the obligors entirely destroys the bond.—*SEATON v. HENSON* (1678), 2 Show. 28; 2 Lev. 220; 89 E. R. 772.

Annotation:—*Mentd.* *Redhead v. Cathgut* (1733), 2 Barn. K. B. 373.

See, also, Nos. 799, 801, post.

763. Time for—After issue joined.]—A bond cancelled after issue joined may be given in evidence as debt.'s deed.—*MICHAEL v. STOCKWITH* (1588), Cro. Eliz. 120; Gouldsb. 83; 78 E. R. 377; *sub nom.* *MICHAEL'S CASE*, Owen, 8.

PART X. SECT. 7.

m. What amounts to—Substitution of new bond—Agent's act.—In trover, the execution of a bond for the faithful performance of his duties by a bank clerk was proved, but it was further proved that the cashier had returned

it to debt. for the purpose of being obliterated, the cashier thinking there was no impropriety in so doing, a new bond having been executed. No instruction was acted on by the cashier when he so delivered up the bond, but there was some evidence of

764. Effect of—Fraudulent.]—On the marriage of pltf., a widow, who was possessed of £1,000 of her late husband's personal estate, it was agreed that she should have £1,000 for her own use, & the second husband was to leave her £6,000 at his death. The husband gave a bond to secure that sum. Subsequently he took the bond away fraudulently & cancelled it:—*Held*: after his death, pltf. was entitled to satisfaction of the £6,000 out of his estate, as if the bond had not been cancelled, & she must be paid in priority to debts of a lower nature.—*BROWN v. SAVAGE* (1674), Cas. temp. Finch. 184; 23 E. R. 101.

765. — Mistake—Relief in equity.]—A. gave three bonds to B. for £500 each, payable at different times. The two first were paid, but upon the parties settling an account relative to other matters, the third bond was delivered up by mistake, instead of a particular voucher belonging to that account:—*Held*: equity would relieve against the mistake, by directing an issue to try whether there were two bonds or three, & whether the last bond was paid or not.—*VANHOVEN v. GIESQUE* (1706), 4 Bro. Parl. Cas. 622; 2 E. R. 424.

766. Repayment of interest.]—Where a bond is void & has been ordered to be delivered up to be cancelled, interest which has been paid on the supposition of its being valid, will be ordered to be repaid.—*HITCHCOCK v. GIDDINGS* (1817), Dan. 1; 4 Price, 135; Wils. Ex. 32; 146 E. R. 418.

Annotations:—*Mentd.* *Clare v. Lamb* (1875), L. R. 10 C. P. 334; *Joliffe v. Baker* (1883), 11 Q. B. D. 255; *Re Tyrell*, *Tyrell v. Woodhouse* (1900), 82 L. T. 675.

767. — Contemplated marriage not taking place.]—In contemplation of a marriage between a woman, who was an orphan & a Protestant, & a man, who was a Roman Catholic, a settlement was executed, to which the woman's uncle was a party, & the subjects of which were stock belonging to the woman, & two sums of money, one secured by the uncle's, & the other by the man's, bond, & both of them payable to the trustees of the settlement twelve months after the date of the bonds. The settlement, after declaring trusts in favour of the woman & man & their children, provided that, until the marriage should be duly had & solemnised according to the forms of the Church of England, or in case it should not be so solemnised within twelve months next after the date of the settlement, the trustees should stand possessed of all the trust money, securities & premises & the securities for same, in trust for the woman, her exors., etc., & should pay, assign, & transfer same accordingly. The marriage never took place. After the uncle's death his bond was found amongst his papers with the words "cancelled, the marriage never having taken place," written by him across the face of it:—*Held*: though the bond was not invalidated, according to the true construction of the proviso the woman was not entitled as the *cestui que trust* of the bond.—*MITFORD v. REYNOLDS*, *Ex p. PATTLE*, *Ex p. INDIA CO.* (1848), 16 Sim. 130; 60 E. R. 822.

768. Evidence of—In hands of assignees of bankrupt obligor.]—The production of a bond out of the hands of the assignees of bkpt., who was the principal obligor, in a cancelled state, is *prima*

passive acquiescence on the part of the board:—*Held*: the jury were not justified in finding that the bond had been cancelled.—*BANK OF UPPER CANADA v. WIDMER* (1833), 2 O. S. 222.—CAN.

facie evidence of its having been cancelled with the consent of the obligee.—**ALSAGER v. CLOSE** (1842), 10 M. & W. 576; 12 L. J. Ex. 50; 152 E. R. 600.

Annotation:—**Mentd. Heald v. Carey** (1852), 21 L. J. C. P. 97.

769. By order of court.—*Held*: the Ct. of Q. B. had jurisdiction over a bond given by a trader under Judgments Act, 1838 (c. 110), s. 8, on an affidavit of debt filed in the Ct. of Bkpcy., & if the bond were satisfied, the Ct. of Q. B. would order it to be produced, so that it might be cancelled.—**WILSON v. FIRTH** (1841), 10 L. J. Q. B. 292; 5 Jur. 608.

SECT. 8.—BY ALTERATION.

770. What are material alterations—General rule.—When any deed is altered in a point material, by pltf. himself, or by any stranger without the privity of the obligee, be it by interlineation, addition, erasing, or by drawing of a pen through a line, or through the midst of any material word, the deed thereby becomes void; as if a bond is to be made to the sheriff for appearance, etc., & in the bond the sheriff's name is omitted, & after the delivery thereof his name is interlined, either by the obligee or a stranger, without his privity, the deed is void; so if one makes a bond of £10 & after the sealing of it, another £10 is added, which makes it £20, the deed is void; so if a bond is rased, by which the first word cannot be seen, or if it is drawn with a pen & ink through the word, although the first word is legible, yet the deed is void, & shall never make an issue, whether it was in any of these cases altered by the obligee himself, or by a stranger without his privity. So if the obligee himself alters the deed by any of these ways, although it is in words not material, yet the deed is void, but if a stranger, without his privity,

769 i. By order of court—Where proper.—The former treasurer of a municipality & his sureties sued on a bond given by them to secure the due performance of the office to compel a cancellation of the bond after the treasurership had come to an end & the accounts had been settled. The defence was that it was impossible to say that the audit covered all things & something might still be found which the treasurer had not accounted for:—*Held*: cancellation was usually ordered only in cases where there was actual danger of improper use to the injury of the party seeking cancellation; here, there was a possibility that the instrument had not fulfilled all its purposes, & there was no right of action.—**SHEWFELT v. TOWNSHIP OF KINCARDINE** (1916), 9 O. W. N. 237; 35 O. L. R. 344.—CAN.

769 ii. Where fresh security taken.—The owner of a steamboat sold ten shares in her, taking the bond of the vendee for a portion of the price. The vendee sold the same subject to this bond, & the shares were afterwards transferred in trust for the benefit of the original owner of the vessel, who still held the bond; notwithstanding which proceedings were taken by him to enforce payment of the bond. The ct. restrained further proceedings thereon, & ordered the bond to be delivered up to be cancelled, with costs.—**THOMPSON v. WILKES** (1856), 5 Gr. 594.—CAN.

769 iii. Circumstances negating fraud.—Where Comrs. of Customs had expressed a disinclination to enforce a bond given by a party who had been guilty of an infraction of an Act of Parliament in circumstances which

negated every presumption of fraud on his part. In an action on the bond:—*Held*: the bond was cancelled.—**BROOKING v. BYRNE & JOB** (1818), 1 Nfld. L. R. 132.—NFLD.

769 iv. Death of obligee—Whether executor's consent necessary.—A debtor, resident in C., executed a mtge. bond upon land in C. in favour of N., who was domiciled in E. N. died, & his exor. in E., after obtaining cession of the bond to himself, ceded it to the wife of debtor, who consented to the cancellation of the bond, the land having been sold. At the time of N.'s death the bond was in E.:—*Held*: the Registrar of Deeds could not be ordered to cancel the bond without the consent of an exor. appointed or confirmed by letters of administration granted in the Colony.—**NEWDIGATE v. REGISTRAR OF DEEDS** (1902), 19 S. C. 269; 12 C. T. R. 434.—S. AF.

769 v. Insufficiency of evidence.—The ct. refused to decree cancellation of a bond, for which, at the time of its execution, no money passed; on petitioner's sole evidence against resp't's answering affidavit, stating that the bond was petitioner's free & voluntary act, done for past services, & advances of money.—**WYSE v. LAMBERT** (1865), 16 I. Ch. R. 378.—IR.

PART X. SECT. 8.

770 i. What are material alterations—General rule.—Any change in a bond which causes it to speak a different language in legal effect, from that which it originally spoke, which the legal identity or character

alters the deed by any of these ways in any point not material, it shall not avoid the deed.—**PIGOT'S CASE** (1614), 11 Co. Rep. 26 b.; 77 E. R. 1177; *sub nom.* **WINCHCOMBE v. PIGOT**, 2 Bulst. 246; *sub nom.* **WINSCOMBE v. PIGGOTT**, 1 Roll. Rep. 39; *sub nom.* **ANON.**, Moore, K. B. 835.

Annotations:—**Consd. Aldous v. Cornwell** (1868), L. R. 3 Q. B. 573; **Suffell v. Bank of England** (1882), 9 Q. B. D. 555; **Crediton v. Exeter**, [1905] 2 Ch. 455. *Reid. Master v. Miller* (1791), 4 Term Rep. 320; **Sanderson v. Symons** (1819), 4 Moore, C. P. 42; **Falmouth v. Roberts** (1841), 11 L. J. Ex. 180; **Davidson v. Cooper** (1843), 11 M. & W. 778; **Mollett v. Wackerbarth** (1847), 5 C. B. 181; **Agriculture Cattle Insee. v. Fitzgerald** (1851), 16 Q. B. 432; **Burchfield v. Moore** (1854), 3 E. & B. 683; **Gardner v. Walsh** (1855), 5 E. & B. 83; **Croockewit v. Fletcher** (1857), 1 H. & N. 893; **Adsetts v. Hives** (1863), 33 Beav. 52. *Mentd. Miller v. Manwaring* (1635), Cro. Car. 397; **Colton v. Goodridge** (1776), 2 Wm. Bl. 1108; **Collins v. Gwynne** (1831), 5 Moo. & P. 276; **Mason v. Bradley** (1843), 11 M. & W. 590; **Bank of Australasia v. Brelliat** (1847), 6 Moo. P. C. C. 152; **Simons v. G. W. Ry.** (1857), 2 C. B. N. S. 620; **Ward v. Lumley** (1860), 24 J. P. 150; **Robinson v. Mollett** (1875), L. R. 7 H. L. 802; **Bagot v. Chapman**, [1907] 2 Ch. 222; **Howatson v. Webb**, [1908] 1 Ch. 1; **Wild v. Simpson**, [1919] 2 K. B. 544.

771.—If a deed after execution be altered in a material place by the parties or a stranger, as by an insertion of the Christian name or addition of the obligor, or of a condition, though for the advantage of the obligor, he may plead *non est factum*, & avoid the deed, but the obligee may afterwards have an action on the case against the person who made the alteration, & recover damages for the injury, although in suing upon the deed he was non-suited upon the issue "that the alteration was not made after the sealing & delivery."—**MARKHAM v. GONASTON** (1598), Cro. Eliz. 626; 78 E. R. 866.

Annotations:—**Reid. Weeks v. Maillardet** (1811), 14 East, 568; **Newburn v. Eaton** (1869), 20 L. T. 449. *Mentd. Hutchins v. Scott* (1837), 2 M. & W. 809; **Hartley v. Manson** (1842), 4 Scott, N. R. 728.

772. Erasure.—If a bond is erased after sealing it is void.—**ANON.** (1551), Moore, K. B. 10; 72 E. R. 404.

of the instrument either in its terms or the relation of the parties to it, is an alteration, which will invalidate it against all parties not consenting to the alteration. It is of no consequence whether the alteration would be beneficial or detrimental to the party sought to be charged on the contract.—**GOUR CHANDRA DAS v. PRASANNA KUMAR CHANDRA** (1906), I. L. R. 33 Calc. 812; 10 C. W. N. 788.—IND.

772 i. Erasure of date.—In an action against debts, as sureties on a bail-bond, the defence chiefly relied on was that the bond was vitiated by material alterations made therein after its execution, & by the erasure of the date mentioned for the appearance of debt, & the substitution of another date:—*Held*: the alleged alteration being noted in the attestation clause, the burden was upon debts, of showing that it was made subsequent to the execution of the bond.—**WOODWORTH v. DICKIE** (1886), 7 R. & G. 96; 7 C. L. T. 144; 14 S. C. R. 734.—CAN.

o. Affixing seal—Authority presumed.—Debts, signed a bond at the request of T., who was indebted to pltf. They intended the document to be their bond & it purported to be under seal, & it was sealed when handed by T. to pltf., but they swore that there were no seals upon it when they signed it. They did not say that they did not authorise T. to complete the document & make it what it was intended to be affixing seals:—*Held*: it should be presumed that debts, had authorised T. to affix the seals for them, & their defence of alteration of the bond failed.—**PEASE v. RANDOLPH** (1911), 21 Man. L. R. 368.—CAN.

Sect. 8.—By alteration. Sects. 9, 10 & 11.]

773. Substitution of currency.]—B. was obliged in £100 to A. for the honesty of his son, an apprentice with A. A. erased "pounds" in the obligation, & put in "marks":—*Held*: by that the obligation was void.—**BLACK v. ALLEN** (1600), Noy. 99; 74 E. R. 1065.

Annotations:—**Mentd.** R. v. Knight & Burton (1698), 1 Ld. Raym. 527; R. v. Ward (1726), 1 Barn. K. B. 10.

774. Substitution of co-surety—Without consent of first surety.]—One surety to an administration bond executed same on being assured that the other person named in it as co-surety would execute it. The latter refused to do so. The name of another surety was inserted in the bond, & that person executed it. The first surety did not assent to the alteration:—*Held*: the bond was void & must be cancelled.—*In the Goods of COWARDIN* (1901), 86 L. T. 261; 18 T. L. R. 220; 46 Sol. Jo. 163.

775. Joint & several bond—Addition of another obligor.]—In debt on a bond, deft. pleaded that at the time that he sealed & delivered the bond, there was a space left, wherein afterwards the name of J. was put in, who also sealed & delivered it, supposing that the adding another obligor, bound jointly & severally with him, was an alteration material to avoid the bond:—*Held*: the bond remained the same as to him, & he could not take advantage of the matter.—**ZOUCH v. CLAY** (1671), 1 Vent. 185; 2 Keb. 872, 881; 2 Lev. 35; 86 E. R. 126.

Annotations:—**Foll.** Matson v. Booth (1816), 5 M. & S. 223. **Refd.** Weeks v. Maillardet (1811), 14 East, 568; Hartley v. Mawson (1842), 4 Scott, N. R. 728.

776. Before acceptance by obligee.]—The addition of another obligor after a bond has been executed to the sheriff on the arrest of a person upon mesne process, but before the sheriff has accepted it, with the assent of the sheriff & the prior obligors, does not vacate the bond or make a new stamp necessary.—**MATSON v. BOOTH** (1816), 5 M. & S. 223; 105 E. R. 1033.

Annotations:—**Mentd.** Spicer v. Burgess (1834), 1 Cr. M. & R. 129; Hibblewhite v. M'Morine (1840), 6 M. & W. 200.

777. Substitution of co-obligor.]—In debt on a joint & several bond, the condition set out was for payment by deft. & A. & B. The bond was given in evidence, & was found to have been altered, H. having been substituted for B. in the condition:—*Held*: this was a fatal variance.—**ADAMS v. BATESON** (1829), 6 Bing. 110; 3 Moo. & P. 339; 7 L. J. O. S. C. P. 251; 130 E. R. 1222.

778. Insertion of Christian name of one.]—A. & B. gave a joint & several bond, & a warrant of attorney for jointly & severally confessing judgment thereon to C. for securing an annuity, payable by B. to C. After execution by A. & B., an omission of one of the Christian names of A. in the bodies of the instruments was discovered, & was supplied by interlineation by the attorney of the grantee, & the instruments so altered were re-executed by A., but not by B. A. was sued on the bond, pleaded the judgment, & defeated the action:—*Held*: on motion by A., the ct. would not set aside the securities, because (1) he had assented to the alteration, & (2) he had recognised the validity of the judgment by pleading it.—**COKE v. BRUMMELL** (1818), 8 Taunt. 439; 2 Moore, C. P. 495; 129 E. R. 453.

779. ——— Alteration of liability by one.]—Four persons, as sureties for a principal, executed

a joint & several bond of suretyship, by the terms of which the liability of two of them was limited to £50 each, & that of the other two to £25 each. One of those whose liability was limited to £50, after the other three had executed the bond, executed it himself, but added to his signature the words, "£25 only." The obligee accepted the bond so executed without objection, & subsequently the principal became in default:—*Held*: the effect of the added words was to make a material alteration in the bond, so that the three first signatories were thereby discharged from their obligation, & as the last signatory only executed the bond as a joint & several bond, he also was not bound by it.—**ELLESMERE BREWERY Co. v. COOPER**, [1896] 1 Q. B. 75; 65 L. J. Q. B. 173; 73 L. T. 567; 44 W. R. 254; 12 T. L. R. 86; 40 Sol. Jo. 147; 1 Com. Cas. 210, D. C.

Annotations:—**Refd.** National Provincial Bank of England v. Brackenbury (1906), 22 T. L. R. 797. **Mentd.** Re Denton's Estate, Licenses Insee. Corp'n. & Guarantee Fund v. Denton, [1903] 2 Ch. 670; Stirling v. Burdett, [1911] 2 Ch. 418.

Joint & several bonds generally, see Part VI., Sect. 2, *ante*; Sects. 10, 11, *post*.

780. ——— Insertion of omitted correct amount.]—A bond was conditioned to pay £100 by six equal payments of £16 13s. 4d. on Oct. 3 in every year until the full sum of one pounds was paid. A stranger inserted the word "hundred" between "one" & "pounds," & pltf., on oyer craved, set it out as being "until the full sum of £100 was paid":—*Held*: (1) a fatal variance; (2) the sense being sufficiently manifest before the alteration, that the condition was for payment of £100 by six yearly instalments of £16 13s. 4d., the insertion of the word "hundred" did not alter the sense, & was immaterial, & did not destroy the bond.—**WAUGH v. BUSSELL** (1814), 5 Taunt. 707; 1 Marsh. 311; 128 E. R. 868.

Annotations:—**Appl.** Coles v. Hulme (1828), 8 B. & C. 568. **Consd.** Loveland v. Knight (1828), 3 C. & P. 106. **Mentd.** Handford v. Palmer (1820), 5 Moore, C. P. 74; Snell v. Snell (1825), 4 B. & C. 741.

781. ——— Insertion of name & sum—By agent.]—A. wanting to borrow £400, or so much of it as his credit should be able to raise, executed a bond, with blanks for the name & sum, & sent an agent to raise money on the bond. B. lent £200 on it, & the agent filled up the blanks with that sum & B.'s name, & delivered the bond to him:—*Held*: it was a good deed.—**TEXIRA v. EVANS** (1788–1794), cited in 1 Anst. at p. 228; 145 E. R. 854, N.P.

Annotations:—**Consd.** Hibblewhite v. M'Morine (1840), 6 M. & W. 200. **Refd.** Master v. Miller (1794), 1 Anst. 225; Davidson v. Cooper (1844), 13 M. & W. 343; Tayler v. Great Indian Peninsular Ry. Co. (1859), 28 L. J. Ch. 285; Re North British Australasian Co., Ex p. Swan (1860), 7 C. B. N. S. 400; Swan v. North British Australasian Co. (1861), 31 L. J. Ex. 425.

782. ——— Date in collateral indenture—After execution of bond.]—Debt on bond against A., who pleaded that the condition of the bond was that if he performed all the covenants contained within a pair of indentures, by which D. sold to S. certain trees growing, & covenanted to cut them down before Aug. 7, 1684, their, etc., & showed that after the sealing & delivery, pltf. caused & procured J., to erase the indenture, & of 1684 to make it 1685:—*Held*: the indenture did not become void, for the erasure was in an immaterial place, & was to the advantage of deft., & if the indenture had become void, the obligation had been single & without defeasance.—**DARCY (LORD) & SHARPE'S CASE** (1584), 1 Leon. 282; 74 E. R. 257.

Annotations:—**Refd.** Sanderson v. Symonds (1819), 1 Brod. & Bing. 426; Aldous v. Cornwell (1868), L. R. 3 Q. B. 573. **Mentd.** Parker v. Kett (1701), 12 Mod. Rep. 466.

783. Effect of alteration—Interlineation after execution—Relief in equity.]—A bond, which was void at law by reason of an interlineation of £50 after execution:—*Held*: good in equity for the money really secured thereby, but only as a simple contract debt.—*ANON.* (1725), 2 Eq. Cas. Abr. 286; 22 E. R. 241, L. C.

784. Pleading alteration—Addition to condition.]—A plea, to debt on bond, that after its execution a material addition was made to the condition thereof:—*Held*: bad, for not stating that the addition was made in writing to the condition itself.—*HARDEN v. CLIFTON* (1841), 1 Q. B. 522; 1 Gal. & Dav. 22; 10 L. J. Q. B. 159; 5 Jur. 962; 113 E. R. 1232.

Annotation:—*Mentd.* *Milner v. Jordan* (1846), 8 Q. B. 615.

SECT. 9.—BY OPERATION OF LAW.

785. Merger in judgment—Proof of satisfaction.]—Deft. entered into a bond with pltf. Afterwards he gave pltf. a judgment for his debt:—*Held*: in point of law the bond did *transire in rem judicatam*, but failing proof of satisfaction of the judgment must pay £100 on the bond with damages.—*TRYON v. MITCHEL* (1636), 1 Rep. Ch. 107; 21 E. R. 521.

786. New bond in satisfaction of judgment on bond.]—T. & pltf. were obligors of a bond for £200 conditioned for payment of £100, on which an action was brought & judgment recovered. Afterwards T. entered into a new bond for £200 conditioned for payment of £110 at another day in satisfaction of the judgment:—*Held*: this was not sufficient to avoid the judgment.—*LUTTERFORD v. LE MAYRE* (1620), Cro. Jac. 579; 79 E. R. 495.

787. Act of pardon—Bond for submission to church.]—Debt on a bond given in 1693 to a bishop for submission to the church:—*Qu.*: whether a general Act of Pardon since that date, which took away the offence & excommunication, did not likewise discharge the bond.—*DURHAM (Bp.) v. LADLER* (1703), 6 Mod. Rep. 71; 87 E. R. 830.

Discharge by making obligor executor.]—See EXECUTORS & ADMINISTRATORS.

SECT. 10.—BY CO-OBLIGEEES.

788. Release of several debts by one—Whether discharge of joint bond.]—A release by one of two obligees to a bond of all actions & suits that he had against the obligor upon his own account does not necessarily amount to a discharge of the bond.—*NOKES v. —* (1669), 1 Vent. 35; 86 E. R. 25.

789. Release of joint debt by one—Absence of fraud.]—A release by one of two joint obligees of a bond will not be set aside, except upon a very strong case of fraud.

J. & M., co-exors., lent money belonging to testator's estate to H., who gave them a bond for the amount. J. subsequently commenced an action making M. co-pltf. upon the bond. After the action M. gave a release to H., who pleaded it as a defence. J. moved to set aside the plea & to have the release delivered up to be cancelled:—

*p. Effect of alteration—Filling up blank—Absence of obligor.]—*A blank having been left in a bond, which was afterwards filled up with the consent of the obligor, although not in his presence, was held no variance on *non est factum*.—*LEONARD v. MERRITT* (1830), 1 Dra. 199.—*CAN.*

who has executed a bond cannot be bound by an alteration made in his absence by his verbal direction.—*MARTIN v. HANNING* (1860), 26 U. C. R. 80.—*CAN.*

r. S. P. R. v. MOLLOY (1865), 5 Nfld. L. R. 127.—*NFLD.*

*s. — Where fraudulent.]—*A

Held: in the absence of evidence of fraud the instrument must have its legal effect.—*JONES v. HERBERT* (1817), 7 Taunt. 421; 129 E. R. 168.

Annotations:—*Reid.* *Arton v. Booth* (1820), 4 Moore, C. P. 192; *Herbert v. Pigott* (1834), 2 Cr. & M. 384; *Crook v. Stephen* (1839), 5 Bing. N. C. 688. *Mentd.* *Gibson v. Winter* (1833), 5 B. & Ad. 96.

790. Cancellation by one.]—*Re SMITH, Ex p. SMITH*, No. 801, *post*.

SECT. 11.—OF CO-OBLIGORS.

791. Bound jointly—Judgment against one.]—To debt on bond against one obligor a plea of judgment recovered against the other is bad, for a co-obligor cannot plead anything but satisfaction.—*DYKE v. MERCER* (1684), 2 Show. 394; 89 E. R. 1002.

Annotation:—*Consd.* *Clerk v. Withers* (1704), 2 Ld. Raym. 1072.

792. — Agreement with one—For increase of interest.]—*HEATH v. PERCIVAL*, No. 738, *ante*.

793. — Release of one—Whether co-obligor released.]—A release to one obligor, is a release to both in equity as well as at law.—*BOWER v. SWADLIN* (1738), 1 Atk. 294; 26 E. R. 188, L. C. *Annotation*:—*Mentd.* *Erving v. Peters* (1790), 3 Term Rep. 685.

794. — — — Bond executed after release.]—A release to one of two obligors shall not discharge the other, if he sealed the bond after the release was given.—*MANNINGS v. TOWNSEND* (1589), Cro. Eliz. 161; 78 E. R. 419.

795. — — — Remedy reserved against co-obligor.]—In debt on bond deft. showed that he was bound with D. & that the obligee had released D. from all actions, writings obligatory, etc., provided that such release should not prejudice the obligee but he should have his remedy against deft.:—*Held*: the proviso was void.—*EVERARD v. HERNE* (1668), Litt. 190; 124 E. R. 202.

Annotation:—*Reid.* *Owen v. Homan* (1851), 3 Mac. & G. 378.

796. — — — .]—Pltf., the obligee in a bond, given by two joint obligors, executed a release to one, & having brought an action on the bond against deft., the co-obligor, he pleaded such release in bar. Pltf. replied that the release was given with an undertaking on the part of deft., that such release should not operate in his discharge:—*Held*: pltf. could not by a parol averment vary the instrument under seal, which being the release of an entire demand, would operate as a release to deft.—*COCKS v. NASH* (1832), 9 Bing. 341; 2 Moo. & S. 434; 2 L. J. C. P. 17; 131 E. R. 643; *subsequent proceedings* (1833), 9 Bing. 723; (1834), 4 Moo. & S. 162.

Annotation:—*Mentd.* *Teede v. Johnson* (1856), 11 Exch. 840.

797. — Bequest of debt to one—Death of legatee in lifetime of testator.]—A bequest by the obligee to one of joint obligors, of a debt due on the bond, in the following terms:—"I remit & forgive to T., £500 which he stands indebted to me on his bond, & I direct the bond to be delivered up to him, and cancelled," is merely a personal legacy to T., & lapses by his death in the lifetime of testator,

person who had a bond executed in his favour by one of three brothers forged the signatures of the other two brothers to the bond:—*Held*: a material alteration in a bond is, if fraudulently made, sufficient to render the bond void.—*GOGUN CHUNDER GHOSH v. DHURONIDHUR MUNDUL* (1881), 1 L. R. 7 Cal. 616; 9 C. L. R. 257.—*IND.*

Sect. 11.—Of co-obligors. Sect. 12. Part XI.]

for, notwithstanding the terms in which it is bequeathed, such a bequest does not operate by way of equitable release, or as an extinguishment of the debt, & the surviving co-obligor, & the representatives of the deceased legatee, are not discharged from payment of the money due on the bond.—*IZON v. BUTLER* (1815), 2 Price, 34; 146 E. R. 13.

Annotation:—*Mentd. A.-G. v. Holbrook* (1823), 12 Price, 407.

798. — Two sued—Release of third.]—Where in the condition of a money bond it appears that three persons are to repay the money advanced absolutely, & two of them are sued on the bond, they cannot plead that they were only sureties for the third, whose representative had been discharged by a release from the obligee.—*ASHBEE v. PIDDUCK* (1836), 1 M. & W. 564; 2 Gale, 116; Tyr. & Gr. 1016; 5 L. J. Ex. 251; 150 E. R. 559.

Annotation:—*Mentd. Husband v. Davis* (1851), 10 C. B. 645.

799. Bound jointly & severally—Seals of some destroyed—Laches of obligee.]—Deft.'s testator was bound in a bond with two others jointly & severally. The seals of the two others were eaten by mice & rats. In an action of debt against deft. alone on the bond:—*Semble*: judgment ought to be given to deft., on the ground that the absence of the seals of all parties was an act or laches of the obligees.—*BAYLY v. GARFORD* (1641), March, 125; 82 E. R. 441.

800. — —.]—*SEATON v. HENSON*, No. 762, *ante*.

Seal of one destroyed—By one co-obligee.]—In 1808, J. & his brother, R., executed a joint & several bond for securing £3,000 to certain other members of the family. R. died in 1817, & the bond was cancelled as to him, by removing his seal & obliterating his name. J. became bkpt. & the sole surviving obligee, who had never given his consent to the cancellation, sought to prove in the bkpcy.:—*Held*: in the circumstances, the cancellation or mutilation of the bond, as to the execution of the bond by R., did not affect the right of proof against bkpt.'s estate.—*Re SMITH, Ex p. SMITH* (1843), 3 Mont. D. & De G. 378; 1 L. T. O. S. 456; 7 Jur. 864.

802. Discontinuance of action against one.]—*Qu.*: whether a *retraxit* entered in an action of debt on bond against one of two joint & several obligors could be pleaded in bar to a second action on the same bond.—*DENNIS v. PAYN* (1639), Cro. Car. 551; March, 95; 79 E. R. 1074; *sub nom.* *DENYS v. PAINE*, W. Jo. 451.

803. — Execution against one.]—Where two are bound in £100 to J. jointly & severally, recovery & execution against one is no bar against the other, for execution is not any satisfaction of the £100 demanded.—*BROOME v. WOOTON* (1605), Yelv. 67; 80 E. R. 47; *sub nom.* *BROWN v. WOOTON*, Cro. Jac. 73; Moore, K. B. 762.

Annotations:—*Consd. Lechmere v. Fletcher* (1833), 1

Cr. & M. 623; *Buckland v. Johnson* (1854), 15 C. B. 145. *Fold. Brinsmead v. Harrison* (1872), L. R. 7 C. P. 547. *Refd. King v. Hoar* (1844), 13 M. & W. 494. *Mentd. Greenlands v. Wilmshurst & London Assoon. for Protection of Trade.* [1913] 3 K. B. 507.

804. — — & escape therefrom.]—The escape from execution of one of two joint & several obligors does not discharge the debt, but an action lies against the other.—*PENDAVIS v. KENSHAM* (1619), Cro. Jac. 531; 79 E. R. 455.

805. — — —.]—If one obligor be in execution & the sheriff suffer him to escape, the obligee may sue the other obligor, notwithstanding he has remedy against the sheriff.—*WHITEACRES v. HAMKINSON* (1627), Cro. Car. 75; 79 E. R. 666.

Annotations:—*Consd. Lechmere v. Fletcher* (1833), 3 Tyr. 450. *Refd. Goodman v. Chase* (1818), 1 B. & Ald. 297; *Blyth v. Fladgate* (1890), 39 W. R. 422. *Mentd. Tonkin v. Croker* (1703), 2 Ld. Raym. 860.

806. — — & discharge therefrom.]—Three parties having given a joint & separate bond were sued jointly, & a joint judgment obtained against them. One was taken in execution, but discharged out of custody by consent of pltf., on giving a promissory note for a portion of the debt:—*Held*: the other defts. could not be taken in execution under the judgment, the discharge of one operating as a release to the others.—*PHILLIPS v. JONES, DAVIS* (1846), 6 L. T. O. S. 414.

807. — Deed poll release of one—Breaches before execution of.]—A. & B. entered into a joint & several bond, B. being surety for A. After the accruing of the cause of action the obligees, without the priority or consent of B., by deed poll released A. from his liability, with a proviso that such release should not extend to release any other party to the bond. In an action against B. on the bond:—*Held*: the obligees were not precluded from suing deft. in respect of breaches accruing before the execution of the deed poll.—*PRICE v. BARKER* (1855), 4 E. & B. 760; 24 L. J. Q. B. 130; 25 L. T. O. S. 51; 1 Jur. N. S. 775; 3 C. L. R. 927; 119 E. R. 281.

Annotations:—*Consd. Duck v. Mayeu*, [1892] 2 Q. B. 511. *Refd. Bailey v. Edwards* (1864), 4 B. & S. 761; *Bateson v. Gosling* (1871), L. R. 7 C. P. 9.

808. — Composition from one.]—*WILSON v. LLOYD*, No. 739, *ante*.

809. — —.]—*CRAGOE v. JONES*, No. 743, *ante*.

— **Covenant not to sue.]—**See Sect. 5, subsect. 2, *ante*.

— **Alteration.]—**See Sect. 8, *ante*.

Liability on joint & several bonds.]—See Part VI., Sect. 2, *ante*.

SECT. 12.—OTHER CASES.

810. Lessee to pay annuity during term—Surrender of lease.]—Where the lessee of a term entered into an obligation to the lessor to pay an annuity during the term to a third person:—*Held*: the surrender of the term to the lessor did not discharge the annuity, & the lessee's failure to pay it was a forfeiture of the obligation, for if he had

jointly & severally bound in a bond for £10,000, to a bank; three of them paid up £1,500; a stranger to the bond paid up the balance, took an assignation to the bond, & refused to accept full payment of that balance from the parties, who had paid £1,500, & grant them an assignation of the bond:—*Held*: barred from claiming against the first three obligants, in so far as he had thereby cut off their right of relief.—*GILMOUR v. FINNIE* (1882), 11 Sh. (Ct. of Sess.) 193.—*SCOT*.

PART X. SECT. 11.

798 i. Bound jointly—Some Fresh bond from rest—Whether latter released.]—Where an obligee sues some of the persons jointly liable to him under a bond, & takes another bond from the rest for what he considers to be their share of the debt, he does not discharge the latter from their liability to contribute according to the shares in which they are liable among themselves, nor does his transaction with them destroy the joint liability.—*SHUSHEE MOHUN PAL CHOWDERY v.*

RAM KOOMAR KOONDOO (1874), 22 W. R. 193.—*IND*.

808 i. Bound jointly & severally—Judgment against all—Release of one.]—A. & B. executed their joint & several bonds, & judgment was marked on each bond separately. Subsequently the judgment creditors released the lands of A.:—*Held*: the release of A. did not release B.—*Re GERVAIS' ESTATE*, [1903] 1 I. R. 172.—*IR*.

*i. — Payment by stranger—Release of some.]—*Six co-obligants were

not made the surrender he might have enjoyed the property until the end of the term, & by his own act the lease was determined.—*FORTH v. HOLBOROUGH* (1594), Poph. 39; 79 E. R. 1158.

811. Covenants of lease—Determination of rent.]—A bond to perform the covenants in a lease is defeated by the determination of the rent.—*DRUE v. BAILIE* (1675), 1 Freem. K. B. 402; 89 E. R. 299.

812. Notice—Fidelity bond.]—The obligor of a bond conditioned for the faithful service of A. whilst in the employ of B. cannot discharge himself by giving notice, that after a certain period he will be no longer answerable; nor can the personal representative of the obligor discharge himself by such notice.—*CALVERT v. GORDON* (1828), 7 B. & C. 809; Dan. & Ll. 173; 3 Man. & Ry. K. B. 124; 7 L. J. O. S. K. B. 77; 108 E. R. 925.

Annotations:—*Consd.* Lloyd's v. Harper (1880), 16 Ch. D. 290; *Re Crace, Balfour v. Crace*, [1902] 1 Ch. 733. *Mentd.* Kingsford v. Dutton (1850), 1 L. M. & P. 479.

813. Giving time—Principal & surety—Award.]—To an action on a replevin bond, entered into by the tenant & two sureties, upon a distress for rent, the sureties pleaded that the replevin suit, whilst pending, was referred to an arbitrator, without any notice to or consent of the sureties, that, after enlarging the time, he made his award, & that the sureties were thereby discharged from their obligations:—*Held*: the plea was bad, as the facts therein stated could not be pleaded as a bar

to the action, as they amounted to a part discharge only, & the only plea of discharge from the performance of the condition of the replevin bond would be a plea of a discharge by a writing under seal.—*ALDRIDGE v. HARPER* (1833), 10 Bing. 118; 3 Moo. & S. 518; 2 L. J. C. P. 274; 131 E. R. 850.

; further, GUARANTEE.

814. Presumption—Bond in obligor's possession at death.]—In 1852 the trustees of a marriage settlement, on the written consent of the wife, lent the trust fund in cash to the husband on the security of his bond in a penal sum, conditioned for repayment to the trustees of the sum advanced with interest at 4 per cent. *per annum* six months after date. The husband died in 1896. At his death the bond was found in his possession. He never, either during his wife's lifetime or afterwards, paid any interest on the bond or gave any written acknowledgment of his indebtedness under it:—*Held*: no presumption of discharge of the bond arose from the mere fact of its being in the obligor's possession at his death.—*Re DIXON, HEYNES v. DIXON*, [1900] 2 Ch. 561; 69 L. J. Ch. 609; 83 L. T. 129; 48 W. R. 665; 44 Sol. Jo. 515, C. A.

Annotation:—*Mentd.* *Re Drax, Savile v. Drax*, [1903] 1 Ch. 781.

Making obligor executor.]—See EXECUTORS & ADMINISTRATORS.

Part XI.—Lost, Stolen, and Destroyed Bonds.

815. Relief—Concurrent jurisdiction.]—Though a ct. of law will permit pltf. to declare upon a lost bond, that does not oust the concurrent jurisdiction of the Ct. of Equity.—*ATKINSON v. LEONARD* (1791), 3 Bro. C. C. 218; 29 E. R. 499, L. C.

Annotations:—*Consd.* Toulmin v. Price (1800), 5 Ves. 235. *Reid.* Wright v. Maldstone (1855), 1 K. & J. 701. *Mentd.* Russell v. Ashby (1799), 5 Ves. 96; Bromley v. Holland (1802), 7 Ves. 3; Etches v. Lance (1802), 7 Ves. 417; Howden v. Rogers (1812), 1 Ves. & B. 129; Stewart v. Graham (1815), 19 Ves. 313.

816. ——— Affidavit of loss—Offer of indemnity.]—No relief will be granted in equity on a lost instrument, where there is no affidavit of the loss, & no offer of indemnity. As to an action on a lost bond, the practice of cts. of law in dispensing with *proferit* has not destroyed or affected the ancient & acknowledged jurisdiction of cts. of equity.—*WALMSLEY v. CHILD* (1749), 1 Ves. Sen. 341; 27 E. R. 1070, L. C.

Annotations:—*Reid.* Mossop v. Eadon (1810), 16 Ves. 430; Cockell v. Bridgeman (1841), 4 Beav. 499; Wright v. Maldstone (1855), 1 K. & J. 701. *Mentd.* Grant v. Vaughan (1764), 1 Wm. Bl. 485.

PART X. SECT. 12.

a. Performance of work—Substitution of fresh agreement.]—When the obligor in a bond agrees, if required by the obligee, to perform certain work, & subsequently, by agreement between the obligor & the obligee, an absolute obligation to do the work is substituted, the effect of the latter agreement is to discharge the obligation created by the bond.—*OTTAWA CORPN. v. OTTAWA ELECTRIC STREET RY. CO.* (1901), 1 O. L. R. 377; 21 C. L. T. 289.—CAN.

b. Whether legacy satisfaction.]—On a bond made by deceased payments were made from time to time by the administrator, but the bond was never fully paid. The obligee signed a quit-

claim deed to the administrator reciting that all debts due by deceased were paid. The administrator died leaving a legacy to the obligee, who filed a claim against the administrator's estate for the balance due on the bond:—*Held*: the legacy was not given in satisfaction of the bond, & the claim was allowed on bond for amount unpaid & interest from the date when the claim was filed.—*Re DALE* (1911), 20 O. W. R. 546; 3 O. W. N. 329.—CAN.

c. ———.]—A father, upon his daughter's marriage, executed, to her intended husband, his bond, conditioned to pay £800 by instalments, & afterwards bequeathed £800 to her:—*Held*: this legacy was not a satis-

817. Principal & surety—Remedy against surety.]—The obligee of a bond given by principal & surety to secure a loan, has a remedy against the surety in equity, though the bond be lost, for having parted with his money there is good consideration for the bond. *Qu.*: whether if the obligee of a voluntary bond lose it, he has a remedy against the obligor in equity.—*UNDERWOOD v. STANEY* (1866), 1 Cas. in Ch. 77; 22 E. R. 703, L. C.

;—If A. be bound in a bond for payment of money, & B. be bound with him as his surety only, & the bond happens to be lost, equity will set up the bond, as well against the surety, as against the principal, because the bond was once a legal charge against both.—*SHEFFIELD v. CASTLETON (LORD)* (1700), 1 Eq. Cas. Abr. 93; 21 E. R. 904.

819. ——— Principal out of jurisdiction.]—Relief will be granted upon a lost bond against sureties, the principal being out of the jurisdiction, upon pltf. giving an indemnity against demands by himself, or persons claiming under him, by virtue of the bond, & such costs, damages, &

faction of the debt due to her husband.—*HALL v. HILL* (1841), 4 L. Eq. R. 27; 1 Dr. & War. 94; 1 Con. & Law. 120.—IR.

PART XI.

d. Relief—In equity.]—The jurisdiction of equity in the case of lost bonds exists also in the case of destroyed bonds.—*FRONTENAC COUNTY v. BREDEN* (1870), 17 Gr. 645.—CAN.

e. Seal torn off by obligor—Trover.]—Trover may be maintained against the obligor of a bond who has torn off the seal, & damage recovered against him to the amount of the penalty.—*BANK OF UPPER CANADA v. WIDMER* (1832), 2 O. S. 256.—CAN.

226; 58 L. T. 64; 36 W. R. 460; 3 T. L. R. 760, C. A.

Annotation:—*Mentd.* Robertson v. Willmott (1909), 25 T. L. R. 681.

829. Joint & several obligees—Separate actions.]—Several actions will not lie on a joint & several bond.—SPENCER v. DURANT (1688), 1 Show. 8; Comb. 115; 89 E. R. 413.

Annotation:—*Reid.* Johnson v. Wilson (1741), Willes, 248.

830. Changing obligees—Master & Fellows of college.]—A bond to Dr. C., the Master, Fellows, & Scholars, etc., of Sussex & Sidney College, *solvendum* to the Master, Fellows, & Scholars, is a bond taken in their corporate capacity, so that an action will lie upon it at the suit of the Master, Fellows, & Scholars notwithstanding the death of the Master, Dr. C.—SUSSEX & SIDNEY COLLEGE (MASTER) v. DAVENPORT (1747), 1 Wils. 184; 95 E. R. 563.

See, further, CORPORATIONS.

831. — Partnership—Members at time of execution.]—An action may be maintained upon a bond expressed to be payable to a mercantile firm, by the persons who actually constituted the firm when the bond was executed.—MOLLER v. LAMBERT (1810), 2 Camp. 548, N. P.

See, further, PARTNERSHIP.

832. — Trustees of company.]—A bond given to trustees to secure the faithful services of a clerk to an insurance co. which is no corp'n., may be put in suit by the trustees for a breach of faithful service by the clerk committed at any time during his continuance in the service of the actual existing body of persons carrying on the same business under the same name, notwithstanding any intermediate change of the original holders of the shares by death or transfer, the intention of the parties to the instrument being apparent to contract for such service to be performed to the co. as a fluctuating body, & the intervention of the trustees removing all legal & technical difficulties to such a contract made with, or suit instituted by, the co. themselves as a natural body.—METCALF v. BRUIN (1810), 12 East, 400; 104 E. R. 156.

Annotations:—*Distd.* Leadley v. Evans (1824), 2 Bing. 32. *Reid.* Buckhouse v. Hall (1856), 6 B. & S. 507.

See, further, COMPANIES.

833. — Treasurer of friendly society—Bond to previous treasurer.]—Declaration by B., a treasurer of a friendly society, on a bond to A., then being treasurer. Plea, *non est factum*. The bond given in evidence was to A., without stating him to be treasurer to the society:—*Held*: B. was entitled to recover.—CARTRIDGE v. GRIFFITHS (1817), 1 B. & Ald. 57; 106 E. R. 21.

See, further, FRIENDLY SOCIETIES.

834. — Overseers of poor—Bond to previous overseers.]—*Held*: under 54 Geo. 3, c. 170, s. 8, an action on a bond, given to the overseers to indemnify the parish against the expense of an illegitimate child, must be brought in the names of the overseers in office at the time of commencing the action, though they might not be the overseers to whom the bond was given.—ADDEY v. WOOLLEY

(1819), 3 Moore, C. P. 21; 8 Taunt. 691; 129 E. R. 552.

Annotations:—*Reid.* Graves v. Colby (1838), 9 Ad. & El. 356. *Mentd.* Timms v. Williams (1842), 3 Q. B. 413.

835. — Board of guardians—Action by treasurer.]—An Act of Parliament, after appointing a number of persons guardians of the poor of a parish, & declaring that seven should be a quorum, enacted that the guardians should sue & be sued in the name of their treasurer, & that no action that might be brought by them or any of them in the name of the treasurer, should abate, etc. A bond for the due performance of a poor rate collector's duties having been executed to seven of the guardians:—*Held*: an action upon the bond was well brought in the name of the treasurer.—KINGSFORD v. DUTTON (1850), 1 L. M. & P. 479.

836. Assignee.]—*Held*: an assignee of a bond, who could not bring an action in his own name, could apply to a ct. of equity to be paid the principal & interest, without praying a circuit, *i.e.*, that a trustee might bring an action at law.—SCOTT v. ELLERS (1754), 3 Keny. Ch. 95; 96 E. R. 1320, L. C.

837. ——Where a bond has been given to secure money advanced to a co. under & in pursuance of Co.'s Clauses Consolidation Act, 1845 (c. 16), & the bond is subsequently transferred by the obligee, an action to recover the amount due thereon may be brought in the name of the transferee.—VERTUE v. EAST ANGLIAN RYS. CO. (1850), 5 Exch. 280; 1 L. M. & P. 302; 6 Ry. & Can. Cas. 252; 19 L. J. Ex. 235; 155 E. R. 120; *sub nom.* MILLS v. EAST ANGLIAN RY. CO., 15 L. T. O. S. 116.

Corporation.]—*See CORPORATIONS.*

SUB-SECT. 2.—DEFENDANTS.

838. Joint bond—General rule—Joinder of all.]—Two were bound in an obligation & *quibet eorum conjunctim*, & an action was brought against one alone:—*Held*: it was not maintainable, by reason of the word *conjunctim*.—WIGHTMAN v. CHARTMAN (1588), Gouldsb. 83; 75 E. R. 1011.

839. — — — — —.]—Where two are jointly bound in a bond neither can say that the bond is not his deed, but either may plead in abatement the non-joinder of his co-obligor.—WHELPDALE'S CASE (1604), 5 Co. Rep. 119 a.; 77 E. R. 239.

Annotations:—*Apld.* Evans v. Lewis (1794), 1 Wms. Saund. 291. *Reid.* Chappel v. Vaughan (1669), 1 Sid. 420; Boson v. Sandford (1690), 1 Show. 101; Collins v. Blantern (1767), 2 Wils. 341; Abbot v. Smith (1774), 2 Wm. Bl. 947; Richards v. Heather (1817), 1 B. & Ald. 29. *Mentd.* Winchcombe v. Pigot (1614), 2 Bulst. 246; Lyn v. Wyn (1665), O. Bridg. 122; Prigg v. Adams (1692), 2 Salk. 674; Thompson v. Leach (1697), 1 Ld. Raym. 313; Wankford v. Wankford (1702), 1 Salk. 299; Colton v. Goodridge (1776), 2 Wm. Bl. 1108; Edwards v. Brown (1831), 1 Cr. & J. 307; Hill v. Manchester & Salford Water Works Co. (1833), 5 B. & Ad. 866; Ward v. Lumley (1860), 24 J. P. 150; Latter v. White (1870), L. R. 5 Q. B. 622; David v. Sabin, [1893] 1 Ch. 523.

840. — — — — —.]—If one obligor alone be sued on a joint bond, he cannot take advantage

m. Changing obligee—Lieutenant-Governor—Successor in office.]—Where pltf. declared in debt as "Gov.-Gen. of C. & judge of the ct. of probate in U. C.," on a bond made by defts. to "J. C., at the time of the execution thereof being Lieut.-Gov. of U. C., & judge of the ct. of probate therein, & to his successor in office," & assigned as a breach the nonpayment of the penalty to the said "J. C., or any other person or persons whatever," whereby an action had accrued to pltf. as

"Gov.-Gen., & judge of the ct. of probate, & successor of J. C.," the declaration was held bad for not showing where or when pltf. became the successor of J. C., & for averring that the action had accrued to pltf. as "Gov.-Gen. & judge of the ct. of probate."—BAGOT v. MCKENZIE (1843), 6 O. S. 580.—CAN.

833 i. — Treasurer—Bond to previous treasurer.]—A bond & warrant of attorney given to A., treasurer of,

etc., & his successors contained a release of errors. A succeeding treasurer sought to enter judgment on it:—*Held*: pltf. being acting treasurer was entitled to enter judgment.—WESTROPP v. M'ELIGOTT (1842), Jebb & B. 211.—IR.

836 i. Assignee.]—The exor. of the assignee of a bond may bring an action upon it.—SCRIBNER v. GIBBON (1858), 4 All. 182.—CAN.

BONDS.

Sect. 1.—Parties: Sub-sect. 2. Sects. 2 & 3: sect. 1.]

of it on *non est factum*, but must plead the matter in abatement.—**STEAD v. MOON** (1606), Cro. Jac. 152; 79 E. R. 133.

Annotation:—Refd. Abbot v. Smith (1774), 2 Wm. Bl. 947. **841.** ————*]*—If in debt on bond it appears upon oyer that another person is mentioned in the bond to be bound jointly with deft., he must not demur, but plead in abatement, that the other person sealed the bond and is still alive.—**CABELL v. VAUGHAN** (1669), 1 Saund. 291; 1 Vent. 84; 2 Keb. 528; 85 E. R. 389; *sub nom.* **CHAPPEL v. VAUGHAN**, 1 Sid. 420.

Annotations:—Folld. Gilbert v. Bath (1722), 1 Stra. 503. *Apld.* Evans v. Lewis (1794), 1 Wms. Saund. 291. *Refd.* Abbot v. Smith (1774), 2 Wm. Bl. 947; Scott v. Godwin (1797), 1 Bos. & P. 67; Addison v. Gibson (1847), 8 L. T. O. S. 467; Kendall v. Hamilton (1879), 4 App. Cas. 504; Royal Albert Hall Corpn. v. Winchelsea (1891), 7 T. L. R. 362; Rodriguez v. Speyer, [1919] A. C. 59. *Mentd.* Vernon v. Jefferies (1740), 7 Mod. Rep. 358; Fowler v. Rickerby (1841), 2 Man. & G. 760; Alton v. Mid. Ry. Co. (1865), 19 C. B. N. S. 213; London Assn. for Protection of Trade v. Greenlands, [1916] 2 A. C. 15.

842. ————*In equity.]*—A bill for payment of money upon a bond must be against all the obligors, or else pltf. can have no decree.—**ANON.** (circa 1670), Freem. Ch. 127; 22 E. R. 1104.

843. ————*]*—Where several are bound in a bond, the ct. may proceed against any, & make a decree, though all the obligors are not before the ct. The reason why all the obligors are to be before the ct. is a rule of conscience & may be dispensed with in equity.—**CRANBORNE (LADY) v. CRISPE** (1673), Cas. temp. Finch, 105; 23 E. R. 57.

844. ————*]*—If deft. in debt upon a bond would take advantage of another's being jointly bound, he must plead it in abatement, & cannot demur upon oyer, for if he does, the ct. will presume the other did not seal it.—**GILBERT v. BATH** (1722), 1 Stra. 503; 93 E. R. 662.

845. ————*]*—An action lies against one of two joint obligors, but the joint contract may be pleaded in abatement.—**CLOUD v. NICHOLSON** (1724), 8 Mod. Rep. 242; 88 E. R. 173.

846. ————*]*—If pltf. show on his declaration in debt on bond against two, that the bond is executed by three, it is good matter of plea in abatement, or in arrest of judgment, but it is no ground of nonsuit on the plea of *non est factum*.—**SOUTH v. TANNER** (1810), 2 Taunt. 254; 127 E. R. 1074.

847. ————*Exception—Death of one.]*—Where three are bound & action is brought against two, pltf. must set forth that the third is dead.

If two or three are bound & one dies, action cannot be brought against the survivor & the exor. of deceased jointly; but if three are bound jointly & action is brought against two without mentioning the third, it is doubtful if it be good, for perhaps the third did not seal.—**OSBORNE v. CROSBERN** (1665), 1 Sid. 238; 82 E. R. 1080.

Annotation:—Mentd. Scott v. Godwin (1797), 1 Bos. & P. 67.

848. ————*Insolvent.]*—Where there were three obligors in a bond, & the obligee brought the principal, & the representative of one of the sureties before the court, & by his bill stated

the third was dead insolvent:—*Held:* in the circumstances, the objection for the want of parties should be overruled.—**MADDOX v. JACKSON** (1746), 3 Atk. 405; 26 E. R. 1034, L. C.

Annotations:—Apld. Seddon v. Connell (1840), 10 Sim. 58. *Refd.* Haywood v. Ovey (1821), 6 Madd. 113. *Mentd.* Hoare v. Contencin (1779), 1 Bro. C. C. 27; Creasor v. Robinson (1851), 14 Beav. 589.

849. Joint & several bond—General rule—Right to sue one—Death of one.]—The obligee on a joint & several bond, who is exor. of the exor. of one of the obligors, may sue the survivor, unless it appear that he has received satisfaction out of the assets of deceased.—**COCK v. CROSS** (1672), 2 Lev. 73; 83 E. R. 456; *sub nom.* **CROSSE v. CORKE**, 3 Keb. 116; *sub nom.* **ANON.**; 1 Freem. K. B. 49.

850. ————*]*—Where two obligors in a bond are bound jointly & severally, & one dies, the exors. of the deceased obligor may be sued in equity for the debt without making the surviving obligor a party.—**COLLINS v. GRIFFITH** (1725), 2 P. Wms. 313; 24 E. R. 745, L. C.

Annotation:—Refd. Haywood v. Ovey (1821), 6 Madd. 113.

851. ————*]*—If obligors are bound jointly & severally, the obligee may sue them severally in equity, as well as at law.—**STANLEY v. STOCK** (1730), Mos. 383; 25 E. R. 452, L. C.

852. ————*]*—If A. & B. are bound in a bond jointly & severally to J. he may elect to sue them jointly or severally; but if he sues them jointly, he cannot sue them severally, for the pendency of one suit may be pleaded in abatement of the other.—*Ex p.* **ROWLANDSON** (1735), 3 P. Wms. 405; 24 E. R. 1121, L. C.

Annotations:—Mentd. *Ex p.* Bevan (1803), 9 Ves. 223; *Re* Barrow, *Ex p.* Moulton (1832), 1 Deac. & Ch. 44; *Re* Barrow & Goddes, *Ex p.* Christy (1832), 2 Deac. & Ch. 155; *Re* Brown, *Ex p.* Hill (1837), 2 Deac. 249.

853. ————*Insolvent co-obligor.]*—To a bill against an obligor in a joint & several bond, an insolvent co-obligor need not be a party.—**ANGERSTEIN v. CLARK** (1790), 3 Swan. 147, n.; Dick. 738; 36 E. R. 811, L. C.

854. ————*]*—Bill against the principal obligor & the representatives of another obligor, a surety in a joint & separate bond. The principal obligor was insolvent, & so stated in the bill:—*Held:* he might be made a party, & was not entitled to his costs.—**HAYWOOD v. OVEY** (1821), 6 Madd. 113; 56 E. R. 1035.

855. ————*]*—Three actions were brought against three obligors of a joint & several bond, conditioned for the good behaviour of the manager of a joint stock banking co. After the declarations were delivered, the ct., on motion by defts., ordered that, pltf. proceeding in whichever of the actions he should select, proceedings in the other two should be stayed till the first was tried, defts. undertaking to be bound by the event of the cause first tried, but pltf., after such trial, to be at liberty, if disposed, to proceed in the other two.—**ANDERSON v. TOWGOOD** (1841), 1 Q. B. 245; 113 E. R. 1123.

Annotations:—Refd. Jones v. Pritchard (1849), 18 L. J. Q. B. 104. *Mentd.* Newton v. Belcher (1846), 8 L. T. O. S. 89.

856. ————*Joinder of all.]*—To a bill filed by an obligee of a joint & several bond for payment of his debt, all the obligors must be made parties.

PART XII. SECT. 1, SUB-SECT. 2.

847 i. Joint bond—Exception—Death of one—Joinder of administrator.]—In an action on a bond & security it was objected that the bond was not several, but the joint obligation of deft. & G., deceased, & that G.'s administrator ought to be made a party to the action:—*Held:* G.'s administrator must be made a party as prayed.—**CLUCAS v.**

GAWNE (1845), Bluett, 294.—I. of M.

p. — Amendment of title of record.]—A declaration on a bond stated that I., W. & M., by their writing obligatory, acknowledged themselves bound in £50, which bond was lost. Defts. pleaded *non est factum*, & the general issue: at the trial, proof of a notice to produce being served on defts., & of a search made among the

papers of deceased obligee, & secondary evidence of the contents of the bond having been given by the person who filled it up, defts. then produced the instrument, & it appeared to be a joint & several bond executed by J., J. jun. & M.:—*Held:* the names J., J. jun. & M. might be struck out.—**HARE v. M'GAHEY** (1850), 13 I. L. R. 448; 2 Ir. Jur. 198.—IR.

BLAND v. WINTER (1823), 1 Sim. & St. 246; 57 E. R. 99.

857. Death of obligor—Joinder of representatives—Action against heir.]—Where an action was brought for interest on a bond and security originally granted by the father of deft., who was in possession as heir-at-law:—*Held*: the representatives of the original grantor must be made parties, the heir being no party to the bond.—

DINWOODIE v. CROW (1847), Bluet, 456.

Corporation.]—See CORPORATIONS.

SECT. 2.—THE WRIT.

858. Special indorsement—Payment of annuity.]

—The indorsement on a writ claimed £500 as the principal sum due on a bond conditioned for payment by the obligor to pltf. of an annuity of £26 during the life of a child & until she should attain the age of sixteen years by specified quarterly payments, & alleged that two of such payments were due & unpaid:—*Held*: pltf. was not entitled to proceed under R. S. C. Ord. 14, r. 1, to obtain final judgment, but was limited to the procedure specified in 8 & 9 Will. 3, c. 11, s. 8, & Ord. 13, r. 14.—**TUTHER v. CARALAMPI** (1888), 21 Q. B. D. 414; 23 L. J. N. C. 123; 59 L. T. 141; 52 J. P. 616; 4 T. L. R. 759; *sub nom.* **JUTHER v. CARALAMPI**, 37 W. R. 94, D. C.

Annotation:—**Distd.** **Gerrard v. Clowes**, [1892] 2 Q. B. 11.

859. — Common money bond.]—A writ in an action upon a common money bond within 4 & 5 Anne, c. 3, s. 12, can be specially indorsed under R. S. C. Ord. 3, r. 6, & pltf. can proceed under Ord. 14 for the purpose of obtaining final judgment.—**GERRARD v. CLOWES**, [1892] 2 Q. B. 11; 67 L. T. 204; *sub nom.* **GERARD v. CLOWES**, 61 L. J. Q. B. 487, D. C.

860. — Liquidated damages—Single event.]—A bond was executed by deft. for the payment of £100 to the pltf. The condition of the bond was that if deft. should at all times thereafter, in obedience to a perpetual injunction granted by the High Ct., refrain from trespassing on pltf.'s lands therein mentioned, or the walls, gates, or fences thereof, or inclosing same, & from pulling down or removing or otherwise injuring same, or inciting others to commit any such trespasses, the obligation should be void. Deft. committed a breach of the injunction:—*Held*: the condition of the bond depended on one event only, namely, a breach of the injunction, & the sum secured by the bond was a liquidated sum, to the recovery of which the procedure of R. S. C. Ord. 14, r. 1, was applicable.—**STRICKLAND v. WILLIAMS**, [1899] 1 Q. B. 382; 68 L. J. Q. B. 241; 80 L. T. 4; 15 T. L. R. 131, C. A.

Annotation:—**Refd.** *Re White & Arthur* (1901), 84 L. T. 594.

SECT. 3.—PLEADINGS.

SUB-SECT. 1.—STATEMENT OF CLAIM.

See, now, R. S. C., Ords. 19, 20.

861. Non-payment—In general.]—In an action of debt on bond, it is not necessary to aver a breach in non-payment of the money. It is

sufficient for pltf. to show the debt due, & then it lies on deft. to discharge himself.—**ASHBEE v. PIDDUCK** (1836), 1 M. & W. 564; 2 Gale, 116; Tyr. & Gr. 1016; 5 L. J. Ex. 251; 150 E. R. 559.

Annotation:—**Mentd.** **Husband v. Davis** (1851), 10 C. B. 645.

862. — No express covenant—Proviso only.]—If a bond contain only a proviso, & no express covenant, a breach cannot be assigned.—**SUFFIELD v. BASKERVIL** (1675), 2 Mod. Rep. 36; 86 E. R. 927.

Annotation:—**Refd.** **Brookes v. Drysdale** (1877), 3 C. P. D. 52.

863. — Due date.]—In debt on bond for the penalty on non-payment of the principal sum, it must be averred that it was not paid at the day.—**BAYNS v. BRIGHTON** (1638), Cro. Car. 515; 79 E. R. 1045.

864. — Action by assignee.]—In an action by the assignee of a bond it is sufficient to aver that the money was not paid to pltf.—**KENDAL v. BROMWICH** (1735), Fortes. Rep. 371; 92 E. R. 896, Ex. Ch.

865. — To person entitled.]—In debt on bond given to the obligee, conditioned for payment of an annual sum to the wife of the obligor, a breach assigned in non-payment of the annual sum to the obligee is ill, as it should have alleged the money to be due to the wife.—**LUNN v. PAYNE** (1815), 6 Taunt. 140; 1 Marsh. 495; 128 E. R. 986.

866. — Notice or request to pay.]—By the condition, which recited an agreement by pltf.s., bankers, to advance money not exceeding £200 at any one time, to B. on security, the bond was to be void if A., B., & C., or either of them, should pay to pltf.s. all such sums not exceeding £200 as pltf.s. should advance for or on account of bills from time to time drawn by B. on pltf.s., within three calendar months "after receiving notice to pay such sums":—*Held*: in assigning a breach of the condition, it was not enough to aver that deft. "had & received notice" that certain sums were due from B., without averring a notice or request to pay.—**BATSON v. SPEARMAN** (1838), 9 Ad. & El. 298; 3 Per. & Dav. 77; 112 E. R. 1225.

Annotation:—**Distd.** **Jones v. Williams** (1841), H. & W. 80.

867. — —.]—In debt on bond, the declaration stated that defts. & L. acknowledged themselves bound to pltf.s. in £8,000 to be paid to pltf.s., or to W., on request, & that thereby & by reason of the non-payment thereof, an action had accrued, etc.:—*Held*: it was unnecessary to allege a request, & non-payment to W. was sufficiently shown.—**KEPP v. WIGGETT** (1848), 6 C. B. 280; 17 L. J. C. P. 295; 11 L. T. O. S. 243; 12 Jur. 831; 136 E. R. 1259; *subsequent proceedings* (1849), 12 L. T. O. S. 430; (1850), 10 C. B. 35.

Annotation:—**Mentd.** **Turquand v. Hennet** (1849), 7 C. B. 179;

868. To account & pay—Rates—Quarter sessions.]—The condition of a bond, after reciting that the obligor had been nominated treasurer & receiver of the rates & assessments made for the county, upon his giving security to the clerk of the peace for the due & faithful execution of the trusts reposed in him according to statute, was, that the obligor should, when he was thereto required by the justices of the peace assembled at quarter sessions, or the major part of them, or by any committee of the magistrates duly appointed

PART XII. SECT. 2.

8601. Special indorsement—Damages.]—In an action upon a bond with a penalty conditioned for the payment of money by instalments, with interest in the meantime on the unpaid principal:

—*Held*: the claim is not the subject of a special indorsement, but is in the nature of a claim for damages.—**STAR LIFE ASSURANCE SOCIETY v. SOUTHGATE** (1898), 18 P. R. 151.—**CAN.**

86011.

—*—*—An action against

sureties in an appeal bond to recover pltf.s.' costs of an appeal is in the nature of a claim for damages requiring assessment, & a special indorsement of the writ of summons is inappropriate.—**APPLEBY v. TURNER** (1900), 19 P. R. 145.—**CAN.**

Sect. 3.—Pleadings: Sub-sects. 1 & 2.]

for that purpose by any order of the ct. of quarter sessions, then made, or thereafter to be made, well & truly account for all sums of money received by him by reason or on account of his office, & also should faithfully perform all the trusts reposed in him by virtue of his appointment:—*Held*: a breach of the condition was sufficiently assigned which stated that deft., while he was treasurer, received sums of money, & that he was required by the justices at sessions to account, but did not do so; it being unnecessary to allege that he had been required by an order of the ct. of quarter sessions, the words in the condition of the bond, "by any order of the ct. of quarter sessions then made, or thereafter to be made," applying only to the appointment of a committee, & not to the requisition by the justices to account.—*FARR v. HOLLISS* (1829), 9 B. & C. 315; 4 Man. & Ry. K. B. 230; 8 L. J. O. S. M. C. 14; 109 E. R. 117.

869. — Board of guardians.]—A bond was conditioned to be void if A., a poor rate collector, should, when requested by the guardians, pay to such banker or other person as they should appoint, all sums which he should collect when they amounted to £20, or if, in the event of his not paying according to the direction of the guardians, either of his sureties should, within twenty-one days after notice, pay any sums which he should not have paid according to such direction. A declaration upon the bond against one of the sureties averred that A., after the bond, & before being directed to pay, collected by virtue of his office sums amounting to £470, & that although a reasonable time for payment had elapsed before action, & before the twenty-one days' notice to the sureties, yet he made default. It then assigned two breaches, the first of which was non-payment by deft. twenty-one days after notice of the default of A., & the second, that while A. was collector he received sums amounting to £500 in respect of rates, & same remained in his hands, & although a reasonable time had elapsed, he had not paid same, though often requested, to the guardians or their treasurer, or any person appointed by them to recover same:—*Held*: (1) the declaration was not bad for omitting to aver that legal rates were made & delivered to A., or to set forth the names of the persons from whom they were collected; (2) the second breach was not a good breach of either branch of the condition.—*KINGSFORD v. DUTTON* (1850), 1 L. M. & P. 479.

870. — Appointment to & acceptance of office.]—Upon bond conditioned that a collector of poor rates shall render an account of money received, it is necessary to aver not only an appointment, but an acceptance by the person appointed, the office being merely a voluntary one, & not one cast on the party by law.—*SERRA v. WRIGHT* (1815), 6 Taunt. 45; 1 Marsh. 441; 128 E. R. 949.

871. Embezzlement.]—A declaration in debt on a bond, conditioned to make satisfaction within three months after proof made of goods embezzled

by an apprentice, & notice thereof given, must allege how much he embezzled, the manner in which the proof was made, & when the notice was given.—*LEE v. FYDGE* (1618), Cro. Jac. 488; 79 E. R. 416.

872. —.]—In debt on bond conditioned that if the apprentice of the obligee should purloin or embezzle anything to his master's damage, the obligor will pay it, a breach that he embezzled & purloined £200 is well assigned.—*THORNICROFT v. BARNES* (1713), 10 Mod. Rep. 149; 88 E. R. 669.

873. —.]—If the condition of a bond is, that A. shall not embezzle any money that shall come to his hands on account of his master, it is necessary in an action against the obligor, to state, in the breach, what particular sum of money was embezzled, & how, or from whom it was received.—*JONES v. WILLIAMS* (1779), 1 Doug. K. B. 214; 99 E. R. 139.

Annotations:—*Dbtd. Shum v. Farrington* (1797), 1 Bos. & P. 640; *Barton v. Webb* (1800), 8 Term Rep. 459. *Consd. Gale v. Reed* (1806), 8 East, 80.

874. Award—Delivery.]—In debt on bond to perform an award, pltf. must aver that it was ready to be delivered, etc. where the submission is in those terms.—*JENKINSON v. ALLISSON* (1675), Freem. K. B. 415; 3 Keb. 513, 556; 89 E. R. 308.

Annotation:—*Refd. Winter v. White* (1819), 1 Brod. & Bing. 350.

875. — Date.]—In debt on bond for performance of an award it is not necessary to state the date of the award, for if it be alleged to have been made on a day which is within the time of the submission, it is sufficient.—*ARNOTE v. BREAME* (1704), 6 Mod. Rep. 244; 87 E. R. 992; *sub nom. ARMITT v. BREAME*, 2 Ld. Raym. 1076; 1 Salk. 76; *sub nom. ARMOTE v. BREAM*, Holt, K. B. 212.

Annotation:—*Refd. Styles v. Wardle* (1825), 4 B. & C. 908.

876. — Words of award.]—Assignment of breaches in debt on bond to perform an award, in the words of the award:—*Held*: generally sufficient, although pltf. do not show that performance might have been effected, or that deft. had become enabled to carry it into effect by the circumstances having taken place on which it was to have been performed, the award being held to assume that they had; & the fact of such circumstances not having taken place, if they lay properly within deft.'s knowledge, should be pleaded & set out by him.—*WILLCOCKS v. NICHOLLS* (1814), 1 Price, 109; 145 E. R. 1347.

877. Performance of covenants—Assignment of lease.]—Debt on bond for performance of covenants in an assignment of a lease, in which it was covenanted that it then was a good & indefeasible lease, & that pltf. should quietly enjoy during the whole residue of the term without any let or disturbance of defts. A stranger entered, & breach was assigned that at the time of making the assignment the lease was not good & indefeasible:—*Held*: the breach was well assigned, for the first sentence was distinct, & contained a general covenant not restrained by the latter

PART XII. SECT. 3, SUB-SECT. 1.

r. Award — Non-compliance.]—In an action on a bond conditioned for performance of an award, the particular breach relied on must be stated in the declaration: it is not sufficient to state generally that deft. refused to comply with the award, & would not perform the acts on his part to be performed according to the directions of the award.—*BURGOYNE v. BURGOYNE* (1827), Chip. 120.—CAN.

s. Common money bond — Setting out condition—Assignment of breaches.]—Pltfs., who had taken from defts. a bond for the due performance of a collector's duty, with a condition in it prescribed by by-laws, declared upon it as upon a common money bond, without setting out the condition; deft. pleaded *non est factum*:—*Held*: it would have been better for pltfs. to have set out the condition in their declaration, & assigned breaches.—

BROCK DISTRICT COUNCIL v. BOWEN (1850), 7 U. C. R. 471.—CAN.

t. Must show obligation by deed—"Bound."]—A declaration that deft. became bound, etc., whereby the bond became forfeited, sufficiently discloses an obligation by specialty; though the mere expression "bound" would not.—*PROVINCIAL INSURANCE CO. v. WALTON* (1865), 16 C. P. 62.—CAN.

sentence.—**GAINSFORD v. GRIFFITH** (1867), 2 Keb. 76, 201, 213; 1 Saund. 58; 85 E. R. 69; *sub nom.* **GAINSFORD v. GRIFFITH**, 1 Sid. 328.

Annotations:—**Consd.** **Nind v. Marshall** (1819), 1 Brod. & Bing. 319. **Refd.** **Browning v. Wright** (1799), 2 Bos. & P. 13; **Barton v. Fitzgerald** (1812), 15 East, 530; **Forde v. Wilson** (1818), 2 Moore, C. P. 592; **Osborne v. Eales** (1862), 2 Moo. P. C. C. N. S. 100. **Mentd.** **Scot v. Schwartz** (1739), 2 Com. 677; **Hankin v. Broomhead** (1804), 3 Bos. & P. 607; **Line v. Stephenson** (1838), 4 Bing. N. C. 678; **Webb v. James** (1841), 11 L. J. Ex. 38; **Branscombe v. Scarbrough**, **Branscombe v. Heath** (1844), 6 Q. B. 13; **Betts v. Burch** (1859), 28 L. J. Ex. 267; **Preston v. Dania** (1872), 42 L. J. Ex. 33.

878. — Particularity.—In an action on a bond for the performance of covenants, the breach assigned must be as particular as the covenants.—**TIBBS v. CLOW** (1719), 11 Mod. Rep. 312; 88 E. R. 1060.

879. Bond dated abroad.—A bond dated abroad may be alleged to have been made at any place in England.—**HIGHAM v. FLOWER** (1605), Cro. Jac. 76; 79 E. R. 64.

880. Signature or seal.—A declaration that deft. was indebted *per scriptum suum obligatorium* is sufficient, without saying *sigillo sigillatum*.—**ASHMORE v. RYPLEY** (1617), Cro. Jac. 420; 79 E. R. 359.

Bonds under 8 & 9 Will. 3, c. 11.—See Subsect. 2, *post*.

SUB-SECT. 2.—ASSIGNMENT OR SUGGESTION OF BREACHES UNDER 8 & 9 WILL. 3, c. 11, s. 8.

881. In general.—Debt on bond conditioned for payment of an annuity of £175 quarterly, during the life of G. Pleas, payment of the annuity at the days, & payment of the arrears after the days in the condition. Replication, that deft. did not pay the annuity or the arrears in manner & form as deft. alleged, but on the contrary pltf. suggested that during the life of G. £87 10s. for two quarterly payments became due, & was in arrear, & concluded to the country:—*Semble*: the replication was bad.

Under 8 & 9 Will. 3, c. 11, s. 8, there is no power of introducing any suggestion on the record except in the three cases of judgment upon demurrer, by confession, or *nil dicit* (**CHAMBRE, J.**).—**DE LA RUE v. STEWART** (1806), 2 Bos. & P. N. R. 362; 127 E. R. 667.

Annotation:—**Consd.** **Hudson v. Smith** (1827), 6 L. J. O. S. K. B. 146.

882. Necessity for—Interest on mortgage debt.—In an action of debt on bond, stating that A. having lent B. £1,000 B. had given him a mtge. deed conditioned that if B. should pay the interest until the principal was paid, then the bond should be void, it is not necessary to assign a breach, for the indenture need not be set forth.—**STONE v.**

TAVERNER (1716), 10 Mod. Rep. 329; 88 E. R. 720.

883. — Proof of damage.—8 & 9 Will. 3, c. 11, s. 8, was made in favour of defts., & is highly remedial, calculated to give pltf. relief up to the extent of the damage sustained, & to protect defts. against the payment of further sums than what was in conscience due, & also to take away the necessity of proceedings in equity to obtain relief against an unconscientious demand of the whole penalty in cases where small damages only had accrued. It is not in the power of pltf. to refuse to proceed according to that Act, in cases within the sect., but he must assign the breach of such covenants as he proceeds to recover the satisfaction for, & if deft. plead to issue, & the cause goes to a jury for trial, the jury of such cause must assess damages for such of the breaches assigned, as pltf., upon the trial of the issues, shall prove to have been broken.—**HARDY v. BERN** (1794), 5 Term Rep. 636; 101 E. R. 355.

Annotations:—**Refd.** **Walcot v. Goulding** (1799), 8 Term Rep. 126. **Mentd.** **Wall v. Rederiaktiebolaget Luggude**, [1915] 3 K. B. 66.

884. — — ——8 & 9 Will. 3, c. 11, s. 8 is compulsory on pltf., & he cannot enter up judgment for the whole penalty on a judgment by default, as he might have done at common law.—**ROLES v. ROSEWELL** (1794), 5 Term Rep. 538; 101 E. R. 302.

Annotations:—**Refd.** **Walcot v. Goulding** (1799), 8 Term Rep. 126; **Doe d. Jersey v. Smith** (1819), 7 Price, 281; **Jones v. Harrison** (1851), 17 L. T. O. S. 41.

885. — Annuity.—After judgment for pltf. on demurrer, in debt on a bond conditioned to pay an annuity, pltf. cannot take out execution for the arrears due, but must assign breaches on the record.—**WALCOT v. GOULDING** (1799), 8 Term Rep. 126; 101 E. R. 1303.

Annotation:—**Refd.** **Murray v. Stair** (1823), 2 B. & C. 82.

886. — — — Whole sum due on default.—Where one gives a counter security to another containing a covenant to pay an annuity & indemnify him, & also a warrant of attorney by way of collateral security, & it is agreed that in default of any one payment of the annuity judgment shall be entered up & execution issue for the whole sum specifically being the price of the annuity, it is not necessary to assign breaches, but execution may issue for the whole sum.—**HOWELL v. STRATTON** (1804), 2 Smith, K. B. 65.

887. — — — Collateral security.—Breaches need not be assigned on non-payment of an annuity secured by a warrant to confess judgment on a *mutuatus*.—**SHAW v. WORCESTER (MARQUIS)** (1830), 6 Bing. 385; 4 Moo. & P. 21; 8 L. J. O. S. C. P. 98; 130 E. R. 1328.

Annotation:—**Consd.** **Sherborn v. Huntingtower** (1863), 13 C. B. N. S. 742.

PART XII. SECT. 3, SUB-SECT. 2.

881 i. In general—Application of 8 & 9 Will. 3, c. 11.—The provisions of the above Act as to the assignment or suggestion of breaches, & as to judgment for the penalty standing as a security for damages in respect of future breaches, are in force in Ontario.—**STAR LIFE ASSURANCE SOCIETY v. SOUTHGATE** (1898), 18 P. R. 151.—CAN.

881 ii. — — ——The above Act is in force though virtually superseded by rules of the Code of Civil Procedure.—**MOORE v. ORFORD** (1908), 27 N. Z. L. R. 577.—N.Z.

a. Necessity for—Prior to trial.—Where the condition of a bond is set out & it appears that the bond is within the above Act, pltf. ought to suggest his breaches before trial, & cannot take

a verdict for the penalty, & suggest breaches afterwards.—**CAMPBELL v. LEMON** (1832), 2 O. S. 435.—CAN.

b. — Waiver.—The provisions of the above Act are mandatory, & cannot be waived by agreement between the parties.—**MONTGOMERY v. BYRNE** (1851), 1 I. C. L. R. 230; 4 Ir. Jur. 46.—IR.

c. S. P. DELACOUR v. MURPHY (1848), 13 I. L. R. 195; 1 Ir. Jur. 46.—IR.

885 i. — Annuity.—A. & B. entered into a joint & several bond, with a warrant of attorney to confess judgment thereon. The bond was a simple money bond, but the warrant of attorney referred to the provisions of an annuity deed executed contemporaneous therewith. By this deed A. granted an annuity to pltf., chargeable on lands in the deed named, & it

was agreed, that if any gale of this annuity should be in arrear, it should bear interest, & that a receiver should be appointed; & in case he should be interfered with in the receipt of rents, or in case the same should be insufficient, pltf. might proceed under the powers conferred by the deed or the judgment collateral therewith. Three gales of the annuity being in arrear, pltf. issued execution without a previous assignment of breaches:—**Held**: there should have been a suggestion of breaches.—**RYAN v. MASSY** (1852), 2 I. C. L. R. 642; 5 Ir. Jur. 15.—IR.

885 ii. — — ——It is not necessary to suggest breaches on a judgment obtained on a bond & warrant, with release of all errors, to secure an annuity.—**WOFFINGTON v. ARMSTRONG** (1832), Glascock, 209.—IR.

Sect. 3.—Pleadings: Sub-sects. 2 & 3.]

888. Award.]—In debt on bond, conditioned to perform an award, pltf. must assign a breach & cannot have judgment for the penalty & take out execution for the single sum awarded, though the measure of damages be ascertained by the award.—**WELCH v. IRELAND** (1805), 6 East, 613; 2 Smith, K. B. 666; 102 E. R. 1424.

Annotations:—*Refd.* Murray v. Stair (1823), 2 B. & C. 82. *Refd.* Gillingham v. Waskett (1824), M'Cle. 198.

889. — Indemnity bond.]—8 & 9 Will. 3, c. 11, s. 8, extends to a liability created by the breach of an indemnity bond, whereby the obligee is so far damnified as that he may be required to pay money in consequence of a forfeiture, although the matter of the liability should be in some sort collateral to the direct breach, & actual damnification has not ensued.

Where a party indemnified by bond is sued for damages in respect of the matter of the indemnity, pltf. recovers, if deft. in that action recover over against the indemnifier, he must assign as breach not only the damages & costs recovered against him, but also his own costs, sustained in defending the suit, although he have, as yet, in fact, paid nothing in respect or on account of such costs; or, if he do not so assign, he will be estopped from recovering, by *sci. fa.* on the judgment obtained on the bond, what he may afterwards be compelled to pay on that account.

Demurrer to a plea in *sci. fa.*, that pltf. might have suggested & assigned the damages as further breach of a bond already recovered on under the judgment obtained in the action on the bond, on which the *sci. fa.* was founded, overruled.—**HARRAP v. ARMITAGE** (1823), 12 Price, 441; 147 E. R. 772.

890. Post obit bond.]—A *post obit* bond, upon which a forfeiture has taken place, is not within 8 & 9 Will. 3, c. 11, & it is unnecessary to suggest breaches.—**MURRAY v. STAIR** (EARL) (1823), 2 B. & C. 82; 3 Dow. & Ry. K. B. 278; 107 E. R. 313.

Annotations:—*Consd.* England v. Watson (1842), 6 Jur. 763; *Gerrard v. Clowes*, [1892] 2 Q. B. 11. *Refd.* Smith v. Bond (1833), 10 Bing. 125. *Mentd.* Spicer v. Burgess (1834), 1 Cr. M. & R. 129; *Bowker v. Burdekin* (1843), 11 M. & W. 128; *Davis v. Jones* (1856), 17 C. B. 625; *Gudgen v. Besset* (1856), 6 E. & B. 986; *Cumberlege v. Lawson* (1857), 1 C. B. N. S. 709; *Wallis v. Littell* (1861), 5 L. T. 489; *London Freehold & Leasehold Property Co. v. Suffield*, [1897] 2 Ch. 608; *Strickland v. Williams* (1898), 68 L. J. Q. B. 241.

891. — By Crown.]—It is not necessary for the Crown to assign breaches.—**R. v. PERO** (1826), 1 Y. & J. 169; 148 E. R. 631.

Annotation:—*Mentd.* Lord Advocate v. Dunglas (1842), 9 Cl. & Fin. 173.

892. — Collateral agreement—& payment.]

892 i. — Collateral agreement—Payment of sum certain.]—Deft. executed a bond, with warrant of attorney to confess judgment in a penal sum, the only condition of the bond being for the payment of a less sum & interest. Contemporaneously with the execution of the bond pltf. wrote a letter to deft., by which he undertook that, upon deft. effecting a policy of assurance on his life in favour of pltf., for the smaller sum, & paying interest thereon upon the days therein specified, that he would not put the bond, or a judgment thereon, in force:—*Held*: in order to entitle pltf. to issue execution it was not necessary, either under 9 Will. 3, c. 10 (Ir.), or under C. L. P. Act, 1853, s. 145, to assign breaches; the object of the bond, in reserving the payment of the penal sum, not being to secure the performance of some duty or agreement, but to secure the payment of a

certain sum, which was a *bond fide* subsisting debt.—**QUIN v. O'KEEFE** (1859), 10 I. C. L. R. 393; 4 Ir. Jur. 257, 297.—IR.

892 ii. — — — Payment by instalments.]—Execution cannot be issued on a judgment entered on a warrant of attorney collateral with the money conditioned for payment by instalments, until breaches have been duly suggested on the bond.—**HALL v. BLACKWELL** (1860), 10 I. C. L. R. App. xxxviii.—IR.

892 iii. — — — .]—Although, to the ordinary condition of a common money bond, upon which judgment has been entered, there is added & incorporated into the sealed instrument a proviso containing an agreement that the sum secured shall be paid by instalments, yet a suggestion of breaches is not necessary, if, upon the construction of the condition & proviso taken together,

—A bond, upon the face of it, appeared to be conditioned for payment of a sum certain, but by an indenture of the same date, declaring the purposes for which the bond was executed, it was agreed that it should be lawful for the obligees in the bond to commence an action, & to proceed to judgment whenever they should think fit, & upon judgment being obtained, to issue execution, & that the judgment should be a security for payment to the obligees, on demand, of all sums of money which then were or might thereafter become due to them. A judgment having been entered up by virtue of the deed, the obligees issued execution without assigning breaches or executing a writ of inquiry:—*Held*: this was a bond substantially conditioned for the performance of an agreement, & the obligees ought to have assigned breaches.—**HURST v. JENNINGS** (1826), 5 B. & C. 650; 8 Dow. & Ry. K. B. 424; 108 E. R. 242.

Annotations:—*Consd.* Shaw v. Worcester (1830), 6 Bing. 385. *Distd.* Smith v. Bond (1833), 10 Bing. 125. *Consd.* Power v. Lowe (1855), 26 L. T. O. S. 188. *Refd.* Ranson v. Dundas (1837), 3 Scott, 501.

893. — — — .]—A bond was executed on Mar. 17, 1827, in the penalty of £10,000, conditioned for payment of £5,000, on Mar. 17, 1829, with interest in the meantime payable half-yearly, pursuant to the provisos & stipulations contained in an indenture of assignment of even date with the bond. Deft., after craving oyer of the bond & condition, pleaded payment according to the condition of the bond & of the provisos in the indenture, which plaintiff denied in his replication. The principal & interest having become due before the action was commenced:—*Held*: it was not necessary for pltf. to assign breaches.—**SMITH v. BOND** (1833), 10 Bing. 125; 3 Moo. & S. 528; 2 L. J. C. P. 269; 131 E. R. 853.

Annotations:—*Appld.* Roakes v. Manser (1845), 1 C. B. 531. *Refd.* Gerard v. Clowes (1892), 61 L. J. Q. B. 487.

894. — — — .]—To a declaration in debt on a bond conditioned for payment of £1,000 on a day certain, & for the performance of the covenants in a certain indenture, defts. pleaded a general plea of performance of all things mentioned in the condition. Pltf., by his replication, denied that defts. paid the £1,000 in manner & form as alleged:—*Held*: as pltf. was proceeding solely on the breach in non-payment of the money, it was not necessary for him to assign breaches.—**ROAKES v. MANSER** (1845), 1 C. B. 531; 14 L. J. C. P. 199; 5 L. T. O. S. 93; 135 E. R. 648.

Annotations:—*Consd.* Trix v. Thorne (1846), 9 Q. B. 282; *Grey v. Friar* (1850), 14 Jur. 1105.

895. — — — Payment of sum certain.]—An action of debt was commenced against exors. on a bond of their testator, conditioned for making it void on payment of a certain sum at a future day,

it appears to have been intended that the whole sum remaining secured by the judgment should become payable upon default made as to any one instalment.—**BUCHANAN v. JACK** (1870), 11 R. 5 C. L. 41.—IR.

e. — — — Payment of contingent sum.]—In the condition of a bond reciting that B., deft. kept an account, & discounted bills of exchange, with a bank was contained an agreement that if W. & A., or either of them, their heirs, etc., should satisfy & pay such sums as they might be indebted to the bank for advances, then the bond was to have no effect:—*Held*: a suggestion of breaches was required.—**MONTGOMERY v. BYRNE** (1861), 2 I. C. L. R. 230; 4 Ir. Jur. 46.—IR.

895 i. — — — Payment of sum absolutely & sum conditionally.]—When a judgment is entered on a bond & warrant of attorney, & the bond is for

or within one month after his decease, whichever should first happen. Defts. obtained a judge's order for time to plead, which they neglected to do, & final judgment was signed for want of a plea, which was afterwards set aside, on the defts.' undertaking to plead within a week, when they pleaded a judgment recovered against them as exors., which not being signed by a serjeant, pltf. again signed final judgment:—*Held*: it was unnecessary to suggest breaches.—**CARDOZO v. HARDY** (1818), 2 Moore, C. P. 220.

Annotations:—**Apld.** *Smith v. Bond* (1833), 10 Bing. 125. *Refd.* *Murray v. Stair* (1823), 3 Dow. & Ry. K. B. 278.

896. — Payment by instalments—Certificate for execution.—In a debt on a bond, with *non est factum* (*inter alia*) pleaded, to secure payment by instalments of the consideration for the purchase of a business, pltf. ought to suggest breaches, & if he has not done so, & a verdict be found for him on the plea of *non est factum*, he is not entitled to a certificate for speedy execution.—**D'ARANDA v. HOUSTON** (1834), 6 C. & P. 511, N. P.

897. — Administration bond.—Pltf. suing upon an administration bond entered into with the President of the Probate Divorce & Admlty. Div. of the High Ct. in the usual form to secure the due administration of the estate of a deceased person, must suggest breaches.—**COPE v. BENNETT** (1911), 55 Sol. Jo. 521; *subsequent proceedings*, [1911] 2 Ch. 488.

898. Validity of—Immaterial allegations added.—The breach of the condition of a bond, otherwise well assigned, is not vitiated by the superaddition of immaterial allegations.—**STOTHERT v. GOODFELLOW** (1832), 1 Nev. & M. K. B. 202.

899. Further breaches — Procedure.—Where pltf. suggests further breaches after a verdict in an action on a bond, he should serve deft. with a copy of the suggestion, or he cannot regularly proceed to execute a writ of inquiry of damages, & the irregularity may be taken advantage of at the time of holding the inquisition. Such an irregularity is waived, if deft., being present, suffer the inquiry to proceed to an assessment of damages, & he cannot afterwards set aside the inquisition on the ground of surprise, unless as matter of indulgence, & on terms.—**GILLINGHAM v. WASKETT MYERS** (1824), 13 Price, 791; M'Cle. 568; 147 E. R. 1156; *subsequent proceedings* (1825), M'Cle. & Yo. 147.

the payment of one sum of money absolutely, & of another conditionally, an execution issued for the payment of the money absolutely secured, without an assignment of breaches previously had, will be set aside as irregular.—**MADDEN v. KELLY** (1850), 2 Ir. Jur. 120.—IR.

896 i. — Payment by
—A bond was executed by the deft., conditioned for payment of money by instalments, with warrant of attorney, on which judgment was entered. Execution allowed to issue on the judgment for the amount of the instalments due on it, without suggestion of breaches.—**PURCEL v. O'REILLY** (1834), 3 Ir. L. Rec. N. S. 25.—IR.

896 ii. — — ——A bond was conditioned for the payment of a penal sum of £200, subject to a proviso, that if the obligor, or his heirs, etc., should pay the obligee £100 at the times mentioned in a defeasance in a warrant of attorney thereto annexed, without delay, the obligation should be void, otherwise, to remain in force. The times & manner of payment specified in the defeasance were, that payment should be in instalments, & if default were made, the obligee was to proceed for whatever sum remained due:—

Held: execution could not issue without a suggestion of breaches.—**HARRINGTON v. COXE** (1853), 3 L. C. L. R. 87.—IR.

g. — Performance of—Agreement.—Pltf. ought to suggest breaches before issuing execution on a judgment entered pursuant to a warrant of attorney upon a bond conditioned for the performance of an agreement.—**ERSKINE v. BEATTY** (1837), 2 Jo. Ex. Ir. 471.—IR.

h. — — — Covenants in mortgage—Mortgage unavailing.—Execution will not be allowed to issue on a judgment upon a bond & warrant of attorney, conditioned to perform the covenants in a mtge. deed, without assigning breaches, although the mtge. be unavailing.—**NOLDER v. WALSH** (1839), Smythe, 74.—IR.

Work—& payment of damages.—Pltf. is bound to suggest breaches before he issues execution on a bond conditioned for the performance of work necessary to the protection of pltf.'s premises from injury, & for payment of all damages which might be suffered by reason of the non-performance of such work.—**BURKE v. DUBLIN & KINGSTOWN**

Annotations:—**Mentd.** *Blair v. Ormond* (1851), 17 Q. B. 423; *Johnson v. Diamond* (1855), 11 Exch. 78.

900. — Occasioned by delay.—8 & 9 Will. 3, c. 11, does not apply to cases where the damages assessed are calculated by the jury to meet & satisfy the entire condition of a bond, etc.

Where pltf., having recovered a verdict in action on a bond for replacing stock & paying dividends, etc., in the meantime, & the jury having assessed damages for the stock not having been transferred, & for the accruing dividends, etc., long subsequently, obtained judgment & satisfaction for the whole by an action of debt on the judgment:—*Held*: he could not afterwards sue by *sci. fa.* as for further breaches so to obtain satisfaction for the loss of the dividends, etc., sustained by the delay of satisfaction during the interval between the two judgments.—**SAVILLE v. JACKSON** (1824), 13 Price, 715; M'Cle. 377; 147 E. R. 1131.

901. Default of rejoinder—Procedure.—In a case where breaches must be assigned or suggested, if deft. does not rejoin, the ordinary course is for pltf. to sign judgment for want of a plea, strike out all pleadings subsequent to the declaration, & suggest breaches, if the declaration itself does not state them. But this is only a rule of convenience, & if the nature of the case requires that the pleadings, down to the default, should continue on the record, they ought to be retained.

Where to debt on bond conditioned to perform certain duties deft. pleaded, generally, performance of the condition, pltf. replied, alleging breaches, by not performing some of the duties, deft. suffered judgment by default, & pltf. sued out a writ of inquiry, setting forth on the writ all the pleadings down to the end of the replication:—*Held*: the course pursued was right, a statement of breaches appeared, of which the ct. executing the inquiry might properly take notice.—**LAWES v. SHAW** (1843), 5 Q. B. 322; 1 Dav. & Mer. 714; 8 Jur. 461; 114 E. R. 1270.

SUB-SECT. 3.—DEFENCE.

See, now, R. S. C., Ords. 19, 21, 22.

902. Previous judgment—Condition in alternative.—Bond with double condition. In an action for non-performance of one, if the verdict be for deft., it is a bar to the whole bond, & if pltf.

Ry. Co. (1834), 3 Ir. L. Rec. N. S. 24.—IR.

i. — Rendering account.—A suggestion of breaches is necessary before execution issues on a judgment entered on a bond, with warrant of attorney, containing a release of errors, which bond was conditioned to levy & collect all such sums as should be presented by the grand jury.—**STRATTON v. CODD** (1845), 9 L. L. R. 1.—IR.

900 i. Further breaches—Occasioned by delay.—To debt on bond setting out the condition & assigning breaches, deft. cravedoyer & demurred, & pltf. having succeeded on the demurrer, entered judgment for the penalty & issued execution. Deft. then moved to set aside the proceedings, but pltf. had leave to amend, by substituting an interlocutory for the final judgment, & entering an award of venire to assess damages, & inquire of further breaches, although three years had elapsed from the entry of judgment.—**DOUGLASS v. POWELL** (1832), 2 O. S. 87.—CAN.

PART XII. SECT. 3, SUB-SECT. 3.

n. Non-performance — Of condition precedent.—Non-performance of a condition precedent by pltf. is a

Sect. 3.—Pleadings: Sub-sect. 3.]

brings another action of debt on the same bond deft. may plead the judgment in bar.—ANON. (1580), 3 Dyer, 371 b; 73 E. R. 832.

Payment.]—See cases in Part VII., Sect. 2, sub-sect. 1, & Part VIII., Sect. 4, sub-sect. 2, *ante*.

903. Part payment.]—In debt upon a bond payment of part can only be pleaded in bar.—PIERCE v. PAXTON (1701), 1 Ld. Raym. 691; Holt, K.B. 560; 12 Mod. Rep. 541; 91 E. R. 1361; *sub nom.* PEIRCE v. PAXTON, 2 Salk. 519.

904. — With interest—Duty to account for residue.]—A plea that part of the money mentioned in the condition of a money bond has been paid, together with the interest thereon, is not sustainable, without any answer as to the residue.—ASHBEE v. PIDDUCK (1836), 1 M. & W. 564; 2 Gale, 116; Tyr. & Gr. 1016; 5 L. J. Ex. 251; 150 E. R. 559.

*Annotation:—*Refd. Husband v. Davis (1851), 10 C. B. 645.

905. — & Statute of Limitation.]—By an agreement for the sale of property it was provided that as to £1,000, part of the purchase-money, the purchaser should execute a bond for securing payment of an annual sum of £40 to the vendor & his wife during their lives, & at the decease of the survivor of them, payment of £750 to his children, & payment of the remaining £250 to M. The purchaser executed a bond conditioned for payment of £1,000 & interest at 4 per cent., to trustees at the times & in the manner to be mentioned in an indenture which was intended to be subsequently executed by the purchaser & trustees, & which would be made with regard to payment of the £1,000 agreeably to the terms of the agreement. The indenture when executed was in fact a declaration that the £1,000 should be held on the trusts mentioned in the agreement. In 1872, the trustees of the bond, & the purchaser being dead, the representative of the last surviving trustee joined with M. in filing a bill against the purchaser's exors. for administration of his estate, claiming to be creditors in respect of the £250:—*Held*: a plea by defts., that certain sums had been paid by the purchaser on account of the £250, the truth of which plea was wholly denied by plffs., did not prevent defts. from also pleading that the debt was statute-barred.—ASHLIN v. LEE (1875), 44 L. J. Ch. 376; 32 L. T. 348; 23 W. R. 458, L. J.J.

See, also, cases in Part VII., Sect. 2, sub-sect. 1, *ante*.

906. Payment into court.]—Payment of money into ct., under 4 & 5 Anne, c. 3, s. 13, in discharge of principal & interest on a bond, & costs, cannot be pleaded to an action on the bond.—ENGLAND v. WATSON (1842), 9 M. & W. 333; 1 Dowl. N. S. 398; 11 L. J. Ex. 102; 6 Jur. 763; 152 E. R. 142. *Annotation:—*Refd. Hodgkinson v. Wyatt (1843), 13 L. J. Q. B. 73.

— To obtain relief—Under 4 & 5 Anne, c. 3.]—See Part VIII., Sect. 4, sub-sect. 2, *ante*.

907. —.]—In an action on a bond, money cannot be paid into ct.

In an action on an administration bond, breaches were assigned in the declaration, & deft. by way of plea set out the condition & paid money into ct. as to certain breaches, & as to the residue averred performance or excuse for non-performance:—*Held*: pltf. was entitled to strike out the whole plea, & proceed to assess damages.—LONDON (Bp.) v. M'NEIL (1854), 9 Exch. 490; 23 L. J. Ex. 111;

18 Jur. 314; 2 W. R. 232; 2 C. L. R. 561; 156 E. R. 209.

*Annotations:—*Mentd. Johnson v. Diamond (1855), 11 Exch. 73; Marshall v. Exeter (1859), 6 C. B. N. S. 716.

See, now, R. S. C., Ord. 22, r. 1.

908. Performance—In words of condition.]—If the condition of a bond be sufficient, performance must be pleaded in the words of the condition.—RENNELL v. RENNEL (1756), Say. 316; 96 E. R. 893; *sub nom.* REYNALD v. REYNALD, 1 Keny. 357.

909. — General plea—Disjunctive covenants.]—To covenants some negative & some affirmative, performance pleaded generally is good, except upon demurrer; but performance of disjunctive covenants must be specially pleaded.—OGLETHORP v. HYDE (1591), Cro. Eliz. 233; 78 E. R. 488.

910. — — Several matters.]—A plea of performance of conditions of a bond is bad if general; it should show in detail performance of the several things comprised in the condition.—WOODCOCK v. COLE (1664), 1 Sid. 215; 82 E. R. 1065.

*Annotations:—*Refd. Fitz-Patrick v. Strong (1714-27), Gilb. Ch. 251; Reynald v. Reynald (1756), 1 Keny. 357; Roakes v. Manser (1845), 1 C. B. 531.

911. — — —.]—In an action of debt on a bond conditioned for the performance of various things, deft. pleaded that he had performed them all:—*Held*: (1) a bad plea, for the particulars being expressed in the condition, he ought to have pleaded particularly to each by itself; (2) *secus*, where the condition was to perform all covenants in an indenture.—WIMBLETON v. HOLDRIE (1671), 1 Lev. 303; 2 Keb. 720; 83 E. R. 419.

*Annotation:—*Refd. Roakes v. Manser (1845), 1 C. B. 531.

912. — — —.]—To an action on a bond conditioned for the performance of several matters, it is requisite to set forth in the plea, with particularity, the manner in which the terms of the condition were complied with.—REYNALD v. REYNALD (1756), 1 Keny. 357; 96 E. R. 1020; *sub nom.* RENNEL v. RENNEL, Say. 316.

913. — — —.]—To a declaration in debt on a bond conditioned for payment of £1,000 on a day certain, & for performance of the covenants in a certain indenture, defts. pleaded a general plea of performance of all things mentioned in the condition. Pltf., by his replication, denied that defts. paid the £1,000 in manner & form as alleged:—*Semble*: the plea of general performance would have been bad on special demurrer, as the bond was conditioned for the performance of several matters, & the plea ought to have contained a distinct allegation of the payment.—ROAKES v. MANSE (1845), 1 C. B. 531; 14 L. J. C. P. 199; 5 L. T. O. S. 93; 135 E. R. 648.

*Annotations:—*Consd. Grey v. Friar (1850), 14 Jur. 1105.

Refd. Trix v. Thorne (1846), 9 Q. B. 282.

914. — — Condition to give notice to obligee.]—Debt on bond conditioned to give notice to the obligee. A plea, that deft. gave notice according to the form & effect of the condition:—*Held*: bad for not showing how he gave it.—HARWOOD v. HELYARD (1678), 1 Freem. K. B. 247; 3 Keb. 848; 2 Mod. Rep. 268; 89 E. R. 177.

*Annotation:—*Consd. Wills v. Murray (1850), 4 Exch. 843.

915. — — Performance of duties by collector.]—In debt on bond, the declaration stated that defts. & L. acknowledged themselves

good plea in bar of an action on the bond.—DAY v. SPAFFORD (1836), 5 O. S. 57.—CAN.

903 i. Partial performance.]—Partial performance of the condition is no answer to an action on a bond.—

HERSHEY v. WARREN (1837), 4 Ont. Dig. 720.—CAN.

bound to pltf. in £8,000 to be paid to pltf., or to W., on request, & that thereby & by reason of the non-payment thereof, an action had accrued, etc. Defts. set out the bond & condition on oyer, & pleaded general performance by them. The condition was, that L. & defts., or either of them, should duly pay all such sums assessed & collected or which thereafter might be assessed & to be collected, by L., as a collector of property-tax, & that L. should duly demand the sums assessed, & in case of non-payment duly enforce the powers of the Acts against defaulters:—*Held*: the plea was bad, for averring performance generally, instead of showing what was done in performance of the condition, & also for not showing performance by L. as well as by defts.

The bond and condition having been incorrectly set out by defts. on oyer, pltf. set them out correctly, & prayed that they might be enrolled, & then demurred, on the ground of the defective oyer in the plea: *Qu.*: whether that was the proper course, or whether pltf. should not have moved to set aside the plea. *Semble*: the effect of the enrolment was, to make the bond & condition, as enrolled, a part of the declaration.—*KEPP v. WIGGETT* (1848), 6 C. B. 280; 17 L. J. C. P. 295; 11 L. T. O. S. 243; 12 Jur. 831; 136 E. R. 1259; *subsequent proceedings* (1849), 12 L. T. O. S. 430; (1850), 10 C. B. 35.

Annotation:—*Mentd.* *Turquand v. Hennet* (1849), 7 C. B. 179.

916. Impossibility of performance—On certain day.—Even if it be an answer to breaches assigned on the condition of an administration bond, for not exhibiting a perfect inventory, or making a true & just account at or before a particular day, that there was no ct. held on that day, it must be pleaded in excuse of performance, & cannot be given in evidence where deft. has pleaded only *non est factum*, and breaches have been suggested on the roll, pursuant to 8 & 9 Will. 3, c. 11, s. 8.—*CANTERBURY (ARCHBP.) v. ROBERTSON* (1833), 1 Cr. & M. 690; 3 Tyr. 390; 3 L. J. Ex. 101; 149 E. R. 576.

Annotations:—*Mentd.* *Crowley v. Chipp* (1836), 1 Curt. 456; *Goodwin v. Knight & Knight* (1848), 12 Jur. 706; *Saundry v. Mitchell* (1863), 1 New Rep. 317; *In the Goods of Sullivan* (1867), 16 W. R. 408; *Dobbs v. Brain*, [1892] 2 Q. B. 207; *Cope v. Bennett* (1911), 105 L. T. 541.

917. — Bond under Judgments Act, 1838 (c. 110), s. 8—Arrest of principal.—In an action against a surety upon a bond under the above sect., for payment of a debt by H., or his rendering himself in any action to be brought, deft. pleaded that pltf. had brought an action against H. in the Ct. of Queen's Bench, & had issued a *ca. sa.* on a judgment recovered therein, on which H. was taken & detained in custody, according to the practice of the ct., & that from recovery of the judgment until the arrest, H. was ready & willing to surrender himself according to the practice of the ct. & the condition of the bond, & that by reason of his having been so taken & detained, "he was, by the practice of the ct., exonerated & discharged from rendering himself according to the condition":—*Held*: deft. should be allowed to

p. Set-off — Arbitration bond.—In an action of debt for the penalty of an arbitration bond, in which pltf. assigns as the only breach non-payment of a liquidated sum awarded by the arbitrators to be paid him by deft., a set-off may be pleaded to the sum awarded.—*SHAW v. WILSON* (1838), Ber. 585.—*CAN.*

q. — *non est factum*.—Pleas of *non est factum* & set-off may be pleaded together.—*ATRINS v. CLARK* (1839), 6 O. S. 33.—*CAN.*

921 i. Fraud.—Where a bond given

for the purchase-money of land is impeached for fraud, on the ground that there was a fraudulent representation at the time of the bargain, & previous to the giving of the deed, as to land included in the purchase, it must be affirmatively shown as essential to such defence, that the deed does not in fact contain the land bargained for.—*SISSON v. MERITHEW* (1846), 3 Kerr, 284.—*CAN.*

921 ii. —.—The obligor of a bond which by pltf.'s own showing is clearly fraudulent, need not plead fraud to

amend. *Semble*: the plea should either have shown the practice of the ct., & that H. did surrender, if the facts alleged amounted to a surrender by such practice, or that it became impossible for H. to surrender, on account of the act of pltf. & the practice of the ct.—*HAYWARD v. BENNETT* (1848), 5 C. B. 593; 17 L. J. C. P. 182; 10 L. T. O. S. 374; 12 Jur. 120; 136 E. R. 1011.

918. Set-off—Annuity bond.—Set-off may be pleaded to a bond for payment of an annuity.—*COLLINS v. COLLINS* (1759), 2 Burr. 820; 2 Keny. 530; 97 E. R. 579.

Annotations:—*Consd.* *Willoughby v. Swinton* (1805), 6 East, 550; *Rodgers v. Maw* (1846), 15 M. & W. 444; *Lee v. Lester* (1849), 7 C. B. 1008. *Reid.* *Johnson v. Diamond* (1855), 11 Exch. 73. *Mentd.* *Lonsdale v. Church* (1788), 2 Term Rep. 388; *Walcot v. Goulding* (1799), 8 Term Rep. 126; *Mackworth v. Thomas* (1800), 5 Ves. 329; *Smith v. Bond* (1833), 10 Bing. 125; *Attwooll v. Attwooll* (1853), 2 E. & B. 23; *Cope v. Bennett* (1911), 55 Sol. Jo. 521.

919. — Indemnity bond.—Count on a bond for £100 conditioned to indemnify pltf. against certain actions. Breach, that pltf. was sued on one of them, & obliged to pay £9 10s. 5d., & was not indemnified. Plea, set-off of an amount averred to be equal to pltf.'s claim, but the plea did not show what amount was due on the bond:—*Held*: set-off could not be pleaded to a bond conditioned for indemnity, & a plea of set-off to a bond, under 8 Geo. 2, c. 24, s. 5, was not good, unless it showed what amount was justly due on the bond.—*ATTWOOLL v. ATTWOOLL* (1853), 2 E. & B. 23; 22 L. J. Q. B. 287; 21 L. T. O. S. 99; 17 Jur. 789; 1 W. R. 325; 1 C. L. R. 242; 118 E. R. 677.

Annotations:—*Reid.* *Johnson v. Diamond* (1855), 11 Exch. 73; *Brown v. Tibbetts* (1862), 6 L. T. 385.

920. — Building contract—Delayed completion.—If two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, & a bond is prepared in the name of both, but is executed by one only, with condition for the due performance of the work, or payment of the weekly sum, & the work is not finished in the time, such weekly payments are not by way of penalty, but in the nature of liquidated damages, & may be set off by the obligee in an action brought against him by the obligor who executed.—*FLETCHER v. DYCHE* (1787), 2 Term Rep. 32; 100 E. R. 18.

Annotations:—*Foll.* *Astley v. Weldon* (1801), 2 Bos. & P. 346. *Consd.* *Attwooll v. Attwooll* (1853), 22 L. J. Q. B. 287. *Appl.* *Owen v. Wilkinson* (1858), 5 C. B. N. S. 526. *Foll.* *Bonsall v. Byrne* (1867), 16 W. R. 372. *Reid.* *Barton v. Glover* (1815), Holt, N. P. 43; *Reilly v. Jones* (1823), 8 Moore, C. P. 244; *Morley v. Inglis* (1837), 4 Bing. N. C. 58; *East Anglian Ry. Co. v. Lythgoe* (1851), 10 C. B. 726. *Mentd.* *R. v. Marylebone County Ct. Judge & G. W. Ry. Co.*, *Ex p. Phillips*, [1907] 2 K. B. 664.

See, further, BUILDING CONTRACTS, ENGINEERS, & ARCHITECTS, *post*.

921. Fraud.—A plea of fraud to a bond means fraud by which deft. was misled & deceived in the actual execution of the instrument, not in any transaction which led to it.—*WRIGHT v. CAMPBELL* (1861), 2 F. & F. 393, N. P.

922. Illegal consideration.—The condition of a bond was for payment of a sum of

prevent a recovery.—*SMITH v. DITTRICH* (1852), 8 U. C. R. 589.—*CAN.*

921 iii. —.—Fraud of the obligee in obtaining the bond may be pleaded though the obligor has not brought suit to set the bond aside.—*RANGNATH SAKHARAM v. GOVIND NARSIN* (1904), 1 L. R. 28 Bom. 639.—*IND.*

922 i. Illegal consideration.—Knowledge on the part of pltf. of the purpose for which the bond was given by defts. is an essential factor in the defence of illegal consideration.—*PEASE v. RANDOLPH* (1911), 19 W. L. R. 625.—*CAN.*

Sect. 3.—Pleadings: Sub-sects. 3 & 4.]

an action on the bond, deft. pleaded that the payment to be made was grounded upon an illegal consideration:—*Held*: the plea which set out facts not contradictory, but explanatory of the condition, was good.—*COLLINS v. BLANTERN* (1767), 2 Wils. 347; 95 E. R. 850.

Annotations.—*Consd.* Paxton v. Popham (1808), 9 East, 408; Higgins v. Pitt (1849), 4 Exch. 312; Bourke v. Mealy (1879), 14 Cox, C. C. 329; Kearley v. Thomson (1890), 24 Q. B. D. 742; Barclay v. Pearson, [1893] 2 Ch. 154. *Reid.* Pole v. Harrobin (1782), 9 East, 416, n.; Edgcombe v. Rodd (1804), 5 East, 294; Fletcher v. Soudes (1827), 1 Bli. N. S. 144; Greville v. Atkins (1829), 4 Man. & Ry. K. B. 372; Edwards v. Brown (1831), 1 Cr. & J. 307; Hill v. Manchester & Salford Waterworks Co. (1831), 2 B. & Ad. 544; Prole v. Wiggins (1836), 3 Bing. N. C. 230; Ward v. Lloyd (1843), 8 Man. & G. 785; Keir v. Leeman (1846), 9 Q. B. 371; Benyon v. Nettlefold (1850), 3 Mac. & G. 94; Reynell v. Sprye (1852), 1 De G. M. & G. 660; Royal British Bank v. Turquand (1855), 5 E. & B. 248; Taylor v. Chester (1869), L. R. 4 Q. B. 309; Waugh v. Morris (1873), 42 L. J. Q. B. 57; Yorkshire Ry. Waggon Co. v. Maclure & Cornwall Minerals Ry. Co. (1881), 45 L. T. 747; Reichel v. Oxford (1887), 35 Ch. D. 48; Hermann v. Charlesworth (1905), 74 L. J. K. B. 620. *Mentd.* Master v. Millor (1791), 4 Term Rep. 320; Drage v. Ibberson (1798), 1 Esp. 643; Kerrison v. Cole (1807), 8 East, 231; Morgan v. Horseman (1810), 3 Taunt. 241; Gas Light & Coke Co. v. Turner (1839), 5 Bing. N. C. 666; Kirwan v. Goodman (1841), 9 Dowl. 330; Myers v. Sarl (1860), 9 W. R. 96; Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan (1866), 10 Moo. Ind. App. 540; Pickering v. Ilfracombe Ry. Co. (1868), L. R. 3 C. P. 235; Rawlings v. Coal Consumers Assocn. (1874), 30 L. T. 469; Hegarty v. Shine (1878), 14 Cox, C. C. 124; Re Coltman, Coltman v. Coltman (1881), 45 L. T. 392; Re Robinson's Settlement, Gant v. Hobbs (1912), 106 L. T. 443; Re Worthington, *Ex p.* Pathé Frères, [1914] 2 K. B. 299.

923. —.]—To debt on bond conditioned for payment of a sum of money, which the condition stated to have been taken up, borrowed, & received by defts. of pltf. at *respondentia* interest, secured by a cargo of goods shipped from Calcutta to Ostend, it is competent to deft. to plead that the bond was given to secure the price of goods sold by pltf. to defts. in the East Indies, & illegally prepared by pltf. for shipment from thence to beyond the Cape of Good Hope, without the licence of the East India Co., without proceeding to state formally, that the condition was colourable, to conceal the illegality of the transaction, & to negative that the bond was given for money taken up, borrowed, & received, etc., for the statement in the plea is rather explanatory of, than absolutely inconsistent with, the transaction stated in the condition of the bond, but if it were inconsistent with it, the plea would still be good in such form.—*PAXTON v. POPHAM* (1808), 9 East, 408; 103 E. R. 628.

Annotations.—*Consd.* Gas Light & Coke Co. v. Turner (1839), 5 Bing. N. C. 666. *Distd.* Fisher v. Bridges (1853), 2 E. & B. 118. *Reid.* Greville v. Atkins (1829), 4 Man. & Ry. K. B. 372; Hill v. Manchester & Salford Waterworks Co. (1831), 2 B. & Ad. 544; Bridges v. Fisher (1854), 23 L. J. Q. B. 276; Royal British Bank v. Turquand (1855), 5 E. & B. 248.

—.]—*See, generally, Part III., Sect. 3, ante.*

924. Matters outside claim—Claim for principal
—**Plea of payment of principal & interest.**—If a declaration in debt on a bond conditioned for payment of the principal & interest assigns a breach in non-payment of the principal only, a

925 i. Matters outside bond.—Deft. cannot set up a separate contemporaneous agreement not under seal, varying the condition from that which the bond itself imports.—*CRAMER v. HODGSON* (1846), 3 U. C. R. 174.—*CAN.*

s. Lis alibi pendens.—The dependence of proceedings in England against a Scotsman there, for recovery of the sum in a Scottish bond, does not render it incompetent to charge the debtor on the bond on his return to Scotland; it being in the discretion of the ct. to sist procedure till the issue

of the litigation in England.—*COCHRANE v. PAUL* (1857), 20 Duml. (Ct. of Sess.) 178.—*SCOT.*

PART XII. SECT. 3, SUB-SECT. 4.

926 i. Assignment of breaches—In general.—In assigning breaches, in a replication to a plea of performance generally, it is not necessary to state to what part of the condition of the bond the replication is meant to apply; it is sufficient if a breach be actually alleged; & where this was substantially, though informally, done, the ct.

plea is bad, specially demurred to, which avers payment of both principal & interest.—*BISHTON v. EVANS* (1835), 2 Cr. M. & R. 12; 1 Gale, 76; 5 Tyr. 639; 3 Dowl. 735; 4 L. J. Ex. 142; 150 E. R. 6.

925. Matters outside bond.—By agreement between pltf. & S., S. was to perform certain works for pltf. for a certain sum, & to receive from time to time three-fourths of the cost of the part completed, the first payment to be made after one-eighth was performed, the remaining fourth part to be paid one month after the whole was completed, & if S. should fail to perform the work, pltf. might employ others to perform it, & deduct the expense from the sum payable to S. Deft. entered into a bond conditioned for performance of the agreement by S. S., after performing part of the works, abandoned the contract. Pltf., at the request of S., & upon new security given by him, had advanced to S., for assisting him in performing the works, a sum exceeding the whole cost of the works performed at the time of the abandonment, but less than the whole contract price. Pltf. had the works completed at an expense which, added to the cost of the part performed by S., was less than the whole contract price agreed on with S., but which, added to the sum actually advanced to S., exceeded that contract price. Pltf. brought an action of debt on the bond, suggesting, as a breach, S.'s non-performance, & pltf.'s loss thereby. Deft. pleaded *non est factum*:—*Held*: (1) Pltf. was entitled to nominal damages only, the loss having arisen, not from the non-performance of S.'s contract, but from pltf. having advanced more than the contract required, especially as the sum advanced exceeded, not only the three-fourths, but the whole of the work completed, & as the advances had been made on a fresh negotiation with, & security taken from, S.; (2) this answer could not be pleaded by deft., but was properly set up, under *non est factum*, to meet pltf.'s evidence of damages.—*WARRE v. CALVERT* (1837), 7 Ad. & El. 143; Will. Woll. & Dav. 528; 2 Nev. & P. K. B. 126; 6 L. J. K. B. 219; 1 Jur. 450; 112 E. R. 425.

SUB-SECT. 4.—REPLY.

See, now, R. S. C., Ords. 19, 23.

926. Assignment of breaches—Effect of insufficiency.—In debt on bond, if deft. plead performance, & pltf. assign an insufficient breach, there shall be judgment against pltf., though the plea was defective.—*GEWEN v. ROLL* (1606), Cro. Jac. 131; 79 E. R. 114.

Annotation.—*Mentd.* Rees v. Morgan (1834), 5 B. & Ad. 1035.

927. — Effect of mistake.—Debt on an obligation to perform an award. Pltf. in his replication having ill assigned a breach, & prayed leave to discontinue:—*Held*: the award being for the payment of money, the ct. would not give leave, for he might have his action on debt upon

refused to arrest the judgment & award a repleader.—*A. G. v. DENNIS* (1832), Hayes, 566.—*IR.*

t. — Sufficiency.—*Sci. fa.* on a bond to the Queen for performance of duty by a pork inspector. The assignment of breaches showed an agreement to refer pork to the inspector for his inspection, & then alleged that he wrongfully branded pork of inferior quality with the words "prime mess pork":—*Held*: breaches were sufficiently assigned.—*R. v. MOWAT* (1853), 3 C. P. 238.—*CAN.*

the award.—ANON. (1675), 1 Freem. K. B. 410; 89 E. R. 305.

Annotation:—*Refd.* Winter v. White (1819), 1 Brod. & Bing. 350.

928. — Under 8 & 9 Will. 3, c. 11—*Procedure*.]—After oyer of the condition & *non est factum* pleaded to debt on bond, on which issue is joined & notice of trial given, pltf. may enter a suggestion on the roll, & assign breaches pursuant to 8 & 9 Will. 3, c. 11, but it is irregular to deliver such second issue without a summons & judge's order.—ETHERSEY v. JACKSON (1799), 8 Term Rep. 255; 101 E. R. 1375.

Annotations:—*Consd.* Johnes v. Johnes (1814), 3 Dow, 1. *Folld.* Homfray v. Rigby (1816), 5 M. & S. 60; Webb v. James (1841), 8 M. & W. 645. *Refd.* Quin v. King (1836), 1 M. & W. 42.

929. — — *Formal terms*.]—In debt on bond conditioned not to assault, molest, or injure the person of pltf., the replication alleged that deft. assaulted, molested, & injured the person of pltf. by then & there beating, etc., & otherwise ill-treating him. Deft., while sitting in the same room, had jumped up from his seat with his fist clenched as if to strike pltf., but was pulled back to his seat by another before he was within reach of pltf.:—*Held*: there was a sufficient assignment, by the replication, of a breach of the condition, for which the jury were to assess damages on 8 & 9 Will. 3, c. 11, s. 8, although such breach were not alleged in formal terms to be laid according to the Act.—TOMBS v. PAINTER (1810), 13 East, 1; 104 E. R. 265.

930. — — —.]—In action of debt on bond, with penalty for performance of covenants, breaches may be assigned in the replication; & on demurrer, interlocutory judgment may be given to the extent that it appears to the ct. that the replication is sufficient, & that pltf. ought to recover his debt & damages for detention, & final judgment may be stayed till after award & execution of the writ of inquiry.—JOHNES v. JOHNES (1814), 3 Dow, 1; 3 E. R. 969, II. L.

Annotations:—*Mentd.* Wright v. R. (1849), 14 Q. B. 148; Noble v. Ahier (1886), 11 P. D. 158.

931. — — —.]—Pltf. may suggest breaches in an action on a bond, at the conclusion of his replication.—HOMPHEY v. RIGBY (1816), 2 Chit. 298; 5 M. & S. 60; 105 E. R. 973.

Annotation:—*Folld.* Webb v. James (1841), 8 M. & W. 645.

932. — — — *Traverse of material averment*.]—8 & 9 Will. 3, c. 11, s. 8, does not authorise the assignment of breaches in a replication which traverses a material averment in the plea.

Where, to a declaration in debt on a bond, deft., after setting out the condition of the bond on oyer, pleaded performance of part of the condition only, & matter of excuse for non-performance as to the residue:—*Held*: a replication, incorporating an assignment of breaches with a traverse of the matters of excuse, was bad, on the ground that the Act authorises no double

pleading, except the multiplication of such breaches as could have been properly assigned at common law.—WEBB v. JAMES (1841), 8 M. & W. 645; 1 Dowl. N. S. 35; 11 L. J. Ex. 38; 151 E. R. 1197.

Annotations:—*Refd.* Sanders v. Coward (1846), 15 M. & W. 53; London v. M'Neil (1854), 2 C. L. R. 561.

933. — — — *Award*.]—In debt on bond for performance of an award, if deft. plead "no award," & the replication show an award without assigning a breach, judgment is erroneous.—BARRET v. FLETCHER (1609), Cro. Jac. 220; Yelv. 152; 79 E. R. 192.

934. — — —.]—In debt on a bond conditioned to perform an award, if deft. pleads "no award," pltf. must in his replication assign a breach.—LOCKEY v. DARBY (1696), 1 Ld. Raym. 108; 91 E. R. 968.

Annotations:—*Refd.* Green v. Waller (1703), 2 Ld. Raym. 891. *Mentd.* Murray v. Stair (1823), 2 B. & C. 82.

935. — — — *Variation*.]—Debt on an arbn. bond. Plea, no award. The replication showed an award to pay £16 10s. & costs, etc. The breach assigned was for non-payment of the £16 10s. only:—*Held*: good.—FOX v. SMITH (1765), 2 Wils. 267; 95 E. R. 803.

Annotation:—*Mentd.* Simpson v. I. R. Comrs. (1914), 83 L. J. K. B. 1318.

936. — — — *Collateral matters*.]—In debt on a bond with a condition, if deft. pleads a collateral matter, pltf. need not assign a breach.

If deft. in debt on an award pleads any other collateral matter, pltf. need not assign a breach.—LOCKEY v. DARBY (1696), 1 Ld. Raym. 108; 91 E. R. 968.

Annotations:—*Refd.* Green v. Waller (1703), 2 Ld. Raym. 891. *Mentd.* Murray v. Stair (1823), 2 B. & C. 82.

937. — — — *Admission of non-performance of condition*.]—In debt on a bond conditioned to deliver up certain goods if the law should adjudge them to be prize, if deft. pleads that the law had not adjudged them prize, he admits that he has not delivered them, & need not assign a breach in his reply.—GREEN v. WALLER (1703), 2 Ld. Raym. 891; 92 E. R. 96.

Annotations:—*Mentd.* Bellew v. Aylmer (1719), 1 Stra. 188; Henriques v. Dutch West-India Co. (1728), 2 Stra. 807; Lothian v. Henderson (1803), 3 Bos. & P. 499.

938. — — —.]—Where deft. pleads matter of excuse that admits a non-performance of the condition of a bond, except in the case of an award, pltf. need not assign a breach in his replication.—SHELLEY v. WRIGHT (1737), Willes, 9; 125 E. R. 1029.

Annotations:—*Mentd.* Hill v. Manchester & Salford Water Works Co. (1831), 2 B. & Ad. 544; Lainson v. Tremere (1834), 1 Ad. & El. 792; Bringloe v. Goodson (1839), 5 Bing. N. C. 738.

939. — — — *Specific breaches—To general & specific pleas*.]—In debt on bond conditioned for the performance of covenants, if deft. craves oyer, & pleads performance of each covenant specially, & also general performance, pltf. must assign

933 i. — — — *Award*.]—In an action on a bond, where the plea is that the bond was conditioned to perform an award, & no award made, pltf. must either deny the condition as alleged, or reply specially setting out an award & assigning a breach.—COWAN v. WHITE (1863), 9 U. C. L. J. O. S. 131.—CAN.

937 i. — — — *Admission of non-performance of condition—Suggestion preferable to assignment—Traverse of excuse for non-performance*.]—To an action on a surety bond, conditioned for faithful performance of the principal, as secretary to pltf., & the making of satisfaction for any losses, etc., within three months after due proof

thereof & notice—the surety averred performance up to a certain period, & as an excuse for subsequent non-performance alleged a dealing by pltf. in gold & silver coins contrary to law, which increased the risk, whereby the surety was discharged; the replication traversed the dealing in gold & silver & assigned breaches on days between periods which embraced not only that time in the plea covered by performance, but also that during which the breach was admitted:—*Held*: the replication should not have assigned but suggested breaches, & confined them to the period for which the surety had pleaded performance, & should have concluded the traverse of the surety's excuse of non-performance

with an issue to the country.—MECHANICS' WHALE FISHING Co. v. WHITNEY (1847), 3 Kerr, 312.—CAN.

939 i. — — — *Specific breaches—To general plea*.]—The condition of a bond set out on oyer, was for due performance by A. of the office of secretary & treasurer of a society, according to its rules. In answer to a plea of performance pltf. replied assigning for breaches. (1) that it was a rule that the treasurer should have authority to receive all money for the society, " & that he should also deposit daily with the bank all such money as he should receive "; yet that he had received a large sum of money & had not paid

. 3.—*Pleadings: Sub-sect. 4. Sects. 4 & 5.*]

specific breaches in his replication, if he has not done it in his declaration, & if he merely takes issue on the general performance, & enters a separate assignment of breaches on the record, no damages can be assessed on them, & the ct. will award a repleader.—*PLOMER v. ROSS* (1814), 5 Taunt. 386; 1 Marsh. 95; 128 E. R. 739.

Annotations:—Distd. Homfray v. Rigby (1816), 5 M. & S. 60. *Mentd. Barnwell v. Sutherland* (1850), 9 C. B. 380.

940. — Payment of money—Non-payment.]
—In debt on bond to pay so long as he continued in office, if deft. plead, that it was granted for the life of A. & paid during the life of A., pltf. may reply that he did not enjoy it for, & pay during, the life of A., etc., but he must assign a breach that he did not pay.—*GAYLE v. BETTS* (1676), 1 Mod. Rep. 227; 86 E. R. 846; *sub nom. GAILE v. BETTS*, 3 Salk. 142; *affd. sub nom. BETTS v. GALE* (1677), 3 Keb. 813.

941. — — — — —.]—Debt on bond to save harmless from expenses by reason of naming one to a curacy, or from suits by reason thereof. Plea, *non damnificatus*. Pltf. replied, & assigned for breach that he was obliged to pay such a sum by reason of such nomination, but did not say how he was obliged:—*Held: well enough.*—*SIMMONS v. LANGHORNE* (1754), 2 Wils. 11; 95 E. R. 659.

942. — — — — — General denial.]—A plea, to a declaration on bond, conditioned (*inter alia*) for payment of £3,000, that all the sums of money which become due on the bond were paid, may be replied to generally, by a general denial of the words of the plea, without assigning any specific breach.—*TURNER v. M'NAMARA* (1781) 2 Chit. 697.

Annotation:—Reid. Roakes v. Manser (1845), 1 C. B. 531.

943. — — — — —.]—To debt on bond, deft., after reciting a mtge. deed, which showed the condition to be for payment of a sum of money on a day specified, according to the tenor of the proviso contained in the indenture, & for the performance of the covenants therein, pleaded that there were no negative or disjunctive covenants in the indenture, & that he paid the money mentioned in the condition on the day therein specified, according to the effect thereof, & performed all the covenants & provisos in the indenture on his part to be performed. Pltf., in his replication, took issue generally on the non-payment of the money:—*Held: such replication was good, as the only point in issue was payment of the money, & as pltf. had therein denied the whole substance of deft.'s plea.*—*DARBISHIRE v. BUTLER* (1821), 5 Moore, C. P. 198.

Annotations:—Consd. Smith v. Bond (1833), 10 Bing. 125; *Roakes v. Manser* (1845), 1 C. B. 531.

944. — With averment.]—Debt on bond conditioned to render an account of all such sums of money & goods as were due & belonging to W. at the time of his death, which should any ways come to deft.'s hands, & to make an equal dividend of all such sums of money, etc., & pay pltf. a proportion of same. Plea, that no goods came to deft.'s hands. Replication, that a silver bowl came to his hands, & concluding with an averment:—*Held: the replication was bad, for not*

assigning a breach, viz., that deft. did not make a dividend or pay the proportion, but the conclusion with an averment was proper.—*HAYMAN v. GERARD* (1667), 1 Saund. 102; 2 Keb. 275; 85 E. R. 109; *sub nom. HEYMAN v. GERARD*, 1 Lev. 226; 1 Sid. 340.

Annotations:—Reid. Fitz-Patrick v. Strong (1714-27), Gilb. Ch. 251; *Tryon v. Carter* (1733), 2 Stra. 994; *De La Rue v. Stewart* (1806), 2 Bos. & P. N. R. 362; *Thorne v. Jenkins* (1844), 12 M. & W. 614. *Mentd. Chaudler v. Roberts* (1779), 1 Doug. K. B. 58; *Marks v. Lahee* (1837), 4 Scott, 137.

945. — Accounting for rates—Performance.]

—Upon bond conditioned that a collector of poor rates should render an account of money received, after general performance pleaded, in assigning a breach that he did not render an account. *Semble: it was necessary to aver that he received money to be accounted for.*—*SERRA v. WRIGHT* (1815), 6 Taunt. 45; 1 Marsh. 441; 128 E. R. 949.

946. — Replacement of stock—Notice.]

Action of debt on bond. The condition recited that pltf. had lent to J. £900 3 per cent. reduced annuities, & then the condition was, that J., upon three months' notice in writing from pltf., should replace the £900 stock, as aforesaid, in pltf.'s name, with all dividends which should accrue upon same from the date of the bond. Deft. pleaded that pltf. did not give three months' notice to replace the stock with the dividends, which would have become due for same, from the date of the bond. The replication alleged a three months' notice to replace the stock, with all dividends which had accrued due on same, from the date of the bond, & assigned as a breach, the not replacing of the stock, saying nothing about the dividends:—*Held: (1) the notice was sufficient; (2) the assignment of the breach, as to the dividend, was unnecessary & informal; (3) as the breach was well assigned as to the not replacing of the principal, pltf. was entitled to judgment.*—*HUDSON v. SMITH* (1827), 1 Man. & Ry. K. B. 489; 6 L. J. O. S. K. B. 146.

See, also, Sect. 3, sub-sect. 2, ante; Part VIII., Sect. 4, sub-sect. 3, ante.

SECT. 4.—SPECIFIC PERFORMANCE OR INJUNCTION.

947. Specific performance—To convey land.]

A bond conditioned to convey lands in consideration of money received, is considered in equity as articles of agreement, & the condition will be decreed to be specifically performed.—*ANON.* (1728), Mos. 37; 25 E. R. 256.

948. — To settle property—Consideration of marriage—Not satisfied by penalty.]—T. in consideration of H.'s marrying his daughter, entered into a bond to H. in a penalty of £5,000 to settle one-third of whatever estate should come to him upon the death of his father:—*Held: the condition of the bond should be specifically performed, for the design of the agreement of which the bond was evidence, being to make lasting provision for wife & children, could never be satisfied by the forfeiture of the penalty, which being money would go to the husband absolutely.*—*HOBSON v. TREVOR* (1723),

it over, but had converted it to his own use. (2) that A. fraudulently represented a person to be a shareholder & so induced the society to grant him a loan whereby the money was lost:—*Held: breaches were well assigned.*—*FARMERS & MECHANICS' BUILDING SOCIETY v. WHITEMORE* (1852), 9 U. C. R. 297.—CAN.

PART XII. SECT. 4.

947 i. Specific performance — To convey land—Voluntary bond.]—The locatee of lands from the Crown executed a bond in favour of a son, for the conveyance of land, to procure his marriage with a person, which did not take place, the son was allowed to

retain the bond. The father subsequently conveyed, for value, to another son, who had notice of the bond; & he having obtained the Crown patent for the land, a bill was filed to compel specific performance of the bond:—*Held: the bond could not be enforced.*—*OSBORNE v. OSBORNE* (1856), 5 Gr. 7.—CAN.

PART XII.—ACTIONS ON BONDS.

10 Mod. Rep. 507 ; 2 P. Wms. 191 ; 88 E. R. 829 ; *sub nom.* HOPSON v. TREVOR, 1 Stra. 533, L. C.

Annotations :—*Consd.* Roper v. Bartholomew (1823), 12 Price, 797. *Refd.* Lyde v. Mynn (1833), 1 My. & K. 683 ; Hill v. Gomme (1839), 5 My. & Cr. 250. *Mentd.* Wright v. Wright (1750), 1 Ves. Sen. 409 ; Chesterfield v. Janssen (1751), 2 Ves. Sen. 125 ; Stone v. Lidderdale (1795), 2 Anst. 533.

949. ————.]—On marriage the two fathers agreed to settle lands. One did so ; the other gave a bond of £600 with £1,200 penalty, if he did not :—*Held* : he had not election afterwards to forfeit the £600 or settle, the settlement being the primary agreement, & the £600 only a penalty or further security.—CHILLINER v. CHILLINER (1754), 2 Ves. Sen. 528 ; 28 E. R. 337.

Annotations :—*Appld.* Roper v. Bartholomew (1823), 12 Price, 797 ; Logan v. Wienholt (1833), 7 Bli. N. S. 1.

950. ————.]—A., in consideration of the intended marriage of his niece, entered into a bond with a penalty of £4,000 conditioned to give, by will or otherwise, unto or in trust for her or the issue of the intended marriage so much in money, or in valuable effects, as he should by his will give or bequeath to any one of his next of kin, or to any other person whomsoever :—*Held* : this condition was not to be satisfied by the penalty, but must be specifically performed.—LOGAN v. WIENHOLT (1833), 7 Bli. N. S. 1 ; 1 Cl. & Fin. 611 ; 5 E. R. 674, H. L.

Annotations :—*Consd.* Burrowes v. Gore (1858), 6 H. L. Cas. 907. *Mentd.* Hammersley v. De Biel (1845), 12 Cl. & Fin. 45 ; Squire v. Whitton (1848), 1 H. L. Cas. 333 ; *Re* Powell's Insee. Trusts (1856), 28 L. T. O. S. 19 ; Eyre v. Monro (1857), 3 K. & J. 305 ; Patch v. Shore (1862), 11 W. R. 142 ; Maddison v. Alderson (1883), 49 L. T. 303.

951. *Injunction—Restraint of trade—Liquidated damages payable on breach.*]—A bond in a penalty of £2,000, which recited an agreement by the obligor otherwise merely verbal, to give a bond not to practise as a solr. within fifty miles of W., was conditioned on the payment of £1,000 as & for liquidated damages, if the obligor should so practise :—*Held* : (1) the bond did not give the obligor the right to practise on payment of the £1,000, & the ct. would grant an injunction to restrain him from so practising ; (2) what the ct. would look to was not the mere form of the instrument, but whether, having regard to the contents of the whole instrument, & the nature & circumstances of the particular case, it would grant or refuse an injunction.—HOWARD v. WOODWARD (1864), 5 New Rep. 8 ; 34 L. J. Ch. 47 ; 11 L. T. 414 ; 29 J. P. 3 ; 10 Jur. N. S. 1123 ; 13 W. R. 132.

Annotations :—*Consd.* London v. Yorkshire Bank v. Pritt (1887), 56 L. J. Ch. 987. *Refd.* General Accident Assee. Corpn. v. Noel, [1902] 1 K. B. 377. *Refd.* Dewes v. Fitch, [1920] 2 Ch. 159.

952. ————.]—Pltfs., bankers at L., appointed deft. their bank manager there. Deft. executed a bond in a penalty of £1,000 to pltfs., which was conditioned to be void if deft., after quitting pltf.'s service, should not enter into similar employ within a certain time & distance. Deft. committed a breach of the condition, & contended that the pltfs.' only remedy was to recover the penalty of the bond :—*Held* : the condition of the bond was independent evidence of an agreement sufficient to maintain an injunction.—LONDON & YORKSHIRE BANK, LTD. v. PRITT (1887), 56 L. J. Ch. 987 ; 57 L. T. 875 ; 36 W. R. 135 ; 3 T. L. R. 728.

953. ————.]—Deft. on entering the

service of pltfs., a banking co., executed a bond in the penal sum of £1,000 the condition of which was that it should be void if he should perform his duties in the manner therein mentioned, & also if he should pay to pltfs. £1,000 as liquidated damages in case he should at any time within two years after his leaving the service of pltfs. accept any employment in any other bank within two miles of pltfs.' bank. Deft. resigned his employment in pltfs.' bank & immediately entered the service of a rival bank in the same town. Pltfs. brought an action claiming an injunction to restrain deft. from holding employment in any rival bank. Deft. was willing & offered to pay the penal sum of £1,000 :—*Held* : deft. could not satisfy his obligation by paying the penal sum, but there was an agreement between the parties to be implied from the bond, that deft. should not enter into the service of a rival bank, which could be enforced in a ct. of equity, & pltfs. were entitled to an injunction.—NATIONAL PROVINCIAL BANK OF ENGLAND v. MARSHALL (1888), 40 Ch. D. 112 ; 58 L. J. Ch. 229 ; 60 L. T. 341 ; 53 J. P. 356 ; 37 W. R. 183 ; 5 T. L. R. 81, C. A.

Annotations :—*Refd.* Gent v. Harrison (1893), 69 L. T. 307 ; Silver v. Gatti (1893), 37 Sol. Jo. 776 ; Mason v. Provident Clothing & Supply Co., [1913] A. C. 724. *Mentd.* Carritt v. Bradley, [1901] 2 K. B. 550.

See, further, INJUNCTION ; TRADE & TRADE UNIONS.

954. ———— *Not to do act—Until damage ascertained.*]—If a man agree not to do an act, & enter into a bond with a penalty to be forfeited on his doing it, the penalty is never to be considered as the price for doing such act, but the ct. will relieve by injunction, until the actual damage sustained shall be ascertained by an issue.—HARDY v. MARTIN (1783), 1 Cox, Eq. Cas. 26 ; 1 Bro. C. C. 419, n. ; 29 E. R. 1046.

Annotations :—*Consd.* Astley v. Weldon (1801), 2 Bos. & P. 346. *Refd.* Wallis v. Smith (1882), 21 Ch. D. 243.

955. ———— *To restrain payment—Wrongful possession.*]—*Held* : the Ct. of Ch. had jurisdiction to restrain the India Co. from paying the money secured by their bonds to a person, who had wrongfully obtained possession of them, or to any other person than the lawful owner of them.—GLASSE v. MARSHALL (1845), 15 Sim. 71 ; 15 L. J. Ch. 25 ; 60 E. R. 543.

SECT. 5.—PROOF OF DAMAGES.

See, generally, DAMAGES.

Amount of damages—How determined.]—*See* Part VIII., Sect. 3, *ante*.

956. *Breach of covenants—Lease.*]—In debt on bond for the performance of covenants in a lease, judgment & suggestion of damages to be assessed on the writ of inquiry, the lease need not be proved.—COLLINS v. RYBOT (1794), 1 Esp. 157, N. P.

957. ————.]—In debt on bond conditioned for the performance of covenants, if the condition is not set out in the pleadings pltf. in executing a writ of inquiry under 8 & 9 Will. 3, c. 11, s. 8, must prove that the bond mentioned in the suggestion & produced to the jury is that on which the action was brought.—HODGKINSON v. MARSDEN (1809), 2 Camp. 121, N. P.

PART XII. SECT. 5.

a. Absence of proof.]—Where in debt on an indemnity bond deft. pleaded that if pltf. was damnified she

was damnified of her own wrong, & pltf. took issue on the plea, & did not assign any breach ; & at the trial, pltf. not offering any evidence to prove that she was damnified, was non-

sulted. On a motion for a new trial :—*Held* : the nonsuit was right.—HAMILTON v. DAVIS (1845), 2 U. C. R. 137.—CAN.

SECT. 6.—EVIDENCE AND ONUS OF PROOF.

Evidence.]—See EVIDENCE; PRACTICE & PROCEDURE.

958. Onus of proof—Execution of bond admitted—Plea of solvit ad diem.]—In debt on bond, the only plea being *solvit ad diem*, the execution of the bond is admitted, & debt begins.—**SANDFORD v. HUNT** (1823), 1 C. & P. 118, N. P.

SECT. 7.—JUDGMENT.

959. Entering up—Without writ of inquiry.]—Final judgment may be entered upon a bail bond, without executing a writ of inquiry.—**MOODY v. PHEASANT** (1801), 2 Bos. & P. 446; 126 E. R. 1376.

Annotation:—Folld. Smith v. Bond (1833), 10 Bing. 125.

Compare No. 972, post.

Bail bonds generally, *see* EXECUTION.

960. Failure to pay interest—Stay.]—On bond to pay interest half yearly, & the principal in three years, judgment shall be entered on failure of paying interest, but with stay of execution on discharging it.—**MASFEN v. TOUCHET** (1770), 2 Wm. Bl. 706; 96 E. R. 416.

Annotations:—Refd. Howel v. Hanforth (1772), 2 Wm. Bl. 843. *Mentd. James v. Thomas* (1833), 5 B. & Ad. 40; *Hodgkinson v. Wyatt* (1843), 13 L. J. Q. B. 73.

961. Second judgment—Damages & costs.]—Judgment by default having been suffered in an action on a bond, pltf. entered up judgment for the penalty together with £9 10s. for damages & costs. A writ of inquiry having been executed, damages

were assessed at £1,115 13s. 4d. & costs 40s. Pltf. entered up another judgment for those damages, together with £31 6s. 8d. for costs, but afterwards entered a *remittitur* on the roll for the costs:—*Held*: the second judgment was erroneous.—**HANKIN v. BROOMHEAD** (1804), 3 Bos. & P. 607; 127 E. R. 327, Ex. Ch.

Annotation:—Refd. Johns v. Johns (1814), 3 Dow, 1.

962. — Appeal against first judgment.]—Leave given to pltf. in debt on bond conditioned to perform an award, after judgment for him, upon a plea of judgment recovered, to execute a writ of inquiry upon 8 & 9 Will. 3, c. 11, s. 8, after a writ of error allowed, & to sign a new judgment, on the terms of paying costs, & putting debt. in *statu quo*, etc.—**HANBURY v. GUEST** (1811), 14 East, 401; 104 E. R. 656.

963. Effect of judgment—Bar to further action on same bond.]—So long as a judgment recovered in an action of debt upon a bond remains in force, the obligee cannot have a new action on the same bond.

If a man brings an action of debt on a bond, & is barred by judgment, so long as the judgment remains in force he shall not have a new action.—**HIGGENS' CASE** (1605), 6 Co. Rep. 44 b; 77 E. R. 320.

964. — Bar to scire facias.]—A. advanced to B. £875 stock, for which B. executed a bond conditioned for the replacing the stock on a day certain, & payment to A. of all dividends, bonuses & profits which would have arisen from same in the meantime, B. made default, & A. recovered judgment with damages assessed upon both breaches:

PART XII. SECT. 6.

b. In general.]—The execution of a bond may, if necessary, be proved *vidē voce* at the hearing, but if the execution be admitted positively or by way of belief, or if interest be admitted to be paid upon it, no further proof is necessary of the execution.—**CURTIS v. DROUGHT** (1828), 1 Moll. 487.—IR.

958 i. Onus of proof—Execution of bond admitted.]—Where a bond is pleaded with a protest, the admission of its execution, under a judge's summons for that purpose, does not dispense with the necessity for its production at the trial, but only with the necessity of proof of execution.—**LESSLIE v. LEAHY** (1837), 5 O. S. 482.—CAN.

c. — Execution not admitted or proved—Sealing and delivery.]—Under a plea, that debt. "did not become bound by said bond, nor did he make & deliver any such bond," pltf. would be bound to prove the execution of the deed "in point of fact only," *viz.*, the sealing & delivery thereof.—**HAZELL v. DYAS** (1876), 2 R. & C. 36.—CAN.

d. — — — — —.]—An action of a bond sued on showed that the seals were probably put on after the obligors had signed, & they all stated that there were no seals on it when they signed; they did not say whether they had or had not empowered T., for whose benefit they were signing the bond, or any one else, to affix seals; & as the bond, when delivered to pltf., had seals upon it, the onus was upon debt. to show that these seals were not theirs; & that onus was not discharged by merely saying that there were no seals on it when they signed, as it was quite consistent with that evidence that they authorised T. or some one else to put the seals on it before delivery.—**PEASE v. RANDOLPH** (1911), 19 W. L. R. 625.—CAN.

e. — Execution of bond proved.]—In an action on a bond against sureties the defence raised was that the bond was not executed by them as it had no

seals attached when they signed it:—*Held*: pltf. had proved a *prima facie* case of a bond properly executed on its face, & as debt. had not negatived due execution of the bond, it being consistent with his evidence that it was duly executed, the onus of proving want of execution was not thrown off debt.—**MARSHALL v. MUNICIPALITY OF SHEL-BURNE** (1887), 14 S. C. R. 737.—CAN.

f. — — — — — Want of consideration.]—In a suit on a bond pltf. is entitled to recover upon showing that it was executed by debt. The onus lies on debt. of showing want of consideration.—**JUGGUT CHUNDER CHOWDHRY v. BHUGWAN CHUNDER FUTTEHDUR** (1862), Marsh. 27; 1 Hay, 57; 1 Ind. Jur. O. S. 67.—IND.

PART XII. SECT. 7.

g. Entering up—Mutilated bond.]—The ct. will allow judgment to be entered up on an old bond, although much mutilated, provided it be shown that payments have been made by the obligor on such bond up to a recent period.—**BONACUM v. IRWIN** (1837), Craw. & D. Abr. C. 105.—IR.

h. — Omission in warrant to enter up.]—Bond payable to the obligee, his exors., etc., & warrant, incorporated, with the bond to enter up judgment, but not saying at whose suit. It cannot be entered up at the suit of the exor. of the obligee.—**BELL v. AUCHINLECK** (1835), Hayes & Jo. 350.—IR.

k. — Procedure.]—The obligee in a bond, when applying to enter judgment thereon, must swear positively that the obligors executed the bond & warrant, & are living at the time of the application, or in the preceding time.—**ATTWOOD v. WYSE** (1840), 1 Leg. Rep. 72.—IR.

l. — — — — — Conditional order—Vague affidavits.]—The ct. refused to make absolute a conditional order to enter judgment upon a bond, when the affidavit in support of the motion was vague, & when the affidavits, as

to payments within twenty years, were conflicting, but left the party to declare on the bond.—**ANON. v. ADAMS** (1841), 1 Leg. Rep. 244.—IR.

m. Refusal to order.]—In an action upon a bond given as security in an interpleader issue where a good defence upon the merits was alleged, the ct. refused to make an order for judgment.—**MCPHERSON v. UNITED STATES FIDELITY** (1913), 24 O. W. R. 690; 4 O. W. N. 1182.—CAN.

n. Amendment—Mistake—In name.]—Where an error was made in entering up a judgment on a bond & warrant of attorney—the christian name of pltf. being entered as John in mistake for James—the ct., notwithstanding the lapse of several years & the death of a party in the meantime, allowed the error to be amended by substituting "James as administrator of John, deceased," for "John."—**LOUGHREY v. SWAN** (1889), 23 I. L. T. 8, 54.—IR.

o. — — — — — In date.]—The ct. refused to allow pltf. to amend an error on the judgment-roll as to the date of the bond upon which judgment had been entered, when the judgment was three years old, without notice to the opposite party.—**STACK v. BALDWIN**, 2 Leg. Rep. 228.—IR.

963 i. Effect of judgment—Bar to further action.]—**CARLISLE v. HOSHEL** (1861), 7 U. C. L. J. O. S. 99.—CAN.

963 ii. — — — — —.]—Judgment upon a bond puts the security wholly out of the obligor's control.—**BATEMAN v. RAMSAY** (1837), Sau. & Sc. 459.—IR.

q. — Security—Against further breaches.]—Pltf. had recovered £16 as damages for breach of the condition, the penalty being £500. Judgment had been entered for the debt & damages, & duly registered. An application, showing payment of the damages & costs, to have satisfaction entered, was refused with costs, as pltf. was entitled to the judgment as security for further breaches.—**HILL v. HILL** (1855), 1 P. R. 268.—CAN.

Held: the plea of judgment recovered was a good bar to a *sci. fa.*, & A. was not entitled to further dividends, etc., after verdict, whatever delay there might be in his suing out execution.—**SAVILE v. JACKSON** (1824), *M'Cle.* 377; 13 *Price*, 715; 148 *E. R.* 157.

965. — Merger of debt.—Where the obligee of a bond sues the obligor & recovers judgment, the original debt becomes merged in the judgment.

A railway co. in 1864 issued bonds for £1,000 each with interest at 6 per cent. The bondholder brought an action on the bonds & recovered judgment for the principal debt, interest & costs. In 1868 the co. was ordered to be wound up, & the bondholder claimed to prove for the judgment debt & interest at 6 per cent. :—**Held:** the bond debt was merged in the judgment, & the creditor was only entitled to 4 per cent. interest under Judgments Act, 1838 (c. 110), s. 17.—**Re EUROPEAN CENTRAL RY. CO., Ex p. ORIENTAL FINANCIAL CORPN.** (1876), 4 *Ch. D.* 33; 46 *L. J. Ch.* 57; 35 *L. T.* 583; 25 *W. R.* 92, *C. A.*

Annotations:—**Expld.** *Popple v. Sylvester* (1882), 22 *Ch. D.* 98. **Consd.** *Re Sneyd, Ex p. Fewings* (1883), 25 *Ch. D.* 338; *Arbuthnot v. Bunsill* (1890), 62 *L. T.* 234; *Economic Life Assoc. Soc. v. Osborne*, [1902] *A. C.* 147.

See, further, **CONTRACT**; **ESTOPPEL**.

SECT. 8.—EXECUTION.

966. Joint & several bond—Execution against one.—If the obligee of a joint & several bond obtain by two actions separate judgments against the obligors, & sue out an *elegit* against one, he cannot take the other in execution on a *ca. sa.* after the *elegit* is returned served, nor have a re-extent, for the delivery of the lands is a satisfaction of the debt.—**CRAWLEY v. LIDGEAT** (1614), *Cro. Jac.* 338; 79 *E. R.* 288; *sub nom.* **COWLEY v. LYDEOT**, 2 *Bulst.* 97.

Annotation:—**Mentd.** *Denton v. Godfrey* (1847), 11 *Jur.* 800.

— **Liability on.**—See Part VI., Sect. 2, *ante*.

— **Discharge of.**—See Part X., Sects. 3, 7, 8, 10, 11, *ante*.

967. Payment of annuity—Successive writs of fieri facias.—In a judgment on bond for payment of an annuity, if a *fi. fa.* be sued out, & marked for

only part of the penalty, a new *fi. fa.* for subsequent arrears cannot be taken out without a *sci. fa.* under 8 & 9 Will. 3.—**HOWEL v. HANFORTH** (1772), 2 *Wm. Bl.* 843; 96 *E. R.* 497.

968. — — ——Judgment being entered on a bond to secure the quarterly payment of an annuity, & a *fi. fa.* having issued for the arrears of the last half year, a second *fi. fa.* may be taken out for the next quarter without reviving the judgment.—**SCOTT v. WHALLEY** (1789), 1 *Hy. Bl.* 297; 126 *E. R.* 174.

Annotations:—**Refd.** *Davis v. Norton* (1823), 7 *Moore, C. P.* 499. **Mentd.** *Collins v. Yewens* (1839), 2 *Per. & Dav.* 439.

969. After exercise of one remedy—Deed both bond & mortgage—Satisfaction under mortgage.—Where a deed was both a bond & a mtge., & pltf. had obtained an order for possession of the mortgaged premises & subsequently sought to have execution for the amount due on the bond :—**Held:** the exercise of the first mentioned remedy was not an election on his part so as to destroy the right given by the other part of the deed, & he was entitled to have the execution sought.—**GRIERSON v. CHRISTIAN** (1831), *Bluet*, 76.

970. Stay—Judgment on failure to pay interest.—**MASFEN v. TOUCHET**, No. 960, *ante*.

971. — Fraud of obligee.—A sum of money, secured by a bond, was made payable by instalments, on condition that if any one instalment was not paid at the time it became due, then the whole sum should be payable. The ct., on the appearance of fraud, in not accepting an instalment when offered, stayed execution, but ordered the judgment to stand as security.—**STAFFORD'S CASE** (1822), 1 *L. J. O. S. K. B.* 54.

972. Without writ of inquiry—Replevin bond.—In debt upon a replevin bond, assigning for breach the not making a return of the goods distrained for rent, pltf. may, after signing judgment against deft. for not returning the demurrer-book, tax the costs & issue execution for the costs, & the amount of the goods distrained as indorsed on the replevin bond, without executing a writ of inquiry.—**MIDDLETON v. BRYAN** (1814), 3 *M. & S.* 155; 105 *E. R.* 569.

Annotations:—**Appld.** *Smith v. Bond* (1833), 10 *Bing.* 125. **Foll.** *Dix v. Groom* (1880), 49 *L. J. Q. B.* 430. **Refd.** *Murray v. Stair* (1823), 2 *B. & C.* 82.

Compare No. 959, *ante*.

Replevin bonds generally, see **DISTRESS**.

r. — — — Against judgment on another bond.—The ct. allowed judgment to be entered on an old bond & warrant which had been executed to the obligee, as a security against a judgment entered on another bond in which he was surety for the obligor, in order that it might be assigned as a counter security to the purchaser of certain lands of the obligee.—**CHAMBERS v. BATESON** (1841), 3 *I. L. R.* 365.—**IR.**

965 i. — Merger of debt—Interest.—The assignee of the equity of redemption in a mtge. executed his bond to the mtgee. conditioned to pay the balance due on the mtge. in one year, & "in the meantime, & until fully paid & satisfied, pay interest thereon, or upon such part thereof as shall remain unpaid, such interest to be calculated at 7 per cent." In a suit for foreclosure of the mtge. :—**Held:** the bond being merged in the judgment, deft. thereafter could only be charged

with the statutory rate of interest on judgment debts, & no higher rate from then could be charged against him in the foreclosure suit.—**HANFORD v. HOWARD** (1896), 1 *N. B. Eq. Rep.* 241.—**CAN.**

PART XII. SECT. 8.

t. Restraint of amount of execution.—On a bond for the conveyance of land, the verdict was taken for pltf. for \$1,000, & 20 c. for the detention, no evidence of damage having been given. Deft. moved to restrain the execution to 1s. damages, the bond being within 8 & 9 Will. 3, c. 11 :—**Held:** such application before entry of judgment was premature.—**GREER v. JOHNSTON** (1871), 32 *U. C. R.* 77.—**CAN.**

a. Stay—Damages not assessed.—Pltfs. sued upon a bond for \$1,000 penalty, conditioned to convey land,

alleging non-performance. A verdict was rendered for \$1,000, & 20 c. for detention, no damages being assessed on the breach. A writ of execution was afterwards issued, indorsed to levy \$1,000 & costs taxed :—**Held:** pltfs. having paid 20 c. & costs, execution might be stayed, for the penalty could not be levied.—**GREER v. JOHNSTON** (1876), 40 *U. C. R.* 116.—**CAN.**

b. Payment into court—Money levied—Judgment to stand.—On motion to set aside an execution, on the ground that there was no consideration for the bond executed by deft., except that of compounding a felony, the ct. directed the judgment to stand, the money levied under the execution to be brought into ct., pltf. to declare on the bond, deft. to plead issuably.—**M'CULLAGH v. GREER** (1830), 4 *Ir. L. Rec.* 1st Ser. 13, 26.—**IR.**

payment of a final balance on account current.—**SCOTT v. ALLSOPP** (1816), 2 Price, 20; 146 E. R. 8.
Annotation:—**Refd.** **Simson v. Cooke** (1824), 1 Bing. 452.

984. Bond as collateral security—Surrender of copyhold lands.—A bond conditioned for the payment, by a third party, of a sum of money & interest pursuant to a proviso, contained in a conditional surrender bearing even date therewith, whereby such third party surrendered to the obligee certain copyhold lands for securing the same sum & interest:—**Held**: (1) the bond was properly stamped with a £1 stamp, under the (48 Geo. 3, c. 149) above Act; (2) although such bond was not impressed with a stamp denoting that the *ad valorem* duty had been paid, it was not necessary to produce the surrender to show that fact.—**QUIN v. KING** (1836), 1 M. & W. 42; 1 Gale, 407; Tyr. & Gr. 407; 5 L. J. Ex. 140; 150 E. R. 338.

Annotations:—**Distd.** **Walmsley v. Brierly** (1836), 1 Mood. & R. 529. **Refd.** **Toovey v. Simons** (1839), 3 Jur. 1173. **Mentd.** **Scott v. Staley** (1838), 4 Bing. N. C. 724.

985. — Retransfer of stock.—A bond made in 1812 conditioned for the replacing stock of the value of £792, & for paying the amount of the dividends in the meantime, was stamped with a £3 *ad valorem* bond stamp:—**Held**: the stamp was sufficient under the above Act, although there was of even date with the bond an insufficiently stamped agreement, accompanied with a deposit of title deeds, for making a mtge. of the estate comprised in the title deeds as a security for replacement of the stock & payment of the sums in lieu of dividends.—**BLAIR v. ORMOND** (1850), 14 Q. B. 732; 19 L. J. Q. B. 228; 16 L. T. O. S. 3; 14 Jur. 191; 117 E. R. 282, Ex. Ch.; *subsequent proceedings* (1851), 17 Q. B. 423.

SECT. 3.—UNDER STAMP ACT, 1815 (c. 184).

See, generally, CONTRACT; REVENUE.

986. Indemnity bond—Damages & costs of action.—A bond to secure the damages to be recovered upon a new trial, & the costs of the action, in the event of the result of a second action proving similar to that of the first action, is properly stamped with a 35s. stamp.—**LOPEZ v. DE TASTET** (1819), 8 Taunt. 712; 129 E. R. 561.
Annotations:—**Folld.** **Annandale v. Pattison** (1829), 9 B. & C. 919. **Refd.** **Bowles v. Marsh** (1847), 10 Q. B. 787.

987. Payment of money—& collateral matters.—A bond conditioned for payment of money & interest, & also for the performance of collateral acts, requires only the *ad valorem* stamp, appropriated to the principal sum, where that stamp exceeds the £1 15s. which the collateral matter would require if it stood alone.—**DEARDEN v. BINNS** (1827), 1 Man. & Ry. K. B. 130.
Annotation:—**Consd.** **Wills v. Noot** (1834), 4 Tyr. 726.

988. — & interest.—A bond conditioned for securing £1,000, interest, & bankers' charges of commission, is not a bond properly stamped with only a £5 *ad valorem* stamp, as a bond to secure a sum exceeding £500 but not exceeding £1,000, according to the above Act, sched., pt. I.—**DICKSON v. CASS** (1830), 1 B. & Ad. 343; 8 L. J. O. S. K. B. 306; 109 E. R. 814.

Annotations:—**Distd.** **Doe d. Scruton v. Snaith** (1832), 8 Bing. 146; **Paddon v. Bartlett** (1834), 2 Ad. & El. 9. **Expld.** **Wills v. Noot** (1834), 4 Tyr. 726. **Dbtd.** **Parker v. Smart** (1841), 9 Dowl. 211. **Consd.** **Wroughton v. Turtle** (1843), 11 M. & W. 561. **Dbtd.** **Frith v. Rotherham** (1846), 15 M. & W. 39. **N.F.** **Doe d. Young v. Warner** (1850), 15 L. T. O. S. 89. **Refd.** **Doe d. Merceron v. Bragg** (1838), 8 Ad. & El. 620; **Suffield v. I. R. Comrs.**, [1908] 1 K. B. 865. **Mentd.** **Re Bush, Ex p. Fussell** (1837), 2 Deac. 158.

—.]—A bond was conditioned for

payment, on a certain day, being a year from the date, of £1,000, with interest thereon, at the rate of 5 per cent.:—**Held**: a stamp covering the amount of the principal was sufficient.—**DIXON v. ROBINSON** (1831), 5 C. & P. 96; 1 Mood. & R. 115, N. P.

990. — — — .]—A bond conditioned to pay £1,000 on a day five years from the date, & to pay interest, half yearly, in the meantime, only requires a stamp for the amount of the principal sum of £1,000.—**FOREMAN v. JEYES** (1833), 5 C. & P. 419, N. P.

991. — — — .]—A bond, dated in June, was conditioned for payment of £3,000 with interest at 5 per cent. from Mar. preceding:—**Held**: a £7 stamp was sufficient.—**PARKER v. SMART** (1841), 9 Dowl. 211; H. & W. 85; *sub nom.* **BARKER v. SMARK**, 7 M. & W. 590; 10 L. J. Ex. 200; 151 E. R. 903.

Annotations:—**Folld.** **Pierpoint v. Gower** (1842), 5 Scott. N. R. 605. **Consd.** **Frith v. Rotherham** (1846), 15 M. & W. 39; **Knights Deep v. I. R. Comrs.**, [1899] 1 Q. B. 345. **Refd.** **Daines v. Heath** (1847), 3 C. B. 938.

992. — — — .]—By a bond, A., B., & C. bound themselves in the penal sum of £600 to a co. The bond, after reciting that A. & B. had agreed to join with C. as his sureties, subject to the conditions thereafter contained, in consideration of the co., then advancing C. £300, contained the conditions, that if any of the bounden parties should pay to the co. the principal sum of £300 by three equal yearly payments of £100 each, on specified days, or so much of the payments as should be owing on the day of the decease of C. which should first happen, & should in the meantime until the principal sum should so become due, & until it should be all paid, pay the co. interest at the rate of 5 per cent. upon the £300 in equal half yearly payments, on specified days, & should also in the meantime & until the £300 should become due, & until same, with interest, should be fully paid, well & truly pay the annual premiums which should, during the continuance of the loan, become payable on a certain policy of assurance, under the hands of three of the directors of the co., whereby the funds of the co. were, on payment by C. or his assigns during his life of the annual premium of £23 14s. 7d., made liable to pay C.'s exors., etc., after his decease, £499 10s., which instrument had then been deposited as a collateral security for payment of the principal sum of £300, & interest thereon, & of the premiums which might be due & unpaid, provided the co. might consider the policy as subsisting, notwithstanding any premium might not be paid, & if C. should not, during the continuance of the loan, do any act by which the policy might be avoided & in case either A. or B. should during such time die or go abroad, & if within a time therein mentioned either of them should obtain & substitute a new surety in the place of such surety so dying, etc., who should enter into a like bond, or in case A. or B. should give such additional security for the principal sum, or so much as should then remain unpaid, & the interest thereof, or should forthwith pay upon demand the principal sum & interest, or so much as should be due, then the bond was to be void, otherwise it was to remain in full force, provided that in case any of the events mentioned in the conditions indorsed on the policy should happen during the deposit of the policy, it should be considered as wholly void, & lastly, that if default should be made in payment of the interest, or of either of the instalments, or of the premiums, according to the stipulations, the whole of the

Sect. 3.—Under Stamp Act, 1815 (c. 184).

principal should thereupon become payable:—*Held*: the bond secured payment of the £300 with interest only, & the bond was rightly stamped with a £3 stamp, which covered the principal sum.

—**PRUDENTIAL MUTUAL ASSURANCE INVESTMENT & LOAN ASSOCN. v. CURZON** (1852), 8 Exch. 97; 22 L. J. Ex. 85; 19 L. T. O. S. 257; 155 E. R. 1275.

993. — Not exceeding certain sum.]—T. having a banking account with pltfs., on which he owed them £10,000 in 1822, deft. executed a bond conditioned to secure pltfs. for any sums which for ten years pltfs. should advance on bills, etc., which T. should from time to time draw on them or make payable at their house, & all cheques, etc., not exceeding £5,000 in the whole. It was agreed that this bond should not affect a prior security given to pltfs. by T. in 1817, but no notice was given to deft. by pltfs. that T. owed them £10,000 at the time the deft. executed his bond, but T. saw the accounts every fortnight, & received the vouchers half yearly. At the close of his account, T. owed pltfs. more than £10,000, but subsequently to the executing of deft.'s bond he had paid into pltfs.' bank more than £5,000:—*Held*: deft.'s bond did not require a £25 stamp, but was properly stamped with a £9 stamp.—**WILLIAMS v. RAWLINSON** (1825), 3 Bing. 71; 10 Moore, C. P. 362; Ry. & M. 233; 3 L. J. O. S. C. P. 164; 130 E. R. 440.

Annotations:—**Mentd.** *Re Boys, Eedes v. Boys, Ex p. Hop Planters Co.* (1870), L. R. 10 Eq. 467; *Re Sherry, London & County Banking Co. v. Terry* (1884), 25 Ch. D.

994. —.]—A bond given by country customers to bankers in London, with a condition reciting a request by the obligors to the obligees, to pay from time to time bills of exchange, etc., & binding the obligors to pay or remit cash, etc., to pay & discharge such bills of exchange at or before such bills of exchange should become due, & from time to time, to settle accounts & to pay such sums as upon the settling of such accounts should be found due & owing to the obligees, subject to the proviso that "the whole amount of money to be ultimately recoverable by virtue of the obligation should not exceed the sum of £1,000" is a bond for securing the limited sum of £1,000 only, & requires only a £5 stamp.—**LLOYD v. HEATHCOTE** (1833), 1 Cr. & M. 336; 2 L. J. Ex. 162; 149 E. R. 429; *sub nom.* **LOYD v. HEATHCOTE**, 3 Tyr. 309.

995. —.]—Bond for £2,000, conditioned for payment to the trustees of a banking co. of all & every such sum & sums not exceeding in the whole £1,000, which, from time to time, should be & remain due & owing from the obligor to the co., on the balance of his account current with the co., together with such interest & commission as should be due:—*Held*: not a bond given as a security for repayment of money lent, advanced, or paid, or which might become due on an account current, etc., where the total amount of the money secured or to be ultimately recoverable thereupon was uncertain, & without limit, within the above Act, sched., pt. I., title "Bond," & an *ad valorem* stamp of £6 was sufficient.—**FRITH v. ROTHERHAM** (1846), 15 M. & W. 39; 15 L. J. Ex. 133; 6 L. T. O. S. 324; 10 Jur. 208; 153 E. R. 752.

Annotations:—**Refd.** *Doe d. Young v. Warner* (1850), 15 L. T. O. S. 89; *Suffield v. L. R. Comrs.*, [1908] 1 K. B. 865.

996. Payment of rent—& performance of covenants in lease.]—A bond conditioned for payment of rent, the rent reserved being £650

per annum, & the due performance of all covenants in an indenture of lease of tolls, stamped with a 35s. stamp, is not sufficiently stamped.—**TOOVEY v. SIMONS** (1839), 3 Jur. 1173.

Annotation:—**Consd.** *Winchester Corn Exchange v. Gillingham* (1843), 4 Q. B. 475.

997. —.]—A bond conditioned for the payment of rent reserved by lease under seal is not liable to an *ad valorem* stamp on the amount of rent, but is sufficiently stamped with a 35s. stamp, as a bond, "not otherwise charged" under the above Act.—**WINCHESTER CORN EXCHANGE (PROPRIETORS) v. GILLINGHAM** (1843), 4 Q. B. 475; 3 Gal. & Dav. 567; 12 L. J. Q. B. 159; 7 Jur. 326; 114 E. R. 978.

998. "Bonds not otherwise charged"—Bond by principal & surety—To pay creditors—Indemnity to surety.]—Where by bond A., as principal, & B., as surety, were jointly & severally bound to pay to the creditors of C. 14s. in the pound on the amount of their debts, & by the same bond A. was bound to indemnify B. against all loss by reason of his becoming surety:—*Held*: a stamp of £1 15s. was sufficient in amount for the instrument, & it did not require a second stamp on account of A.'s obligation to indemnify B., the whole being one transaction.

It cannot be said that this bond was given for any certain sum of money so as to require an *ad valorem* stamp, nor does it come within any of the descriptions of bonds given in the schedules to the Act, except the general one, "bonds not otherwise charged" (*per Cur.*).—**ANNANDALE v. PATTISON** (1829), 9 B. & C. 919; 8 L. J. O. S. K. B. 66; 109 E. R. 312.

Annotations:—**Refd.** *Dickson v. Cass* (1830), 1 B. & Ad. 313. **Mentd.** *Stirrup v. Whiston* (1816), 8 L. T. O. S. 90.

999. Collateral security—For payment of annuity.]—The condition of a bond, after reciting that M., the obligee, had contracted with S., the obligor, for the sale to him, S., of a messuage, etc., in consideration (*inter alia*) of an annuity of £150 to be paid to her, M., during her life, by S. by four quarterly payments in the year, & further reciting that, on the contract of the purchase of the messuage, it was agreed, that, for better securing the payment of the annuity, S. should execute that bond, was, for payment of the annuity at the times, etc. The bond was stamped with a £1 15s. deed stamp:—*Held*: the bond was properly stamped.

As to the stamp it is the proper one. On the face of the instrument, it is not a subsequent collateral security, but given originally; if so, it is to be stamped either as an original conveyance or as a collateral security on the original conveyance. If it be an original security, there is no pecuniary consideration on the face of it, & the clause imposing an *ad valorem* duty does not apply. Deft. then not being able to bring it within any special clause, it falls within the general bond clause, & is properly stamped with a common deed stamp (**PARKE, B.**).—**MESTAYER v. BIGGS** (1834), 1 Cr. M. & R. 110; 4 Tyr. 466; 2 Dowl. 695; 3 L. J. Ex. 202; 149 E. R. 1015.

Annotation:—**Mentd.** *A.-G. v. Wolverton*, [1896] 2 Q. B. 389.

1000. — Bastardy bond.]—A bastardy bond, in the penal sum of £100 was conditioned to indemnify the churchwardens & overseers of M. of & from all incumbrances, costs, charges, damages, & expenses whatsoever, for or by reason of the birth, education, & maintenance of the child, & of & from all actions, suits, troubles, & other charges & demands whatsoever, touching same, until such child obtained a settlement out of the parish of M.:—*Held*: it was subject to a stamp of £1 15s.

as a bond "not otherwise charged."—*BOWNES v. MARSH* (1846), 10 Q. B. 787; 16 L. J. Q. B. 36; 8 L. T. O. S. 90; 10 J. P. 742; 10 Jur. 905; 116 E. R. 299.

1001. — Bond to secure future mortgage of tolls.]—A bond conditioned to mtge. the tolls of a turnpike road as a security for £1,200 is not a bond to secure that sum within the above Act.—*R. v. LORDSMERE (INHABITANTS)* (1849), 14 L. T. O. S. 129; 13 J. P. 718.

1002. Bond & collateral security—Different dates—Executed at same time.]—A mtge. & a bond were prepared for securing the same sum of money, & were executed at the same time; but they did not bear the same date. The *ad valorem* duty appeared, by the mtge., to have been paid, but the bond had not the denoting stamp, indicating that the *ad valorem* duty had been paid according to the above Act, sched., pt. I., title "Mtge." The bond had a £1 stamp only:—*Held*: the bond was not exempt from the *ad valorem* duty according to the title "Bonds," in the schedule.—*WOOD v. NORTON* (1829), 9 B. & C. 885; 4 Man. & Ry. K. B. 673; 8 L. J. O. S. K. B. 72; 109 E. R. 329.

Annotations:—*Expld.* *Quin v. King* (1836), 5 L. J. Ex. 140.

Mentd. *R. v. Mabe* (1835), 1 Har. & W. 460.

1003. Same date.]—Where a bond is conditioned for payment of money, which is declared to be the same money as that secured to be paid by an indenture of even date, it must, to dispense with an *ad valorem* stamp on such bond, appear by recital, or production of the indenture, that the latter was such an indenture as required an *ad valorem* stamp.

If it had appeared from the recital in this bond that the other deed had fallen under the description of deeds subject to the *ad valorem* duty, the £1 stamp would have been *primâ facie* sufficient. But the recital does not sufficiently show that the deed was of that description; it is not stated, nor can it be necessarily inferred, that it is a mtge., wadset, or other instrument thereafter charged with the same duty as a mtge. or wadset (*PARKE, B.*).—*WALMESLEY v. BRIERLY* (1836), 1 Mood. & R. 529, N. P.

Annotation:—*Consd.* *Hartley v. Manson* (1842), 4 Man. & G. 172.

SECT. 4.—UNDER STAMP ACT, 1870 (c. 97).

See CONTRACT; REVENUE.

SECT. 5.—UNDER STAMP ACT, 1891 (c. 39).

See, generally, BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS, Vol. VI., pp. 500, 501, 503; CONTRACT; REVENUE.

1004. Issued by foreign company.]—Under a binding scheme of arrangement for reconstruction the property & assets of an English co. were transferred to a new American co., & it was agreed that the debenture holders of the old co. should receive bonds of the new co. in exchange for their debentures. The holder of a debenture in England received a circular from the London office of the new co., signed by its London agent, saying "Your debenture will have to be sent to Chicago to be exchanged there for the new bond. I shall be pleased to forward your debenture to Chicago free of all cost to yourself if you will lodge same at this office, taking my receipt for same." The debenture holder sent his debenture to the London agent, who sent it to the officials of the new co. in America; a bond of the new co. was transmitted by them to the London agent, who delivered it to the debenture holder in England:—*Held*: the bond was not "issued," or "offered for subscription & given or delivered to a subscriber," or "assigned or transferred," in the United Kingdom, within the above Act, s. 82 (1) (b).—*CHICAGO RY. TERMINAL ELEVATOR CO. v. INLAND REVENUE COMRS.* (1896), 75 L. T. 572; 45 W. R. 242; 13 T. L. R. 124, C. A.

Annotations:—*Distd.* *Brown v. I. R. Comrs.*, *Gordon v. I. R. Comrs.* (1899), 16 T. L. R. 94. *Consd.* *Speyer v. I. R. Comrs.* (1902), 66 J. P. 551.

1005. —.]—Bonds of a foreign co. payable to bearer were executed by the co. abroad & delivered abroad to a foreign trustee for the bondholders. The bonds were expressed not to be valid for any purpose unless authenticated by the certificate of the trustee. Some of the bonds were sent to England & the trustee having come to England there certified them & delivered them to the persons entitled to them:—*Held*: since the bonds were not marketable till they were certified, the bonds certified in England were "marketable securities by a foreign co. which were made & issued in the United Kingdom" within the above Act, s. 82 (1) (b) (i), & liable to the stamp duty imposed by that Act upon such securities.—*REVELSTOKE (LORD) v. INLAND REVENUE COMRS.*, [1898] A. C. 565; 67 L. J. Q. B. 855; 79 L. T. 227; 62 J. P. 740; 47 W. R. 210; 14 T. L. R. 525, H. L.; *affg.* *S. C. sub nom. BARING v. INLAND REVENUE COMRS.*, [1898] 1 Q. B. 78, C. A.

Annotation:—*Distd.* *Brown v. I. R. Comrs.*, *Gordon v. I. R. Comrs.* (1900), 84 L. T. 71.

BONUS.

See COMPANIES ; SETTLEMENTS.

BOOKMAKER.

See GAMING AND WAGERING.

BOOTY.

See ADMIRALTY ; CONSTITUTIONAL LAW ; PRIZE LAW AND JURISDICTION.

BOROUGH COUNCIL.

See ELECTIONS ; LOCAL GOVERNMENT.

BOROUGH ENGLISH.

See DESCENT AND DISTRIBUTION ; REAL PROPERTY AND CHATTELS REAL.

BOROUGH POLICE.

See POLICE.

BORSTAL INSTITUTIONS.

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BOTTOMRY.

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BOUNDARIES, FENCES AND PARTY-WALLS.

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Part I.—Boundaries.

SECT. 1.—DELIMITATION.

SUB-SECT. 1.—WHAT INCLUDED IN BOUNDARIES.

1. Wastes without fences.]—In wastes where there are no fences, the boundaries are usually settled in such a manner that the eye may draw the line from a particular spot to some other visible object, that the herds may see when cattle are trespassing (LORD REDESDALE).—*DIXON v. GRAHAM* (1817), 5 Dow, 266; 3 E. R. 1324, II. L. Annotation:—*Mentd.* *Browne v. McClintock* (1873), L. R. 6 H. L. 434.

2. Property described by "Abutments."]—Declaration, in trespass, described the *locus in quo* by abutments on the north, east, south, & west, severally, & it was said to abut, on the south & west, "towards" certain places named. Deft. pleaded only a justification in respect of his seisin of the *locus in quo* which he averred to be parcel of the manor of H., & to have been demised to him by copy of ct. roll. Pltf. denied that it was parcel, etc. On the trial, pltf. applied his evidence to a triangular piece of land, not contiguous on all sides to the places mentioned in the abutments, but situated within their limits:—*Held*: (1) the statement of abutments could not be objected to, on the trial, as insufficient in itself; (2) pltf. might apply it, though not with strict correctness, to the triangular piece of land; (3) deft. could not prove his justification in respect of another piece of land, also situated within the limits of the several places named in the abutments, but not contiguous to them on all sides.—*LEMPRIERE v. HUMPHREY* (1835), 3 Ad. & El. 181; 1 Har. & W. 170; 4 Nev. & M. K. B. 638; 111 E. R. 381.

Annotation:—*Distd.* *Bracegirdle v. Peacock* (1845), 10 Jur. 9.

See, further, DEEDS & OTHER INSTRUMENTS; EVIDENCE; SALE OF LAND.

3. Overhanging building.]—Pltf., the owner of two contiguous houses in the City of London, sold one to defts. by a conveyance which correctly marked out the ground site of the house conveyed. One of the first-floor rooms in the house retained by pltf. projected over the site, & was supported by the other house:—*Held*: the vertical column of air over so much of the room as overhung defts.' site belonged, not to pltf., but to defts.—*CORBETT v. HILL* (1870), L. R. 9 Eq. 671; 39 L. J. Ch. 517; 22 L. T. 263.

Annotations:—*Appld.* *Laybourn v. Gridley*, [1892] 2 Ch. 53. *Consd.* *Newton v. Huggins* (1906), 50 Sol. Jo. 617.

4. —.]—A portion of premises as occupied overhung adjoining premises. The owner in fee of both premises demised them as occupied to separate persons. He subsequently conveyed the overhung premises by reference to a ground-floor

plan, subject to the lease of those premises, but not expressly subject to the lease of the overhanging premises:—*Held*: the overhanging part of the adjoining premises passed by the conveyance.—*LAYBOURN v. GRIDLEY*, [1892] 2 Ch. 53; 61 L. J. Ch. 352; 40 W. R. 474; 36 Sol. Jo. 363.

Annotation:—*Mentd.* *Mitchell v. Mosley*, [1914] 1 Ch. 438.

5. Projection before adjoining house.]—Pltf., having agreed to purchase two adjoining houses, agreed to sell one to P., & by pltf.'s direction that house was conveyed to P., & by P. to deft., in fee, the description being, "all that dwelling-house now in the occupation of P., together with the walls belonging thereto." The houses were in a street, & were built up to the foot-pavement. On the front of deft.'s house adjoining the front of pltf.'s house, was a slight projection nine feet wide; in the middle of this was the doorway three & a half feet wide, & on each side of the doorway was a pillar supporting a shallow portico; over the doorway was a window of the same width & above that a string-course & a pediment, all symmetrically placed on the nine feet projection. Inside, the party-wall, dividing the two houses, instead of being coincident with the extremity of the nine feet projection, was in a direct line with one side of this doorway, so that if the party-wall had been prolonged in a straight line to the street, two feet eleven inches of the width of the projection, which included part of the portico & of the pediment & the whole of one of the pillars supporting the portico, would have been on pltf.'s side of that line; & on the inside these two feet eleven inches, which, from the outside, appeared to be part of deft.'s house, formed part of one of the rooms of pltf.'s house. Deft. having painted the two pillars, the portico, & the whole of the pediment, which were stucco, but had never been before painted, pltf. brought an action of trespass, claiming as his the one pillar, the part of the portico, & the part of the pediment & string-course over the pillar, all of which were on pltf.'s side of the line marking the middle of the party-wall:—*Held*: the parts in question were parts of deft.'s house.—*FOX v. CLARKE* (1874), L. R. 9 Q. B. 565; 43 L. J. Q. B. 178; 30 L. T. 616; 22 W. R. 774, Ex. Ch.

6. Outside wall of room.]—A lease of the rooms on a floor is a lease of a separate dwelling, & includes the outer wall so far as it is solely appropriate to the rooms let.—*CARLISLE CAFÉ CO. v. MUSE BROTHERS & Co.* (1897), 67 L. J. Ch. 53; 77 L. T. 515; 46 W. R. 107; 42 Sol. Jo. 67.

Annotations:—*Folld.* *Hope v. Cowan*, [1913] 2 Ch. 312. *Consd.* *Goldfoot v. Welch*, [1914] 1 Ch. 213. *Refd.* *Phelps v. London Corp.*, [1916] 2 Ch. 255.

7. —.]—The demise of a floor or a room

by walls, but by districts of land (PERRIN, J.).—*WATERPARK v. FENNELL* (1855), 5 I. C. L. R. 120.—*IR.*

1. Supplementary survey—Effect.]—Where land was described for patent by metes & bounds & a patent was issued in accordance with that description & a survey was made before issuance of the patent, it was held that a survey made thereafter could not affect the patentee's land.—*MCGREGOR v. MCMICHAEL* (1877), 41 U. C. R. 128.—*CAN.*

g. "Centre of concession"—Lot on broken front.]—In an action to settle the dividing line between the north & south halves of a lot on a broken front:—*Held*: the words

PART I. SECT. 1, SUB-SECT. 1.

a. Natural boundaries—Effect of, on courses & distances.]—If courses & distances are given to reach an object, & they will not reach that object, the rule is to go to the object as the most certain, & to alter the courses or distances accordingly.—*MCPHERSON v. CAMERON* (1868), 7 N. S. R. 208.—*CAN.*

b. —.]—In boundary questions natural boundaries generally control courses & distances.—*DIMOCK v. STONEHOUSE* (1907), 2 E. L. R. 406.—*CAN.*

c. Property bounded by road or river.]—Where property is bounded by a road or a river, the boundary, even

if given as the road or river, is the middle of the road or river, as the case may be.—*SECRETARY OF STATE FOR INDIA v. BIJOY CHAND MAHATAR* (1918), L. L. R. 46 Cal. 390.—*IND.*

d. Width of concession—Error in survey.]—There is no law requiring each concession to be of the same width throughout a township; nor any principle by which an error in the survey of one concession, entirely unconnected with the actual work & survey on the ground in another, is to affect such other concession.—*JOHNSON v. HONSBARGER* (1857), 6 C. P. 201.—*CAN.*

e. Boundaries of villis.]—The boundaries of villis are not ascertained

Sect. 1.—Delimitation: Sub-sects. 1 2, A. & B.; sub-sect. 3.]

or an office bounded in part by an outside wall *prima facie* includes both sides of that wall, unless there be an exception or a reservation or something in the context to exclude it.—**HOPE BROTHERS, LTD. v. COWAN**, [1913] 2 Ch. 312; 82 L. J. Ch. 439; 108 L. T. 945; 29 T. L. R. 520; 57 Sol. Jo. 559.
Annotations:—Folld. Goldfoot v. Welch, [1914] 1 Ch. 213.
Refd. Phelps v. London Corpn., [1916] 2 Ch. 255.

8. —.]—A demise in writing of the "rooms situate on the first & second floors" of business premises:—Held: in the absence of context to the contrary, to include the external walls of the two floors.—GOLDFOOT v. WELCH, [1914] 1 Ch. 213; 83 L. J. Ch. 360.

Annotation:—Refd. Phelps v. London Corpn., [1916] 2 Ch. 255.

9. Defined by boundary stones.]—The erection of boundary stones, although strong evidence of ownership, will not suffice to prove it, if there is evidence that the erection was protested against either at a court leet or otherwise.—BLANDY-JENKINS v. DUNRAVEN (EARL) (1898),

"the centre of the concession" meant the centre of the particular lot & not the centre of the concession where the lots were not broken.—**SCRIVER v. YOUNG** (1909), 14 O. W. R. 530; *affd.* 15 O. W. R. 27.—**CAN.**

PART I. SECT. 1, SUB-SECT. 2.—A.

h. Whether parol agreement binding.]—Where respective owners of adjoining lots agree by parol to a division line, it is binding upon them.—LAWRENCE v. McDOWALL (1838), *Bar.* 442.—**CAN.**

k. —.]—When parties agree to establish a division line, & do so, & act upon it by putting up their fences, & by severally occupying the land on each side, they are bound by their agreement, whether the line is right or wrong, & cannot repudiate it.—PERRY v. PATTERSON (1874), 2 *Pug.* 367.—**CAN.**

l. —.]—Where parties holding adjoining lands meet upon the land & fix a boundary between their lots by verbal agreement, such agreement will be binding upon them, notwithstanding the boundary agreed upon may vary from the deeds or plans by which the parties hold.—DAVISON v. KINSMAN (1853), *James*, 1, 69.—**CAN.**

m. —.]—A mutual boundary was adjusted by verbal agreement between the proprietors of adjoining lands & marked by a line of trees planted at their mutual expense:—Held: this arrangement, followed by possession in accordance therewith, was binding upon a singular successor without notice.—HETHERINGTON v. GALT (1905), 7 F. (Ct. of Sess.) 706.—**SCOT.**

n. — On successors in title.]—The predecessors in title of plff. & deft., agreed verbally to change the direction of the boundary line between them. The arrangement was completed by the erection of a fence on the substituted line:—Held: plff. & deft. were bound by the arrangement entered into by their predecessors in title.—HOLSWORTH v. FITCH (1904), 37 N. S. R. 143.—**CAN.**

o. — Specific performance — Equitable jurisdiction.]—STEWART v. LEE (1880), *Cass. Dig.* (2nd ed.) 93.—**CAN.**

p. Agreement to abide by boundary — Inconsistent with documentary title.]—When owners of adjoining lots of land agree to abide by a certain boundary between them, though that boundary is inconsistent with their

62 J. P. 661; revsd. on another point, [1899] 2 Ch. 121, C. A.

Annotation:—Mentd. Evans v. Merthyr Tydvil U. D. C. (1898), 79 L. T. 578.

Commons, see COMMONS & RIGHTS OF COMMON. Highways, see HIGHWAYS, STREETS, & BRIDGES. Manors, see COPYHOLDS.

Mines, see MINES, MINERALS, & QUARRIES.

Lakes, rivers, & seashore, see WATERS & WATER-COURSES.

Parishes, see ECCLESIASTICAL LAW; LOCAL GOVERNMENT.

SUB-SECT. 2.—BY ACT OF PARTIES.

A. By Agreement or Assurance.

10. Specific performance.]—Plff. & deft. by an agreement reciting that controversies had arisen between them concerning the boundaries of their lands abroad, agreed that a particular line should be the boundary & that comrs. should delimit the boundary within a certain limited time which had expired before suit brought; the

them, from settling up any other boundary.—**REID v. SMITH** (1868), 7 N. S. R. 262.—**CAN.**

y. — — —.]—Plff. & deft. owned adjoining lots. Deft. had cut trees towards the rear of the lots where there was no fence to indicate where the dividing line was. At plff.'s instance a surveyor ran a conventional line, both parties contributing equally to the cost of the survey. After the conventional line was drawn, plff. complained of deft. cutting within it:—Held: plff. having agreed to the running of the conventional boundary line was bound by it.—CARRIGAN v. LAWRIE (1909), 7 E. L. R. 108.—**CAN.**

a. — — —.]—JOLLYMORE v. ACKER (1915), 49 S. R. 148.—**CAN.**

b. — Boundary run by consent — Estoppel.]—GRASSETT v. CARTER (1884), 10 S. C. R. 105.—**CAN.**

c. — Running line — Acquiescence.]—Running & marking a line by one owner, not in accordance with the true line between adjoining lands, having only been assented to on condition that the true line should be ascertained & run, cannot establish it as a conventional boundary until it is acted on by both owners.—BREVIER v. GOVANG (1858), 4 *All.* 144.—**CAN.**

d. — Subsequent erroneous survey — Assent.]—M. being about to convey land to V., went on the land with V. & fixed the starting point from which the line was to run. A deed was made accordingly. M. died & plff., his widow, with consent of V., got a surveyor to run the line, which was done from the starting point indicated by M. V. was not present when the survey was made, but subsequently assented to the line as run in ignorance of the fact that a mistake had been made. V. conveyed to deft. according to the description in his deed:—Held: the assent given by V. to the line as run by the surveyor was not sufficient to establish a conventional line.—ROACH v. WARE (1886), 7 R. & G. 330; 7 C. L. T. 377.—**CAN.**

e. Recognition under misapprehension.]—Plff. & deft. were owners, respectively, of adjoining lots. Both claimed directly or indirectly under H. Plff. obtained his deed in 1840 from P., to whom H. had conveyed in 1837. Deft., after being in possession for ten years, under an agreement to purchase, derived title directly from H. in 1864. The descriptions in the

documentary title, their agreement will bind them & preclude them from settling up any other boundary.—**WOODBERRY v. GATES** (1846), 2 *Thom.* 255.—**CAN.**

q. Agreement for ascertainment — Subsequent alienation.]—Held: while two persons are in difference about the boundary, & show by their conduct that they are uncertain about the true line, but agree with each other to have it ascertained, & to hold accordingly, either party may make a conveyance to a third person, which will enable the alienee to hold according to the true boundary.—DOE BECKETT v. NIGHTINGALE (1849), 5 U. C. R. 518.—**CAN.**

r. — Mutual survey — Acquiescence.]—Adjoining land owners mutually agreed upon a surveyor to run a boundary line between them, which he did. One owner, without objection on the part of the adjoining proprietor, built a fence on the line so given by the surveyor:—Held: a sufficient acquiescence to establish it as a conventional line.—STEPPER v. HARDING (1887), 24 N. B. R. 143.—**CAN.**

s. — — —.]—Where respective owners employ a surveyor to run a division line between two given points, & he runs a line which does not exactly follow the prescribed course, but they, with full knowledge of that fact, & of the position of the line so run, agree to it, & erect their fences upon it, & occupy according to it, they are bound by the agreement, & one of them cannot afterwards repudiate it.—INCH v. FLEWELLING (1890), 30 N. B. R. 19.—**CAN.**

t. — — — Estoppel.]—Where a boundary line was run, between adjoining proprietors of land by a surveyor, mutually employed by them, & acted upon for a number of years, & improvements & subsequent conveyances made according thereto:—Held: the parties were bound by it, although it proved to have been run incorrectly.—DOE d. CARR v. McCULLOUGH (1842), 1 *Kerr*, 460.—**CAN.**

w. — — —.]—Two adjoining owners mutually agreed to have a survey, & each appointed a surveyor to represent him. These surveyors, attended by the parties, met on the spot, & having read the deeds, fixed, by mutual consent of the parties, a boundary line between the two properties:—Held: an estoppel was thereby created, which prevented the parties, or those claiming under

agreement provided for conveyances from the one party to the other accordingly. In a suit for specific performance of the agreement:—*Held*: (1) the boundaries settled by such an agreement if it were fairly made without collusion (which could not be presumed) were to be presumed the true & ancient limits; (2) although nothing valuable was given on the face of the agreement as a consideration, the settlement of boundaries & quieting of disputes was a mutual consideration on each side sufficient to support the suit; (3) the provisions relating to comrs. were not a submission to arbitration.—*PENN v. BALTIMORE (LORD) (1750)*, 1 Ves. Sen. 444; 27 E. R. 1132, L. C.

Annotations:—*Expld.* Pike v. Hoare (1763), Amb. 428; *Re Courtney, Ex p. Pollard* (1840), 4 Deac. 27. *Consd.* Cookney v. Anderson (1862), 31 Beav. 452; *Sichel v. Raphael* (1864), 3 New. Rep. 662. *Expld.* I. R. Comrs. v. Angus, *The same v. Lewis* (1889), 23 Q. B. D. 579. *Consd.* Companhia de Mocambique v. British South Africa Co., *De Sousa v. British South Africa Co.*, [1892] 2 Q. B. 358; *Black Point Syndicate v. Eastern Concessions* (1898), 79 L. T. 658. *Refd.* Portarlington v. Soulby (1834), 3 My. & K. 104; *Re Holmes* (1861), 2 John. & H. 527; *Norris v. Chambres* (1861), 29 Beav. 246; *Douglas v. Douglas*, *Douglas v. Webster* (1871), L. R. 12 Eq. 617; *Ewing v. Orr Ewing* (1883), 9 App. Cas. 34; *Duder v.*

deeds were vague. Pltf. employed a surveyor to run his lines in 1841, two years before deft. went on, & the latter, for some years, both by words & acts, recognised the line between them, as claimed by pltf., as being the true line, but it appeared this line was not the true one:—*Held*: deft. having acted under a misapprehension of the facts, & being unacquainted at the time with the real boundary of his lot, there was nothing in the acts or declarations so made to establish a conventional line, independent of right.—*McDONALD v. McDONALD* (1867), 7 N. S. R. 42.—*CAN.*

l. Agreed line of fence—Misapprehension.—Where adjoining owners concur in putting up a fence along a certain line, on an erroneous assumption by each that it is the true boundary, & neither has made representation to the other upon the subject, neither is estopped from setting up a different line as the true boundary.—*MOORE v. DENTICE* (1901), 20 N. Z. L. R. 128.—*N.Z.*

g. Subsequent line run by plaintiff—Acquiescence of defendant.—A line was originally run for prior holders of property, one of them at the time claiming title through the original patentee, under an agreement for purchase, but was not acquiesced in by pltf. Thereafter, M. at pltf.'s request ran a line supposed to be acquiesced in by deft., but upon the erection of a fence thereon by pltf. deft. objected, & it was removed. Later P. ran a line, two surveyors being present at the time on deft.'s behalf, which was the correct line:—*Held*: the line originally run was not binding upon the parties.—*McNAUGHT v. TURNBULL* (1863), 13 C. P. 426.—*CAN.*

h. Agreement with former proprietor—Ratification.—Deft., as part of his defence to an action of trespass, relied upon a conventional line alleged to have been established with L., a former proprietor. L. had no title at the time, but after obtaining title, adopted the line:—*Held*: the alleged line was insufficient.—*MOONEY v. McINTOSH* (1887), 7 R. & G. 419; 7 C. L. T. 399, 436; 14 S. C. R. 740.—*CAN.*

k. Acts of predecessors—Whether binding on successors.—*Held*: although there was doubt as to the true dividing line between the parties, their predecessors, possessed for nearly twenty years, had agreed & determined a dividing line between them, & deft. was estopped from denying that the

conventional fence was the true dividing line.—*GALLANT v. DUNN* (1907), 2 E. L. R. 322.—*CAN.*

l. — — ——Pltf. bought land theretofore vacant but with a wire fence & posts running along what was taken for the south line. Subsequently by agreement with deft.'s predecessor, pltf. put up a board fence as the boundary of their lots on practically the line of the former post & wire fence. Deft. purchased the north part of the neighbouring lot to pltf., & the owner to the south of him moved him up about four feet & he then claimed four feet from pltf.; & on the latter's refusal, he tore down the fence:—*Held*: deft. had wholly failed to prove his right to the land beyond the fence & was a trespasser.—*McMENEMY v. GRANT* (1913), 24 O. W. R. 100; 4 O. W. N. 802; 9 D. L. R. 319.—*CAN.*

m. Agreement by tenants of moieties—Tenants becoming owners.—Tenants of moieties of a lot made an agreement as to their boundaries. They were subsequently turned out of possession by the owner & took deeds from him:—*Held*: the agreement could not affect their rights after they became owners.—*FRASER v. KIRK* (1858), 2 Thom. 290.—*CAN.*

n. Wall built with consent of adjoining owner.—In an action for the recovery of land, deft. pleaded that he, "by & with the knowledge, approbation, & consent of pltf.," built a wall for the purpose of making a boundary wall between pltf.'s land & his own, & that the portion claimed was included within the boundary wall on his side:—*Held*: the plea should be construed as impliedly alleging that pltf. had represented to deft. that the site of the wall was the boundary, & such representation having been made with the intent of being acted upon, & deft. having acted upon it, by building the wall, the plea was a good defence by way of estoppel.—*SHERIDAN v. BARRETT* (1879), 4 L. R. 1r. 223.—*IR.*

o. Misrepresentation by vendor—Estoppel.—A vendor of land who wilfully misstates the position of the boundary line & thereby leads the purchaser to believe that he is acquiring a strip not included in the deed, is estopped from afterwards claiming such strip as his own property.—*ZWICKER v. FEINDEL* (1899), 29 S. C. R. 516.—*CAN.*

Termination of agreement—& take "fence—Notice.—Under agreement for boundary between two

Amsterdamsch Trustees Kantoor, [1902] 2 Ch. 132; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354. *Mentd.* Bayley v. Edwards (1792), 3 Swan. 703; *Bedreechund v. Elphinstone* (1830), 2 State Tr. N. S. 379; *Houlditch v. Donegall* (1834), 2 Cl. & Fin. 470; *Mercantile, Investment & General Trust Co. v. River Plate Trust, Loan & Agency Co.* (1892), 61 L. J. Ch. 473; *A.-G. v. Johnson*, [1907] 2 K. B. 885.

See, further, SPECIFIC PERFORMANCE.

Documentary description of boundaries—In deeds.]

—*See DEEDS & OTHER INSTRUMENTS.*

— **In wills.]—See WILLS.**

B. By Adverse Possession.

See LIMITATION OF ACTIONS.

SUB-SECT. 3.—BY STATUTORY AUTHORITY.

11. Inclosure Acts—Notice of appeal against order.]—An Inclosure Act gave to the party aggrieved a right of appeal for anything done in pursuance of that Act, or of the recited (General Inclosure) Act, on giving to the comr. & to the parties concerned ten days' notice in writing. Notice of appeal against an order ascertaining the

properties, to be a "give & take fence" instead of a watercourse each party is entitled to reasonable notice of termination of agreement.—*LANDALE v. MENZIES* (1909), 9 C. L. R. 89.—*AUS.*

See, generally, DEEDS & OTHER INSTRUMENTS.

PART I. SECT. 1, SUB-SECT. 3.

a. Special Surveys Act, 1902—Construction.]—The above Act should be construed liberally so as to carry out the intention of the legislature in eliminating litigation arising from undetermined boundaries.—*PETERSON v. BITULITHIC & CONTRACTING CO.* (1913), 24 W. L. R. 19; 4 W. W. R. 223; 12 D. L. R. 411.—*CAN.*

r. Survey not in accordance with statute.]—A survey not in accordance with statute is illegal.—*Re WALKER & MUNICIPALITY OF BURFORD* (1857), 15 U. C. R. 82.—*CAN.*

s. S. P. COOPER v. WELLBANKS (1861), 14 C. P. 361.—*CAN.*

t. S. P. POCKETT v. POOLE (1897), 11 Man. L. R. 508.—*CAN.*

y. — Original line retraced.]—A surveyor employed by govt., under C. S. U. C., c. 93, ss. 6, 8, to survey a concession line alleged not to have been run in the original survey, or to have been obliterated, instead of attempting to make a survey in accordance with those sects., satisfied himself that the original line could be found & endeavoured to retrace it:—*Held*: such survey was not binding under the statute.—*BOLEY v. McLEAN* (1877), 41 U. C. R. 260.—*CAN.*

z. — Different from original survey.]—*DOE d. CLAPP v. HUFFMAN* (1842), 3 Ont. Dig. 5333.—*CAN.*

a. Petition for survey—Sufficiency.]—A petition for a statutory survey need not show that the necessary number of resident landowners under the Act have applied for a survey when the facts are so; nor need the petition show any want or obliteration of the original survey, or pray for placing monuments.—*R. v. McGREGOR* (1868), 19 C. P. 69.—*CAN.*

b. Whether confirmed by statute.]—Several persons had, under govt., settled according to lines of an original govt. survey. Subsequently, a surveyor was employed by the govt. to run the concessions omitted in the first survey. He did so, but this survey was remonstrated against by petition, & was never definitely adopted

1.—*Delimitation: Sub-sect. 3.]*

boundaries between two townships, was served on the comr., but not on the lady of the manor, who was a party materially concerned in the question:—*Held*: the notice was insufficient, although the general Inclosure Act authorised the comr. to ascertain the boundaries between the several parishes, & gave a right of appeal, on giving notice to the comr. only.—*R. v. LANCASHIRE JJ.* (1818), 1 B. & Ald. 630; 106 E. R. 231.

12. — **Whether conclusive as to former boundaries.]**—The determination of the comrs. under an Inclosure Act, as to the boundaries of a parish to be inclosed, is not conclusive of the fact as to what were the boundaries antecedently to such determination.—*R. v. ST. MARY, BURY ST. EDMUNDS (INHABITANTS)* (1821), 4 B. & Ald. 462; 106 E. R. 1006.

Annotation:—*Reid. R. v. Madeley* (1850), 15 Q. B. 43.

13. — **Acts of ownership beyond boundary fixed by commissioners.]**—Where a boundary line is drawn and fixed by the comrs. under an Inclosure Act, all acts of ownership beyond it fall to the ground.—*FALMOUTH'S (LORD) CASE* (prior to 1824), cited in 9 Moore, C. P. at p. 94.

Annotation:—*Consd. Lester v. Kemp* (1824), 9 Moore, C. P. 85.

14. **Presumption as to limits of manor.]**—By an adjudication of the quarter sessions under an Inclosure Act for the parish of T., the *locus in quo*, parcel of a large waste, was found to be in the parish of G., in which K. had a manor: over the *locus in quo*, B., who had a manor in the adjoining parish of T., had immemorially exercised acts of ownership: K. had also exercised acts of ownership over it occasionally, but they were less decisive than those exercised by B.: in the Act for the inclosure of T., there was an enumeration of B.'s claims in respect of property in T., but no mention of G., nor of any claim by B. in respect of property in G. In an action of replevin, in which there was conflicting evidence as to the boundary of B.'s manor, the judge left it to the jury to say whether the soil of the *locus in quo* was in K. or B., without calling their attention to the question, whether or no the parishes & manors were coterminous: the jury found in favour of K.:—*Held*: the judge had left the case properly to the jury, & the circum-

stances of there being in the inclosure act for T. no mention of B. having any claim in respect of property in the adjoining parish of G. was sufficient to warrant the jury in the inference that B.'s manor did not extend beyond T.—*LESTER v. KEMP* (1824), 2 Bing. 30; 9 Moore, C. P. 85; 130 E. R. 215.

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15. — **Award not in accordance with requirements of Act.]**—By a private Inclosure Act, comrs. were directed to fix & settle the boundaries of a parish, in a certain manner therein specified, & to advertise in a provincial newspaper a description of the boundaries so fixed & settled. The boundaries so fixed & settled were also to be inserted in the award of comrs., & to be final, binding & conclusive. The comrs. having fixed & settled the boundaries in the mode specified, duly advertised a description of them, but the boundaries mentioned in the award varied from those which had been advertised:—*Held*: (1) the comrs. had not pursued the authority given by the Act; (2) their award was not binding as to the boundaries of the parish.—*R. v. WASHBROOK (INHABITANTS)* (1825), 4 B. & C. 732; 7 Dow. & Ry. K. B. 221; 3 Dow. & Ry. M. C. 386; 107 E. R. 1233.

16. — **Service of notice on churchwarden.]**—A parish was divided into four tithings, A., B., C., & D., A. containing the parish church. Each tithing maintained its own poor, & each had a churchwarden, elected at a vestry of the parish in general, but from & by its own inhabitants. The minute of appointment included all the four, & stated them to have been nominated to serve the office of churchwardens for the tithings for the year ensuing. All were sworn in together at the archdeacon's visitation, the oath being administered to them & each of them, "truly to execute the office of churchwarden within your parish." None ever acted out of his own tithing, unless in signing the annual presentments to the archdeacon of the state of the church, etc. Each of the tithings, except A., which was exempt, raised its own church rate, & paid it to the vestry clerk; & he kept a separate account for each churchwarden, who accounted with the inhabitants of his own tithing. A comr. of inclosure under a local Act & Inclosure (Consolidation) Act, 1801 (c. 109), s. 3, made an order settling the boundaries between the parish & another parish adjacent, & adjudging certain

or confirmed:—*Held*: the last-mentioned survey could not govern, or be regarded as confirmed by 12 Vict. c. 35, as having been legally done under former Acts.—*KEELEY v. HARRIGAN* (1853), 3 C. P. 173.—**CAN.**

c. — **Award of Boundary Line Commissioners.]**—*RAIIE v. CRONSON* (1859), 9 C. P. 9.—**CAN.**

d. **Ascertainment of side lines—Lots in concession.]**—*McLACHLIN v. DIXON* (1854), 4 C. P. 71, 307.—**CAN.**

e. — **Original survey.]**—*BELL v. WHITE* (1857), 15 U. C. R. 171.—**CAN.**

f. — **Subsequent survey.]**—*MACDONALD v. McDONALD* (1862), 11 C. P. 374.—**CAN.**

trespass, to try the boundary between lots in a concession, it was admitted, that the original survey of the township was intended to be in double-fronted concessions & that there was satisfactory evidence of the original posts at the north or rear end of the concession. It was admitted also that a post had been planted in the rear, in the original survey between the lots in question & the post in front was agreed upon:—*Held*: under 36 Vict. c. 60, s. 3, the line must be drawn from the

front to the rear of the concession parallel with the governing line.—*DYELL v. MILLAGE* (1877), 27 C. P. 347.—**CAN.**

h. — **Double-fronted concessions.]**—12 Vict. c. 35, s. 37, which prescribes the rule for drawing the side lines in double-fronted concessions, applies to townships theretofore surveyed.—*MARRS v. DAVIDSON* (1867), 26 U. C. R. 641.—**CAN.**

k. — **]**—In the original survey posts were planted on the front or west side of a concession, to mark the lots, & also at the rear or east side, on the road between the two townships; but the lots in it were granted as broken lots, containing 90 acres, not as half lots, except lot 11, which was erroneously described as containing 100 acres:—*Held*: (1) not a double-fronted concession, within the Acts; (2) the side lines in it should be ascertained by running from the posts in front, parallel to the base line of the township, through to the road between the two townships, & without reference to the posts on that road.—*WARNOCK v. COWAN* (1856), 13 U. C. R. 257.—**CAN.**

l. — **Surveyor exceeding authority.]**—*MURPHY v. HEALEY* (1870), 30 U. C. R. 192.—**CAN.**

m. — **Lost post.]**—The proper method of ascertaining the place of a lost post is by dividing the distance between the nearest known posts on the side line, as it was originally run past the lots, & not by running a straight line between the nearest posts on the concession line & dividing the distances by the number of lots.—*DAVIS v. WADDELL* (1857), 6 C. P. 442.—**CAN.**

n. — **Change from original plan—Compensation.]** 23 Vict. c. 101 declares the mode in which the side lines of the first concession of C. shall be run, & provides a method by which those injured by the change from the original plan of survey may obtain compensation:—*Held*: 20 Vict. c. 78 was thereby excluded, & deft. was confined to this method.—*SMITH v. SPARROW* (1861), 21 U. C. R. 323.—**CAN.**

o. **Line not run upon original survey—Ascertainment of original monuments.]**—It appeared that the line between two lots was not run upon the original survey, & that when the line was run, no trace could be found of an original post, if any had been planted, designating the boundary line between the lots on the front of the concession. It also appeared that the

lands to be in the latter; & he, within a month, served a description of the boundaries on a party then acting as churchwarden of tithing A. Until the order, the lands in question had been rated to tithing B. On appeal against a poor rate made upon those lands as situate in tithing B., notwithstanding the comr.'s order:—*Held*: the description of boundaries had been sufficiently served according to the proviso of Inclosure (Consolidation) Act, 1801 (c. 109), s. 3, requiring such description to be served upon one of the churchwardens or overseers of the poor of the respective parishes, although the party served had finished his year of office, but continued to do the duties, because his successor had not been sworn in or acted.—*R. v. MARSH* (1836), 5 Ad. & El. 468; 2 Har. & W. 255; 6 Nev. & M. K. B. 668; 3 Nev. & M. M. C. 728; 111 E. R. 1243.

Annotations:—*Mentd.* *R. v. Fenton* (1841), 1 Gal. & Dav. 17; *Bray v. Somer* (1862), 2 B. & S. 374; *R. v. Green* (1874), 31 L. T. 543; *St. Sepulchre London v. St. Sepulchre Middlesex* (1879), 5 P. D. 64.

17. — Dispute settled by trial of a feigned issue.—An award made by an assistant inclosure comr., that a certain common was within the manor of L., was removed into the Ct. of Queen's Bench by *certiorari*, on the application of the lord of the manor of E., who claimed the common to be parcel of his manor. On his expressing himself dissatisfied with the award, & requiring to have the matter tried by a feigned issue, & stating as the ground of his dissatisfaction that the award was wrong, & setting forth the evidence in support of his claim, the ct. directed the trial of a feigned issue under Inclosure Act, 1845 (c. 118), s. 44, to determine the disputed question of boundary.—*R. v. KELCEY* (1850), 1 L. M. & P. 499; 19 L. J. Q. B. 523; 15 Jur. 629; *subsequent proceedings* (1851), 20 L. J. Q. B. 283.

18. — Fenced strips of land shown on map as part of common—Whether map conclusive.—*COLLIS v. AMPHLETT*, No. 370, *post*.

See, further, Part IV., Sect. 4, *post*.

19. Tithe commutation Acts—Extent of powers of commissioners—No general power to settle boundaries.—Tithe Act, 1836 (c. 71), s. 45, gives the comrs. no power to determine anything but what may prevent them from making their award. For that purpose, but for no other, they may determine any question as to the existence of a modus,

or any question as to the boundary of lands, or any other point in difference. If the words of s. 45 are not restrained in that manner, it would give to the comrs. power to determine the boundary of any man's lands in the kingdom. That is the rational limit to be placed on the words of the Act. If, for instance, a district modus were required to be settled, then, in order to see what lands were covered by the modus, it would be necessary for the comrs. to have a particular power to ascertain the boundaries; but not a general power to settle boundaries (*ALDERSON, B.*).—*GIRDLESTONE v. STANLEY* (1839), 3 Y. & C. Ex. 421; 3 J. P. 250; 3 Jur. 382; 160 E. R. 766.

Annotation:—*Consd.* *Shepherd v. Londonderry* (1852), 21 L. J. Q. B. 204.

20. — Boundaries of parishes or counties.—Tithe Act, 1836 (c. 71), s. 45, empowering the tithe comrs. to decide any question touching the boundary of any lands, does not authorise them to settle, by their award, a dispute as to the boundary of parishes. Nor can they do this under the powers granted by Tithe Act, 1837 (c. 69), s. 2, even at the request of two-thirds in value of the landowners, if the boundary of the parishes be also a boundary between counties. For, by Tithe Act, 1839 (c. 62), s. 37, this & the two prior Acts are incorporated; & Tithe Act, 1839, s. 34 forbids the comrs. to adjudicate on a boundary which divides counties as well as parishes.—*Re YSTRADGUNLAIS TITHE COMMUTATION* (1844), 8 Q. B. 32; 13 L. J. Q. B. 287; 115 E. R. 785.

Annotation:—*Consd.* *Re Dent Tithe Commutation* (1845), 8 Q. B. 43.

21. — Boundaries of township & parish—Award quashed in certiorari.—Tithe Act, 1836, s. 95, took away *certiorari* in the case of orders & adjudication made by the tithe comrs. under that Act. Tithe Act, 1837, s. 2 empowered the comrs. to settle parish boundaries; & sect. 3 gave a *certiorari* to any person interested in the judgments respecting such boundaries, who should be dissatisfied therewith, & enacted that, on removal of such judgment under the writ, the decision of the ct. thereon should be final & conclusive as to the boundaries:—*Held*: on the *certiorari* thus restored, the ct. was authorised to consider, not only the merits of the decision as

position of the original monuments at the front angle of the side road allowances was ascertained by the surveyor, & the monuments planted by him were on such site:—*Held*: plff. was entitled to claim according to the statutable survey.—*PALMER v. THORNBROOK* (1877), 28 C. P. 117.—*CAN.*

p. Survey adopted by government.—*Held*: a survey having been adopted & acted on by the govt., the boundary marked on the ground in accordance with it must govern until changed by competent authority.—*WHITE v. DUNLOR* (1868), 27 U. C. R. 237.—*CAN.*

q. Division line between lots—Conclusiveness of survey.—Plff. owned lot 28 & deft. lot 27 in a concession, between which there was no road allowance, & plff., previous to the survey of that concession under 29 Vict. c. 72, had occupied the land in question for more than twenty years. By this survey it belonged to lot 27:—*Held*: the effect of such survey was to fix conclusively the division line between the lots.—*TAYLOR v. CROFT* (1871), 30 U. C. R. 573.—*CAN.*

r. — Mode of ascertainment.—The divisional post originally planted between two lots could not be found nor its exact location established:—*Held*: the division line should be

ascertained in the manner directed by Surveys Act, 1914 (c. 166), ss. 39, 40, by dividing the width between the two established posts equally, & the side lines should run from that point.—*MOND NICKEL CO. v. DEMOREST* (1919), 16 O. W. N. 299.—*CAN.*

s. Mistake in survey—Adjustment of rights—Line between quarter sections.—*ROHRKE v. MARSHALL* (1910), 13 W. L. R. 198; 3 Sask. L. R. 82.—*CAN.*

t. — Crown patent—Mode of ascertainment.—Where the description of land in a patent from the Crown gave a fixed point of commencement, as to the situation of which there was no controversy:—*Held*: (1) the boundaries of the land granted were ascertainable & should be ascertained by a proper survey according to the description in the patent; (2) it was not within the power of the officials of the Crown Lands Department to establish, as the true line, one erroneously run by a negligent or incompetent surveyor; (3) the erroneous line could not be supported under Surveyors' Act, s. 2.—*SEMPER LUMBER CO. v. HERCHMER* (1914), 28 W. L. R. 952; 18 D. L. R. 237; 7 W. W. R. 333; 19 B. C. R. 436.—*CAN.*

w. Boundary Line Commissioners

—*Jurisdiction of—Surveys.*—Boundary Line Comrs. have authority to cause surveys to be made when the boundaries of lots, etc., are in dispute.—*GANDER v. HILL* (1839), 6 O. S. 101.—*CAN.*

y. — Ascertainment of side lines.—Boundary Line Comrs., in determining the side lines between lots, are bound by 59 Geo. 3, c. 14, that such side lines shall correspond with the course of the side lines of the township on that side from which the lots are numbered.—*DELONG v. STRIKER* (1840), 6 O. S. 137.—*CAN.*

a. — Boundary Line Comrs. have no power to establish the side lines between lots, which are at neither end of the concession, as the governing side lines of the several lots in the concession.—*MORGAN v. SIMPSON* (1841), 6 O. S. 132.—*CAN.*

b. — Estates less than freehold.—Under 1 Vict. c. 19, s. 4, Boundary Line Comrs. have no authority in cases of estates less than freehold.—*VANDERLIP v. MILLS* (1839), 6 O. S. 62.—*CAN.*

c. — Validity of award by.—Under 1 Vict. c. 19 & 3 Vict. c. 11, Boundary Line Comrs. must show in their award the course of the line run

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to boundary, but all questions usually discussed on *certiorari*.

The award of an assistant tithe comr. employed to settle the boundaries of a township on request of the landowners, under Tithe Act, 1837, s. 2, was quashed, on *certiorari*, as not sufficiently showing jurisdiction, because (1) it did not state the district to be one of which the tithes were "to be commuted"; (2) it stated the request to have been signed, not "at a parochial meeting called for that purpose" "according to the provisions of" Tithe Act, 1836, s. 17 (referred to by Tithe Act, 1837, s. 2), but only "at a meeting called for that purpose."

In Tithe Act, 1839, s. 34 (giving the comrs. power, on requisition, to ascertain old or set out new boundaries), the proviso "that nothing in this provision" shall extend to any boundary line of a cty., or of copyhold without consent of the lord, applies only to the enactments in the same clause. And s. 37 of that Act which incorporates it with Tithe Act, 1837, does not abridge the power given by s. 2 of the prior Act. Therefore, in a case under Tithe Act, 1837, s. 2, the comrs. may ascertain the existing boundary of the parish, though it be also that of a county, or of copyhold in a manor, the lord of which does not consent to the inquiry. An award under that clause can be made only where the tithes are "to be commuted": & there is no jurisdiction under it if the tithes have been commuted already.—*Re DENT TITHE COMMUTATION* (1845), 8 Q. B. 43; 10 Jur. 178; 115 E. R. 790.

22. — Notices required.]—The award of an assistant tithe comr., appointed under Tithe Act, 1837, to inquire into & set out the boundary of the township of S., for the purpose of commuting the tithes of the township, stated that he had given, & caused to be given, all the notices prescribed by that Act & Tithe Act, 1839, & then defined the limits of the boundary in the present tense throughout. The boundary so set out, it appeared from the affidavit of the comr. & others, was the ancient boundary of the township, & had been inquired into & set out as such under Tithe Act, 1837, & not under Tithe Act, 1839. But it appeared also, from the same affidavits, that within such boundary was included a tract of land occupied by twenty-one different persons, & claimed to belong to another township, called B., & which had

to mark the boundary & the position of the point of departure, or their award will be defective & void.—*CALDWELL v. WRIGHT* (1842), 2 Ont. Dig. 2786.—**CAN.**

d. ——An award made by Boundary Line Comrs. under 1 Vict. c. 19, on a subject within their jurisdiction, & in which both parties interested were heard, & which had not been appealed against:—*Held*: conclusive between those parties.—*HAVENS v. DONALDSON* (1844), 1 U. C. R. 371.—**CAN.**

e. ——In trespass *quare clausum fregit*, deft. justified his entry under an award of Boundary Comrs., awarding the possession of the *locus in quo* to deft., & averred that he entered into the land under the award as his freehold:—*Held*: bad on general demurrer, as the Comrs. had no power to award the possession.—*VILLIARD v. CECILIE* (1842), 6 O. S. 406.—**CAN.**

f. ——Reasons for award not stated.]—*MURNEY v. MARKLAND* (1841), 6 O. S. 220.—**CAN.**

g. —Conclusiveness of award

by.]—*VIVIAN v. CAMPBELL* (1858), 7 C. P. 175.—**CAN.**

Survey by subordinate.]—A line run by a subordinate, & adopted by the principal surveyor, is the work of the latter, & must be treated as such.—*OVENS v. DAVIDSON* (1860), 10 C. P. 302.—**CAN.**

k. —Filing judgment of.]—3 Vict. c. 11, s. 2, which provides that every judgment & final decision of the Boundary Line Comrs. shall be filed with the registrar of the county where such boundary shall be situate, is directory only, & the omission to file will not affect the validity of the judgment.—*R. v. ROSE* (1855), 12 U. C. R. 637.—**CAN.**

l. —Procedure.]—A rule for a *mandamus* will be granted against Boundary Line Comrs. if they do not return the proceedings had before them within fourteen days after notice of appeal.—*DELONG v. STRIKER* (1840), 6 O. S. 137.—**CAN.**

m. School section—Alteration of boundaries.]—Under 13 & 14 Vict. c. 48, s. 18 (4), the municipality may alter

been rated & assessed to the poor & highway rates of the township of B. for upwards of ninety years; that the comr. had consulted the rate-books of the township of S. only, in order to ascertain whether two-thirds in number & value of the landowners in the township of S. had signed the notice required by Tithe Act, 1837, & that two-thirds of the landowners of S., not including the said tract of land, had signed such notice:—*Held*: the comr. having set out the ancient boundary, under Tithe Act, 1837, the notice was insufficient, & the award could not be sustained.—*R. v. HOBSON* (1850), 19 L. J. Q. B. 262; 15 L. T. O. S. 363.

23. — Issue to try validity of award.]—Where an award has been made under Tithe Acts, 1837 & 1839, settling the boundary of a parish, & is removed into the Ct. of Queen's Bench by *certiorari* under s. 3 of the former Act, the ct. will not, as of course, order a feigned issue under s. 35 of the latter Act, at the instance of a party dissatisfied.

On a motion for a feigned issue, the attorney for appct. stated that he, the attorney, had examined several documents & witnesses concerning the boundary, & believed, from such examination, that the comr. had included in parish A. seventy acres of land belonging to parish B., deposing also that, as he was informed & believed, appct., as one of the inhabitants of B., & a large portion of the landowners, of B. were desirous of trying by such issue the validity & accuracy of the award, & whether the seventy acres were in A. or B.:—*Held*: grounds were not shown on which the ct., in its discretion, ought to direct an issue.—*R. v. MERSON* (1842), 3 Q. B. 895; 3 Gal. & Dav. 367; 12 L. J. Q. B. 7; 7 J. P. 38; 6 Jur. 1061; 114 E. R. 752.

Annotation:—Distd. R. v. Kelcey (1850), 1 L. M. & P. 499.

24. — Award prospective.]—The award of tithe commissioners ascertaining and setting out the boundary between parishes, etc., under Tithe Acts, 1837 & 1839, is prospective only in its operation, whether the boundary line set out be the old or a new one. Therefore, in a dispute on parochial settlement, if it appear that a certain house is within the boundary of parish A., as defined by the award of an assistant tithe commissioner, evidence may be given that at the time to which the dispute relates, if before the making of such award, the house was not in A., but in the adjoining parish.—*R. v. MADELEY (INHABITANTS)* (1850), 15 Q. B. 43; 4 New Mag. Cas. 89; 4

the boundaries of sections within their township, by taking from one & adding to another, without any previous request of the freeholders & householders, & notwithstanding their disapprobation of the change, provided that those affected by the alteration have notice of the intention to make it.—*Re LEY & CLARKE TOWNSHIP* (1856), 13 U. C. R. 433.—**CAN.**

n. ——To alter the boundaries of a school section within a township, not being a union section, it is necessary that the alteration should not go into effect before Dec. 25 following; & that it appear to the municipality that all parties affected have had due notice.—*Re ISAAC & EUPHRASIA MUNICIPALITY* (1859), 17 U. C. R. 205.—**CAN.**

o. —By bye-law—Indefinite boundaries.]—*Re SIMMONS & CHATHAM TOWNSHIP CORPN.* (1861), 21 U. C. R. 75.—**CAN.**

p. —Quashing bye-law.]—*Re PATTERSON & HOPE TOWNSHIP CORPN.* (1871), 31 U. C. R. 360.—**CAN.**

New Sess. Cas. 169; 19 L. J. M. C. 187; 15 L. T. O. S. 87; 14 J. P. 589; 117 E. R. 373.

See, further, Part IV., Sect. 4, *post*.

25. Local Government Act, 1858—Ecclesiastical district.]—A district formed for ecclesiastical purposes, under New Parishes Act, 1843 (c. 37), consisting of parts of two townships, each of which townships separately maintains its own poor & its own highways, is "a place having a known & defined boundary" within Local Government Act, 1858 (c. 98), s. 12, & is not a less place included within a greater within the meaning of s. 14. Preliminary proceedings under ss. 14 & 16 are therefore unnecessary, & the district may at once adopt the Act, at a meeting of owners & ratepayers, convened by the churchwardens; & an order of the Secretary of State confirming such adoption is valid.—*R. v. NORTHOWRAM & CLAYTON RATEPAYERS* (1865), L. R. 1 Q. B. 110; 7 B. & S. 110; 35 L. J. Q. B. 90; 30 J. P. 181.

Annotations:—*Distd. R. v. Hardy* (1868), L. R. 4 Q. B. 117; *R. v. L. G. Board* (1873), L. R. 8 Q. B. 227.

26. — Inclusion of place authorised to adopt Act.]—The parish of L., containing 1,400 acres, comprised within its area the corporate borough of L., which was in extent 100 acres. The parliamentary borough of L. comprised the whole of the parish of L., & part of another parish. The majority of ratepayers of the parish of L. adopted Local Government Act, 1858, & an appeal by some of the ratepayers was made, under s. 17, to the Secretary of State, who dismissed the appeal, & confirmed the adoption of the Act throughout the parish:—*Held*: the parliamentary borough, including within its limits a less place, namely, the parish, was not a place authorised to adopt the Act; the parish was a place authorised to adopt the Act, including within its limits a less place, namely, the corporate borough, which, if not so included, would of itself be authorised to adopt the Act; & the adoption by the parish & the order of the Secretary of State were valid.—*R. v. HARDY* (1868), L. R. 4 Q. B. 117; 9 B. & S. 926; 38 L. J. Q. B. 9; 17 W. R. 173; *sub nom. R. v. SECRETARY OF STATE FOR HOME DEPARTMENT, Re LYMINGTON BOROUGH & PARISH*, 19 L. T.

Annotation:—*Distd. R. v. Grasmere L. B.* (1873), 42 L. J. Q. B. 131.

27. Local Government Act, 1888 (c. 41)—Parish added to adjacent parish.]—By an order

of a county council, made under the Local Govt. Act, 1888, s. 57, & confirmed by the Local Govt. Board, part of a parish was added to an adjacent parish. The original parishes were situated in different poor law unions, & no alteration was made by an order of the Local Govt. Board in the boundaries of the unions:—*Held*: as the added part became part of the parish to which it was added, it became part of the poor law union in which that parish was situate.—*BOOTLE UNION GUARDIANS v. WHITEHAVEN UNION GUARDIANS* (1903), 51 W. R. 550; 19 T. L. R. 453; 47 Sol. Jo. 514; 1 L. G. R. 585.

Boundaries of parishes, generally, see ECCLESIASTICAL LAW; LOCAL GOVERNMENT.

28. Letters patent creating a province.]—By letters patent, dated Feb. 19, 1836, made in exercise of powers given by South Australia Act, 1834 (c. 95), the King in Council erected & established the Province of South Australia, the applt. State, & declared that its boundary on the east, on which side it adjoined New South Wales, should be the 141st degree of east longitude. Under an agreement between the Govts. of New South Wales & South Australia the supposed position of that longitude was marked upon the ground for 123 miles north from the sea, & proclamations were issued in the two colonies publishing the line so marked as the boundary. This marked line was afterwards extended, under agreement between the two Govts., as far as the river M. The Secretary of State for the Colonies approved what had been done. The line so marked was subsequently found to be about 2½ miles to the west of the true position of the 141st degree. The Colony of Victoria, the resp. State, was created in 1850 out of part of New South Wales, & so that on the west it adjoined South Australia so far north as the river M. The applt. State brought an action in the High Ct. of Australia claiming possession of the land between the boundary so agreed & marked & the 141st degree of east longitude, & for ancillary relief:—*Held*: upon the true construction of the letters patent, it was contemplated that the 141st degree of east longitude should be ascertained & represented upon the surface of the earth, & there was implied authority given to the Executives of the two colonies to do such acts as were necessary to that end, & upon the facts the Executives of the two

Time limit.]

Re AMARANTH SCHOOL SECTION ELEVEN TRUSTEES & DUFFERIN COUNTY (1898), 30 O. R. 43.—**CAN.**

r. — Extension of.]—The boundary of a Protestant separate school section cannot be extended into or over an adjoining public school section, where the teacher in the latter is not a Roman Catholic.—*BANKS v. ANDERDON TOWNSHIP* (1890), 20 O. R. 296.—**CAN.**

s. Local municipalities—Alteration of boundaries of—Defective bye-law.]—*Re SOUTHAMPTON VILLAGE & BRUCE COUNTY* (1904), 4 O. W. R. 341; 25 O. L. T. 12; 8 O. L. R. 664.—**CAN.**

t. Road allowance—Alteration in boundaries of lot.]—R. first surveyed part of a township, & his plan returned showed the lots fronting on a lake with an oblique line in rear, following the general course of the lake, but no allowance for road. Afterwards a plan of the whole township was compiled in the Crown land office, from surveys of three separate portions of it made by different surveyors. This plan showed a road in rear of the front lots, & made their depth

greater than in R.'s plan. There was no proof of any work on the ground showing that R. had ever run out or posted the rear line as it appeared on his plan:—*Held*: (1) it was competent for the govt. to make such allowance for road, not being inconsistent with any work on the ground; (2) in order to give effect to the change made by such allowance, to avoid an irregular rear boundary for such front lots, & to reconcile the plans & the grants for one of the front lots & two gore lots in rear of it, which could not all three be carried out owing to a deficiency in the land, a proportionate reduction should be made in each of such lots.—*HAGARTY v. BRITTON* (1870), 30 U. C. R. 321.—**CAN.**

w. — Declared to be boundary of lot—16 Vict. c. 228, s. 1.]—*OTTY v. DAVIS* (1854), 12 U. C. R. 454.—**CAN.**

y. Refusal to appoint agent to settle—Mandamus.]—Where there is a disputed boundary between two districts, & one of the districts appoints an agent for settling the boundary, under 1 Vict. c. 19, s. 3, the ct. will not, on the refusal of quarter sessions of the other district to appoint an

agent on their behalf, direct a *mandamus* to them so to do, as the Act leaves it discretionary with them to proceed or not.—*Re BOUNDARY LINE BETWEEN EASTERN & JOHNSTOWN DISTRICTS* (1813), 2 Ont. Dig. 4142.—**CAN.**

a. Boundary fixed by proclamation.]—In May, 1854, the Governor of N., by proclamation, defined the boundaries of the borough of D. The boundaries so defined did not include certain lots which in 1876 were transferred to W. In June, 1854, by a further proclamation the boundaries of the borough were altered so as to include these lots. The boundaries as defined by the later proclamation were never questioned & the lots continued to be rated as any other land within the borough. In an action brought in 1918 by the extrix. of W. for a declaration that the lots were not & had never been within the borough of D.:—*Held*: the second proclamation, even if invalid when issued by reason of the governor being *functus officio*, had been validated by subsequent legislation.—*DURBAN CORPN. v. WHITTAKER'S ESTATE* (1919), S. A. L. R. 195.—**S. AF.**

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colonies had acted within that implied authority, & the line agreed & marked became & was the boundary between the States.—**SOUTH AUSTRALIA STATE v. VICTORIA STATE**, [1914] A. C. 283; 83 L. J. P. C. 137; 110 L. T. 720; 30 T. L. R. 262, P. C.

SUB-SECT. 4.—BY JUDICIAL AUTHORITY.*A. What Courts have Jurisdiction.*

29. Court of Chancery—Precedent of bill to set out metes & bounds.]—HUNT v. WHITE (undated), Calendar of Chancery Proceedings *temp.* Queen Elizabeth (Record Commission Publication), Vol. I., p. cxlvii.

30. —.]—The Ct. of Ch. entertained suits to set out boundaries.—TIPPING v. CHAMBERLAINE (1626), Toth. 22; 21 E. R. 112.

31. — Boundaries of manor—Consent of parties.]—The lords of two adjacent manors endeavoured to settle the boundaries of their manors by an amicable bill in Ch. :—*Held*: the ct. would not entertain jurisdiction.—WINTERTON v. EGREMONT (LORD) (*circa* 1785), cited 2 Anst. p. 392; 145 E. R. 913, L. C.

Annotation:—Refd. Atkins v. Hatton (1794), 2 Anst. 386.

32. —.]—Pltf.'s suit was for a rent-charge of £200 *per annum*, granted by the late Earl of S. with the privity & consent of the Countess, 7 Jac., to Sir J. T. deceased, during the life of pltf., to be issuing out of the Manor of W. in trust, & for the use of pltf., which annuity was duly paid with the consent of the Countess all the lifetime of the late Earl; the Countess after the Earl's death sought to avoid the said annuity, pretending a precedent lease made by the Earl, 4 Jac., for many years yet to come to certain persons in trust for the Countess of the manor & lands out of which the rent issued; &, because the premises charged with the rent lay intermixt, so that pltf. could make no distress for recovery, pltf. were without remedy :—*Held*: the suit was to have a trust performed, for which pltf. could not sue at law, & to be relieved against the confounding of metes & bounds, so that one manor was not known from the other, which was usually relieved in the Ct. of Ch.—HARDING v. SUFFOLK (COUNTESS)** (1632), 1 Rep. Ch. 61; 21 E. R. 507.**

Annotation:—Refd. Basingstoke Corpn. v. Bolton (1852), 1 Drew. 270.

See, also, No. 41, *post*.

33. — For trial at law.]—A bill in equity lies to have a trial at law for the bounds of a manor.—LETHIEULLIER v. CASTLEMAIN (LORD) (1726), Dick. 46; Cas. *temp.* King 60; 2 Eq. Cas. Abr. 161, pl. 12; 21 E. R. 184, L. C.

Annotation:—Refd. Godfrey v. Littell (1829), 1 Russ. & M. 59.

34. —.]—The jurisdiction of the Ct. of Ch. as to granting a commission to ascertain boundaries is probably to be deduced from the writ *de rationabilibus divisis*, or that, *de perambulatione faciendâ*. Consent was the ground upon which it was first exercised; then upon the application of a party having an equitable claim & no objection made. But a Ct. of Equity will not interfere between two independent proprietors,

to force either to have his right so determined.—**SPEER v. CRAWTER** (1817), 2 Mer. 410; 35 E. R. 997.

Annotations:—Consd. Miller v. Warmington (1820), 1 Jac. & W. 484. *Refd.* Godfrey v. Littell (1829), 1 Russ. & M. 59.

35. — No claim to soil.]—A bill to ascertain the boundaries of two manors was dismissed, there being no dispute as to the soil.—WAKE v. CONYERS (1759), 1 Eden, 331; 2 Cox, Eq. Cas. 360; 28 E. R. 712.

Annotations:—Folld. Speer v. Crawter (1817), 2 Mer. 410. *Consd.* Godfrey v. Littell (1831), 2 Russ. & M. 630; Bute v. Glamorganshire Canal Co. (1845), 1 Ph. 681; Searle v. Cooke (1890), 43 Ch. D. 519. *Refd.* York Corpn. v. Pilkington (1737), West *temp.* Hard. 293; Atkins v. Hatton (1794), 2 Anst. 386; A.-G. to Prince of Wales v. St. Aubyn (1811), Wight. 167; A.-G. v. Stephens (1855), 3 Eq. Rep. 1072.

36. — Between lord of the manor & tenants.]—Decree between the lord of a manor & his tenants, to ascertain boundaries, & to reduce fines to a certainty confirmed.—MEADOWS v. PATHERICK (1674), Cas. *temp.* Finch, 154; 23 E. R. 85.

37. —.]—Pltfs., the lords of the manor, alleged by their bill that thirty-eight estates held by debt. within the manor, had been subject from time immemorial to the payment of certain sums in lieu of heriots & reliefs; that by reason of the confusion of boundaries, pltfs. could not ascertain in respect of what particular estates the payments were respectively due, & were therefore unable to recover the amount by distress. The bill prayed that pltfs. might be declared entitled to the several sums claimed, & that the precise boundaries of the estates might be ascertained. The bill alleged the heriots & reliefs to be payable by custom, but there was no allegation of a custom of distress. A demurrer was allowed, without costs, & leave given to amend.

If this had been a bill proving a long usage of rent only, but that by reason of accident or lapse of time the boundaries had become confused, & there was difficulty in the way of obtaining a legal remedy, the ct. would have given relief.—**BASINGSTOKE CORPN. v. BOLTON (LORD)** (1852), 1 Drew. 270; 22 L. J. Ch. 305; 17 Jur. 57; 1 W. R. 76; 61 E. R. 455; *subsequent proceedings* (1851), 3 Drew. 50.

38. — Boundaries of parishes.]—A bill will not lie to have an issue to ascertain boundaries between two parishes.—ST. LUKE'S, OLD ST. v. ST. LEONARD'S, SHOREDITCH (1779), 1 Bro. C. C. 40; 28 E. R. 972; *sub nom.* **WARING v. HOTHAM**, Dick. 550, L. C.

Annotations:—Refd. York Corpn. v. Pilkington (1737), West *temp.* Hard. 293; Atkins v. Hatton (1794), 2 Anst. 386; A.-G. to Prince of Wales v. St. Aubyn (1811), Wight. 167; Speer v. Crawter (1817), 2 Mer. 410.

39. — Boundary of American provinces.]—Specific performance decreed of articles executed in England concerning boundaries of two provinces in America.—PENN v. BALTIMORE (LORD) (1750), 1 Ves. Sen. 444; 27 E. R. 1132, L. C.

Annotations:—Consd. Companhia de Mocambique v. British South Africa Co., De Sousa v. British South Africa Co., [1892] 2 Q. B. 358; Black Point Syndicate v. Eastern Concessions (1898), 79 L. T. 658. *Refd.* Houlditch v. Donegall (1834), 2 Cl. & Fin. 470; Re Holmes (1861), 2 John. & H. 527; Norris v. Chambres, Chambres v. Norris (1861), 4 L. T. 345; Siebel v. Raphael (1864), 3 New Rep. 662; Ewing v. Orr Ewing (1883), 9 App. Cas. 34; Duder v. Amsterdamsch Trusteers Kantoor, [1902] 2 Ch. 132. *Mentd.* Pike v. Hoare (1763), Amb. 428; Bayley v. Edwards (1792), 3 Swan. 703; Bedrochund v.

PART I. SECT. 1, SUB-SECT. 4.—A.

b. Court of Chancery—Legal claim—Bill filed before Administration of Justice Act.]—STEWART v. LEES (1880), Cass. Dig. (2nd ed.) 93.—**CAN.**

c. Powers of commissioner—Under Transfer of Land Act, 1890,

Part IX.]—The commr.'s powers to rectify certificates under the above Act are not limited to obvious blunders. He is a judicial officer, & has a wide jurisdiction over boundaries.—NATIONAL TRUSTEES, ETC. CO. v. HASSETT, [1906-7] V. L. R. 404.—**AUS.**

d. Powers of Registrar-General—Alteration of boundaries.]—In 1883 S. became the owner of a piece of land described in his certificate of title as bounded on the N. E. by the field of Mars common. In 1885 a fresh survey having been made, it was discovered

Elphinstone (1830), 2 Stato Tr. N. S. 379; Portarlington v. Soulby (1834), 3 My. & K. 104; *Re Courtney, Ex p. Pollard* (1838), Mont. & Ch. 239; *Cookney v. Anderson* (1862), 31 Beav. 452; *Douglas v. Douglas*, *Douglas v. Webster* (1871), L. R. 12 Eq. 617; *I. R. Comrs. v. Angus*, *I. R. Comrs. v. Lewis* (1889), 23 Q. B. D. 579; *Mercantile Investment & General Trust Co. v. River Plate Trust Loan & Agency Co.* (1892), 61 L. J. Ch. 473; *A.-G. v. Johnson*, [1907] 2 K. B. 885; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354.

40. — Boundaries of real estate in Jamaica.]

—A Ct. of Equity in England will entertain a bill to settle the boundaries of real estates in Jamaica.

—*TULLOCH v. HARTLEY* (1841), 1 Y. & C. Ch. Cas. 114; 62 E. R. 814.

Annotation:—Reid. Companhia de Mocambique v. British South Africa Co., De Sousa v. British South Africa Co., [1892] 2 Q. B. 358.

41. — Confusion of boundaries.]—Where from confusion of boundaries there is no remedy by distress, the ct. will relieve.—*LEEDS (DUKE) v. POWELL* (1748), 1 Ves. Sen. 171; 27 E. R. 963, L. C.

See, also, No. 32, ante.

42. — — — Where duty to keep distinct.]—Ground of relief upon confusion of boundaries; that there was a duty upon deft. to keep them distinct.—*GRIERSON v. EYRE* (1804), 9 Ves. 341; 32 E. R. 631, L. C.

43. — — — — — Tenant.]—Duty of the tenant to keep the boundaries; & the ct. will aid the reversioner to distinguish them, & if they cannot be distinguished, will give him as much land.—*ASTON v. EXETER (LORD)* (1801), 6 Ves. 288; 31 E. R. 1056, L. C.

Annotations:—Mentd. Hylton v. Morgan (1801), 6 Ves. 293; *Rumbold v. Forteach* (1857), 3 K. & J. 718.

44. — — — — —.]—The duty of the tenant of land immediately adjoining other land of his own, is not merely to leave the boundary between his own land & his landlord's distinct at the expiration of his term but to keep it distinct during the term. The ct. has therefore jurisdiction during the term to ascertain the boundary if the tenant has confused it.—*SPIKE v. HARDING* (1878), 7 Ch. D. 871; 47 L. J. Ch. 323; 38 L. T. 285; 26 W. R. 420.

45. — — — Multiplicity of actions.]—On a bill for a commission to settle confused boundaries the allegations that defts. had gradually encroached upon pltf.'s land, & had let their own land to as many as fifty persons:—*Held*: a sufficient ground for entertaining the suit in equity.

The rule is, that a suit in equity cannot be sustained on a mere confusion of boundaries unless there is something arising out of the conduct of the parties which renders the interference of a ct. of equity requisite, or it is necessary to prevent a multiplicity of suits.—*BUTE (MARQUIS) v. GLAMORGANSHIRE CANAL CO.* (1845), 1 Ph. 681; 15 L. J. Ch. 60; 6 L. T. O. S. 253; 9 Jur. 1063; 41 E. R. 791, L. C.

Annotation:—Mentd. Lloyd v. Purves (1858), 6 W. R. 421.

46. — — — Land allotted to several offices.]

—The Colony of the Islands of Bermuda was settled by a chartered co. of adventurers, under a grant from James I. Under the govt. of this co., three officers were appointed for the local administration of the Islands, namely, a Sheriff, Secretary, & Provost-Marshal. Each of these officers was paid partly by fees & partly by grants

of certain parcels of public lands made to each officer respectively. In 1688, the co. was dissolved & their charter evicted, & the govt. of the islands became absolutely vested in the Crown. From that period, one person only had been appointed to perform the duties of the three offices, & the Crown appropriated these emoluments, & made certain alterations from time to time in their amount: this state of things continued down to the year 1819, when the office of Provost-Marshal was separately appointed, & some division of the lands was made. In 1839, resp. was appointed Provost-Marshal, & in 1846 he filed a Bill in the Ct. of Ch. in the island, against the Secretary of the island, for an account of the rents & profits of the lands, & other monies received by him in respect thereof, as appertaining to the office of Sheriff, which office was included in that of Provost-Marshal:—*Held*: the Ct. of Ch. had no jurisdiction to entertain such a suit, as such right or title to the office of Sheriff was not of an equitable nature.

Seemle: the only ground for coming into Ch. was the existence of several offices in one individual during a long series of years, & a consequent confusion of boundaries of the lands respectively allotted to the several offices.—*KENNEDY v. TROTTER* (1849), 6 Moo. P. C. C. 449; 13 E. R. 757, P. C.

47. — — — Copyhold tenant.]—A copyhold tenant of a manor is under an obligation to keep the boundaries of his tenement distinct; if he neglects to do so the ct. will direct an inquiry for ascertaining the boundaries, & if that should be impossible, will order land of equal value to be set out in substitution. If the tenement is enfranchised the obligation to preserve the boundaries ceases, but the tenant is still liable for default which had happened before the enfranchisement.

The lord of a manor obtained the enfranchisement of a copyhold tenement under Copyhold Act, 1852 (c. 51), reserving a rent-charge to himself. The boundaries had become confused before the enfranchisement, but the lord did not avail himself of the power given by s. 24 of the Act to have the boundaries ascertained. The rent-charge having fallen into arrear, the grantee of the rent-charge brought an action to ascertain the boundaries of the land charged with the rent-charge, & if that could not be done, to have land of equal value set out in substitution:—*Held*: the lord and those claiming under him did not lose their rights by reason of the lord's omission to have the boundaries ascertained under the Act; & pltf. was entitled to the relief prayed, the costs of the inquiry being reserved.—*SEARLE v. COOKE* (1890), 43 Ch. D. 519; 59 L. J. Ch. 259; 62 L. T. 211, C. A.

Annotations:—Mentd. Re Herbage Rents, Greenwich, Charity Comrs. v. Green, [1896] 2 Ch. 811; *Pertwee v. Townsend*, [1896] 2 Q. B. 129.

See, further, Nos. 62 et seq., 119 et seq., post.

48. Spiritual court—Boundaries of parishes.]—If the Spiritual Ct. attempt to try the boundaries of parishes, a prohibition lies.—*STRANSHAM v. CULLINGTON* (1591), Cro. Eliz. 228; 3 Leon. 129; 78 E. R. 484.

Annotation:—Mentd. Chatfield v. Fryer (1815), 1 Price, 253.

that a strip of land intervened between the common & S.'s land. Subsequently S. applied for & obtained a fresh certificate of title bringing his boundary up to the boundary of the common. S., having brought ejectment against pltf's., who were in possession of the strip of land now

included in his certificate, but formerly part of the common, pltf's. brought this suit to restrain the action of ejectment, claiming also a declaration that they were entitled to the land in dispute, & praying for an order on deft. to deliver up his amended certificate to be

(1) the Registrar-General had no power to alter the boundaries of deft.'s land in the manner adopted; (2) the error of the Registrar-General in issuing the amended certificate afforded no title to relief in equity.—*ROURKE v. SCHWEIKERT* (1888), 9 N. S. W. Eq. 152.—**AUS.**

Sect. 1.—Delimitation: Sub-sect. 4, A. & B. (a).]

49. Boundaries of vills.]—Though the bounds of a parish are not triable in the Ecclesiastical Ct., yet the bounds of vills in the same parish are triable there.—*PETLER v. YALEMAN* (1662), 1 Lev. 78; 83 E. R. 306; *sub nom. BUTLER v. YATEMAN*, 1 Keb. 369; 1 Sid. 89. *Annotation:—Refd. Rutland v. Bagshaw* (1850), 14 Q. B. 869.

50. — Bounds of churchyard.]—Bounds of the churchyard not triable in the Spiritual Ct.—*PEW v. CRESWELL* (1735), 2 Stra. 1013; 93 E. R. 1002.

See, further, ECCLESIASTICAL LAW.

B. Commission to Ascertain Boundaries.

(a) In what Cases appointed.

51. Lands lying promiscuously—Lands subject to debts.]—The ct. ordered that a commission should go forth to set out lands that lay promiscuously to be liable for payment of debts.—*MULLINEUX v. MULLINEUX* (1617), Toth. 39; 21 E. R. 117.

52. Between freehold & customary lands—Decree by consent of parties.]—On a bill to make partition, & settle boundaries between lands which were freehold & other lands held in borough-English, was directed a commission to certain persons, as well to take deft.'s answer, as also to set forth the metes & bounds, & to return terriers & boundaries, which was done accordingly, & by consent of the parties the ct. decreed the boundaries, & that the same should be ratified & confirmed to all intents and purposes, as if the same had been judicially pronounced, upon a full hearing in ct.—*SPYER v. SPYER* (1631), Nels. 14; 21 E. R. 777.

53. —.]—Pltf. claimed as customary heir of testator who died possessed of freehold & customary premises. Testator's freehold & customary premises having been for a length of time in the possession of the same tenant, it was ordered that in case the master should be of opinion that he could not ascertain the customary estates without a commission, he should be at liberty to state the same to the ct., & the master having certified that a commission was necessary, a commission was ordered authorising comrs. to view, ascertain, set out, & distinguish by metes & bounds such parts of the customary estate of testator to which pltf. was entitled as customary heir.—*ROBINSON v. HODGSON* (1800), Taml. 235; 48 E. R. 94.

54. Between freehold & copyhold.]—A commission was directed to set out copyhold land from free land which lay obscured, & if the comrs. could not sever it, then to set out so much in lieu thereof.—*PECKERING v. KIMPTON* (1630), Toth. 39; 21 E. R. 117.

55. —.]—A commission was decreed to set out boundaries, so that sixty acres of copyhold lands might be distinguished from the freehold of other persons.—*WINTLE v. CARPENTER* (1680), Cas. temp. Finch, 462; 23 E. R. 250.

56. —.]—A bill was brought by the lord of a manor against deft., who continued in possession of a copyhold estate of the manor, after the lives for which it had been granted had expired, & had confounded the copyhold lands with part of his own freehold lands. The object of the bill was to distinguish the copyhold lands from deft.'s freehold lands, & set out the boundaries, & if that could not be done, then that an equal quantity of land might be set out & held to be enjoyed as copyhold, & for an account of rents due after the

expiration of the lives for which the copyhold had been granted:—*Held*: a commission to ascertain the boundaries should be decreed.—*ABERGAVENNY (LORD) v. THOMAS* (1739), West temp. Hard. 649; 3 Anst. 668, n.; 25 E. R. 1130, L. C.

Annotations:—Mentd. Wharton v. King (1796), 3 Anst. 659; *Walker v. Abingdon* (1841), 10 L. J. Ch. 289.

57. —.]—A bill stated that part of the premises claimed by the heirs were copyhold & belonged to them, & their title thereto was not controverted, but that defts. insisted the copyhold lands were so intermixed with the freehold, & the boundaries so confounded, that they could not be distinguished by pltf. Pltf. insisted that defts. could distinguish them, but, if necessary, prayed a commission. Defts. by their answer stated, that the freeholds & copyholds were intermixed, & the boundaries destroyed & could not be distinguished by them, & that in case pltf. should be adjudged entitled to the freeholds, they, defts., were willing a commission should issue:—*Held*: pltf. was entitled to the freehold, which should be distinguished & set out from the copyholds belonging to defts.; & a commission should issue to distinguish the freeholds by metes & bounds.—*NORRIS v. LE NEVE* (1742), Taml. 234; 48 E. R. 93; *subsequent proceedings* (1744), 3 Atk. 82, L. C. *Annotation:—Refd. Calmady v. Calmady* (1795), 2 Ves. 568.

58. —.]—Upon the bill of the lord a commission was issued to distinguish copyholds lands within the manor, comprised in admittances produced, the last in 1693, from freehold, & compounded from uncompounded copyholds, & to ascertain the boundaries, & if they could not be distinguished, to set out lands of the tenant of equal value with so much of the copyhold lands as could not be distinguished.—*LEEDS (DUKE) v. STRAF-FORD (EARL)* (1798), 4 Ves. 180; 31 E. R. 93, L. C. *Annotations:—Folld. Searle v. Cooke* (1890), 43 Ch. D. 519. *Refd. Godfrey v. Littel* (1829), 1 Russ. & M. 59; A.-G. v. Stephens (1855), 1 K. & J. 724.

59. Copyholds.]—On a bill by the lord of a manor, praying a commission to ascertain the boundaries of a copyhold estate, a commission of inquiry was directed with a previous inspection of all deeds, etc.—*ROUS v. BARKER* (1725), 4 Bro. Parl. Cas. 660; 2 E. R. 449, H. L. *Annotation:—Refd. Godfrey v. Littel* (1829), 1 Russ. & M. 59.

60. Waste of manors.]—The ancestors of pltf., Sir J. B., being seised of the manor of C. P., & the ancestors of deft., Sir J. W., being seised of the manor of G. C., in 1639 entered into an agreement, whereby after reciting that there were wastes lying intermixed, which belong to both manors, & that one fourth part belonged to C. P., & that J. W. & his ancestors had made inclosures thereof, it was agreed that Sir J. B. might inclose fifty acres of the heath, & that J. W. might enjoy the lands formerly inclosed, & that the residue should be divided into four equal parts, one fourth to be enjoyed by Sir J. B., & the remaining three fourths by J. W., & the same division should be made in the event of an inclosure. A bill was brought by pltf. for a specific performance of the agreement, or in case the ct. should not think fit to execute the agreement, that the limits and boundaries of the waste belonging to each manor might be ascertained:—*Held*: (1) specific performance of the agreement must be refused; (2) pltf. not having shown a title to or possession of the soil, or any impediment why he could not establish his title at law, the ct. would not direct a commission or an issue to ascertain the boundaries of the waste.—*BANKS v. WEBB* (1739), West temp. Hard. 653; 25 E. R. 1132; *sub nom. WEBB v. BANKS*, 2 Eq. Cas. Abr. 164, L. C.

61. —.]—Deft., who derived his title from a grant *temp.* Hen. VIII., claimed to be entitled to the whole of the waste lands in certain parishes, as belonging to certain manors of which he was lord. Pltf. claimed to be entitled to a part of those waste lands, as pertaining to the manor of W., which had anciently been held with deft.'s manors, & deft. himself had been steward under the Crown of this manor; pltf. had become owner by purchase of the Crown, but was unable to ascertain to what part of such waste lands his title as lord extended; deft. denied his right to any:—*Held*: a commission should issue to inquire whether deft., or any person claiming under him, was in possession of any lands of right belonging, or which did at the time deft. became steward of the manor of right belong to the manor of W.; the comrs. should, as far as they were able, set forth & describe such lands "if any such there be," & in that case set out & distinguish by metes & bounds such parts, if any, of the lands belonging to that manor in the possession of deft., or those claiming under him, lying intermixed with lands belonging to deft.'s manors; & set out so much of the respective lands so intermixed, as should seem to them a fair equivalent for pltf.'s portion thereof.—*CLIFTON v. GWYNNE* (1822), *Tam.* 236; 48 E. R. 94.

Annotation:—*Refd.* *Evans v. Merthyr Tydvil U. D. C.* (1898), 79 L. T. 578.

62. Where boundaries confused.]—In a suit to have a discovery of the metes & bounds of four acres of lands, which, as it appeared to the ct., pltf. had a title to, the four acres being intermixed with other lands which deft. had in a place called the G. Field, & which by ploughing & by other means were so destroyed, that those four acres could not be distinguished from the other lands of deft. in the field:—*Held*: a commission should issue, to set out & distinguish the four acres with metes & bounds, & the yearly value thereof, & how long deft. had held them, for which he should pay pltf., & pltf. should enjoy the four acres, when set out & distinguished, against deft. & all claiming under or in trust for him.—*BOTTLER v. SPELMAN* (1673), *Cas. temp.* Finch, 96; 23 E. R. 52.

63. —.]—If a man claims lands in equity, but knows not the bounds, equity will grant a commission to ascertain them when the right is established; but if the right is not settled, the party will be left to his remedy at law.—*CHAPMAN v. SPENCER* (1731), 2 Eq. Cas. Abr. 163; 22 E. R. 139.

64. —.]—If a bill is preferred for a commission to set forth lands, the particulars of which pltf. does not know, & if deft. does not admit pltf.'s title, but denies that he has any lands in his possession belonging to pltf., a ct. of equity will not grant a commission, because that would be admitting pltf.'s title in general, though the particular lands are not known; if pltf.'s title is admitted by deft., & the dispute is only about the particular lands, a commission will be proper.—*ELY (Bp.) v. KENRICK* (1732), *Bunb.* 322; 145 E. R. 688.

Annotation:—*Refd.* *Godfrey v. Littell* (1831), 2 Russ. & M. 630.

65. — By terre-tenant.]—If the *terre-tenant*

will confound the boundaries, in order to prevent a distress, the lord will be entitled to a commission.—*BOUVERIE v. PRENTICE* (1783), 1 Bro. C. C. 200; 28 E. R. 1082, L. C.

66. —.]—Upon a bill by a prebendary against lessees of the prebendal lands, also owners of other lands within the parish, with which the prebendal lands had become intermixed & confounded by reason of the unity of possession, a commission was granted to ascertain & distinguish boundaries, & if not to be distinguished, to set out the value.—*WILLIS v. PARKINSON* (1817), 2 Mer. 507; 35 E. R. 1034; *subsequent proceedings* (1818), 1 Swan. 9; 3 Swan. 233, L. C.

Annotation:—*Refd.* *Godfrey v. Littell* (1829), 1 Russ. & M. 59.

67. —.]—In order to sustain a bill for a commission to ascertain boundaries, pltf. must establish, by the admission of deft., or by evidence, a clear legal title to some land in the possession of deft., & also a ground for equitable relief; where the quantity of the land of pltf. in the possession of deft. is doubtful upon the evidence, the ct. will direct a commission or an issue, as will best answer the justice of the case.—*GODFREY v. LITTEL* (1831), 2 Russ. & M. 630; 39 E. R. 534, L. C.

Annotation:—*Refd.* *A.-G. v. Chambers* (1859), 4 De G. & J. 55.

68. —.]—Upon a bill filed against a canal co., alleging that the co. had for several years been gradually encroaching upon the land of pltf., whose property was adjoining to the canal, & praying for a commission to ascertain the boundaries:—*Held*: the co. were bound to produce maps of the canal, & also leases of the adjoining lands, which pltf. alleged to comprise part of his property; and that, notwithstanding the co. insisted by their answer that they related to their own title and not to the title of pltf.

It is objected that this is a dispute between two contiguous proprietors as to their mutual boundaries; that the remedy is at law, & that there is no ground for that interference. The rule, as I apprehend, is this, that the mere confusion of boundaries between adjacent proprietors will not support a bill for a commission. There must be some equity arising out of the act or acts of the party against whom the commission is prayed, or it must be brought for the purpose of preventing a multiplicity of suits (*LORD LYNDEHURST, C.*).—*BUTE (MARQUIS) v. GLAMORGANSHIRE CANAL CO.* (1845), 1 Ph. 681; 15 L. J. Ch. 60; 6 L. T. O. S. 253; 9 Jur. 1063; 41 E. R. 791, L. C.

Annotation:—*Mentd.* *Lloyd v. Purves* (1858), 6 W. R. 421.

69. —.]—By agreement dated in 1635, the owner of the R. estate, reciting that certain lands belonging to the poor of the parish of P., containing six acres & a half lay dispersed within his estate of R., agreed to pay to the churchwardens & overseers a yearly rent of £6, for such lands, & to set out sufficient land of a better value for the performance thereof, which he should either tie for the said yearly rent, or otherwise assure & convey to such persons as should be nominated feoffees in trust for the same. The R. estate consisted of 350 acres, & the successive owners continued to

PART I. SECT. 1, SUB-SECT. 4.— B (a).

62 i. Where boundaries confused.]—Confusion of boundaries, unless it arose from deft.'s misconduct, is not *per se* a ground for a bill to ascertain boundaries.—*O'HARA v. STRANGE* (1847), 11 L. Eq. R. 262.—*IR.*

62 ii. —.]—*Semble*: where bound-
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aries have been confused the ct. has no jurisdiction on a petition under Renewable Leasehold Conversion Act, to issue a commission to ascertain the boundaries.—*IRELAND v. WILSON* (1851), 1 L. Ch. R. 623.—*IR.*

i. Partition of lands — Between co-owners.]—On the hearing of a petition for partition of lands between

two co-owners, the ct. instead of directing a commission of perambulation to issue, made a declaration that the lands should be divided, & referred to the master to make such partition, with liberty to receive proposals, the parties enjoying the moieties in severalty & to execute mutual conveyances.—*CLARKE v. CLARKE* (1867), 1 L. L. T. Jo. 44.—*IR.*

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pay the yearly rent of £6 the conveyances assuming the whole estate to be subject to the payment of the £6. In course of time the estate became greatly subdivided, & in 1786 the remaining portion, consisting of thirty-one acres, was conveyed to the person under whom deft. derived title. The conveyance of 1786 recited that the annual payment of £6, was due to the parish of P., & contained a covenant by the purchaser to indemnify the owners of the other portions of the R. estate against the payment thereof. The £6 was regularly paid by deft. & his predecessors & the receipt for the money was expressed to be "for rent" or "for rent of parish lands." Upon an information by the churchwardens & overseers of the parish, praying for a commission to set out the boundaries of the six acres & a half:—*Held*: the information should be dismissed, the relators not having shown that the portion of the R. estate in the possession of deft. included the six acres & a half mentioned in the agreement of 1635.—*A.-G. v. STEPHENS* (1855), 6 De G. M. & G. 111; 25 L. J. Ch. 888; 26 L. T. O. S. 189; 20 J. P. 70; 2 Jur. N. S. 51; 4 W. R. 191; 43 E. R. 1172, L. C.

Annotations:—*Reid. Brown v. Wales* (1872), L. R. 15 Eq. 142; *Searle v. Cooke* (1890), 43 Ch. D. 519.

70. — By tenant who owns adjoining land.]—There is an obligation on a tenant to maintain boundaries, & if he permits them to be destroyed, so that the landlord's land cannot be distinguished from his, & restored specifically, to substitute land of equal value, the land or its value being ascertained by commission.—*A.-G. v. FULLERTON* (1813), 2 Ves. & B. 263; 35 E. R. 319, L. C.

Annotation:—*Consd. Spike v. Harding* (1878), 7 Ch. D. 871.

71. — —.]—A termor, by himself or his undertenants, suffered the boundaries between the demised premises & contiguous lands of his own to become confused:—*Held*: he was not entitled, after the expiration of the term, to a commission to ascertain them, in opposition to the assignee of the lessor who then entered & had since continued in possession of both, it not being shown that such possession was improperly obtained.

A commission to ascertain boundaries is only to be granted when the confusion has been occasioned by the misconduct of deft., or those under whom he claims, & only where it is shown that they cannot be ascertained without the assistance of the ct.—*MILLER v. WARMINGTON* (1820), 1 Jac. & W. 484; 37 E. R. 452.

Annotation:—*Reid. Spike v. Harding* (1878), 7 Ch. D. 871.

72. — By lessee of adjoining manor.]—To a bill by the lord of the manor of W. against the lord of the adjoining manor of I., who was also lessee of the manor of W., & against comrs. under an Act for inclosing lands within the manor of I., alleging confusion of boundaries arising out of the union of possession of the two manors, & that defts. were preparing, in combination together, to set out a boundary of the manor of I. which would include lands belonging to the manor of W., & praying a commission to set out the land lying within, & being part & parcel of, the manor of W., the answer of deft., lord of the manor of I., set out boundaries, referring to perambulations made previous to the union of possession. The lease had expired since the filing of the bill, & it was not established in evidence that there was any confusion of boundaries occasioned by default or neglect of the owners of I. while lessees of W.:—*Held*: the bill should be dismissed, with costs as

against the comrs., but without costs as against the other deft.—*SPEER v. CRAWTER* (1817), 2 Mer. 410; 35 E. R. 997.

Annotations:—*Reid. Miller v. Warmington* (1820), 1 Jac. & W. 484; *Godfrey v. Littel* (1829), 1 Russ. & M. 59.

73. — By copyholder.]—Pltfs., who were lords of a manor, alleged by their bill that thirty-eight estates held by deft. within the manor, had been subject, from time immemorial, to the payment of certain sums in lieu of heriots & reliefs; that by reason of the confusion of boundaries, pltfs. could not ascertain in respect of what particular estates the payments were respectively due, & were therefore unable to recover the amount by distress. The bill prayed that the pltfs. might be declared entitled to the several sums claimed, & that the precise boundaries of the estates might be ascertained. The bill alleged the heriots & reliefs to be payable by custom, but there was no allegation of a custom of distress. A demurrer was allowed, without costs, & leave given to amend.

If this had been a bill proving a long usage of payment of rent only, but that by reason of accident or lapse of time the boundaries had become confused, & there was difficulty in the way of obtaining a legal remedy, the ct. would have given relief.—*BASINGSTOKE CORPN. v. BOLTON (LORD)* (1852), 1 Drew. 270; 22 L. J. Ch. 305; 17 Jur. 57; 1 W. R. 76; 61 E. R. 455; *subsequent proceedings* (1854), 3 Drew. 50.

74. — By predecessor in title.]—Testatrix, by her will, appointed the manor of W. to uses, under which pltf. became entitled as tenant in tail in possession, & devised her residuary real estate to trustees upon trust to sell. The trustees sold (*inter alia*) a field, part of which was shown by the abstract to be parcel of the manor, & procured the legal estate in the whole to be conveyed to the purchaser:—*Held*: notwithstanding the fault of the confusion lay with the party through whom pltf. claimed, pltf. was not precluded from establishing in the Ct. of Ch. a claim to his portion of the land, & to a proportional part of the rents from the time when he came of age; an inquiry was directed in what part of the field pltf.'s portion was situate.—*HICKS v. HASTINGS* (1857), 3 K. & J. 701; 69 E. R. 1292.

See, further, Nos. 41 et seq., ante.

75. Land subject to rentcharge.]—Pltf. became entitled by purchase to a rentcharge charged upon lands descending to deft., who refused to pay the rents, pretending the lands were not sufficient, & the limitation of law defective; the lands lying intermixed with others, & boundaries confused, pltfs. could not distrain, & so prayed relief in equity, & charged also, that deft.'s father agreed, that if the lands were too small in value, or defective in title, he would make both good. To have that done, & to discover the abutments & boundaries, & to have the rents arrear & growing rents paid, was the scope of the bill. Deft. by answer insisted, that pltf.'s proper remedy was at law, & that he had not a good title, because he had not any attornment, for ought appeared, or any good conveyance:—*Held*: a commission should go to set out the lands; pltf.'s title to be determined on the return of the commission.—*BOREMAN v. YEAT* (1661), cited in 1 Cas. in Ch. at p. 145; 22 E. R. 734.

Annotations:—*Reid. Davy v. Davy* (1669), 1 Cas. in Ch. 144. *Mentd. Bath & Mountague's Case* (1693), 3 Cas. in Ch. 55; *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *Doe d. Winter v. Perratt, Doe d. Viney v. Perratt, Goodtitle d. Slade v. Perratt* (1826), 4 L. J. O. S. K. B. 246.

76. Land subject to quit rents.]—A. was

grantee of the Crown of quit-rents in the manor of Bray [the boundaries of the lands out of which the quit-rents issued being confused]:—*Held*: the ct. were bound in the first instance to send a commission; the ancestors held subject to quit-rents, & it was their duty to have distinguished out of what lands they were to issue, & a portion of land should be set out, to be subject to the quit-rents.—*AMBLER'S CASE* (1770), cited in 4 Ves. at p. 184; 31 E. R. 95.

See, further, RENTCHARGES & ANNUITIES.

77. Land purchased according to old survey—Deficiency in acreage.—A. agreed with B. for the purchase of lands, & to pay so much per acre for the lands out of lease, & so much for the lands leased, after the rate of twenty-one years purchase, according to the rentals. In order to ascertain the number of acres, deft. produced an old survey, & according to the number of acres in such survey, the purchase money was paid. The conveyancer, being willing to be fully satisfied in the number of acres that he might insert the consideration money right, sent to deft. for this survey, & desired that he would sign it, which deft. did. In this old survey, in some closes there was a great deficiency of acres, in others a greater number than were contained therein, the last not making amends for the first. On a bill to refund what was paid over & above the number of acres:—*Held*: a commission should issue to measure the lands out of lease.—*SHOVEL (SIR CLOUDSLEY) v. BOGAN* (1708), 2 Eq. Cas. Abr. 688; 22 E. R. 578, L. C.

78. Between lands devised to charity & other lands.—A commission was directed to distinguish lands intermixed with those devised to a charity.—*A.-G. v. BOWYER* (1800), 5 Ves. 300; Tambl. 236; 31 E. R. 598, L. C.

79. Land subject to tithes.—Pltf. was lord of a liberty lying principally, if not wholly, in the parish of M., & owner of the greater part of it. An immemorial payment of £7 had been made by the lord of the liberty to the rector of S., in lieu of tithes of some part of the liberty to which he was entitled; the land titheable being about a third of the liberty: a money payment had been also made for many years to the rector of M. The locality of the lands titheable to each was in process of time forgotten. The rector of S. claimed his £7 a year, & pltf. admitted his claim. The rector of M. claimed, & sued for tithes of the whole liberty. Pltf. filed a bill praying (*inter alia*) that a commission might issue to ascertain what lands in the liberty were within the parish or rectory of S., & what within the other parish or rectory. Deft. objected (*inter alia*) that the commission could not be granted:—*Held*: the objection was good.—*WOOLASTON v. WRIGHT* (1796), 3 Anst. 801; 145 E. R. 1044.

80. —.—The ct. will not make a decree in favour of a rector claiming tithes in kind of lands not within his parish for which he has for many years received a money payment by way of composition which deft. does not pretend to insist on as a modus; nor will they grant a commission to ascertain the boundaries of such lands, without a previous inquiry whether pltf. is entitled to any & what tithes on such lands by a trial at

law on an issue; because such a claim is not within the recognised common law right of a rector.—*SANDERS v. LONGDEN* (1817), 4 Price, 117; Wils. Ex. 64; 146 E. R. 412.

81. Chantry lands afterwards granted on long lease.—An information was filed by the A.-G. in 1710 to recover certain lands, formerly chantry lands, which had been granted by Edward VI. for the benefit of the M. School, against defts., who represented the T. family, to whom a lease of the lands for 500 years had been granted in 1685. A commission was issued to ascertain the identity of the lands. The comrs. reported that they were unable to ascertain which were the chantry lands. No final decree was made in consequence of a compromise having been entered into between the parties, by which it was agreed that £100 *per annum* should be paid to the charity, & that an Act of Parliament should be obtained to carry the compromise into effect, but that if the Act should not be obtained within two years, then that the agreement should not be binding. No such Act was ever passed, but the owners of the property continued to pay the £100 *per annum* up to the present time, being a period of 130 years. Another information was filed in 1833, to have the benefit of the proceedings commenced in 1710, & prayed that the lease for 500 years might be set aside, & that the chantry lands might be ascertained:—*Held*: an inquiry ought to take place to ascertain what portion of the lands would be of equal value to those granted by Edward VI.—*A.-G. v. TREVELLYAN* (1817), 16 L. J. Ch. 521; 8 L. T. O. S. 407.

(b) Procedure and Costs.

82. Parties to proceedings—All parties concerned.—A commission to settle the boundaries of a manor or a parish ought not to be granted by a Ct. of Equity where the interests of all parties who may probably be concerned are not before the ct.—*ATKINS v. HATTON* (1794), 2 Anst. 386; 2 Eag. & Y. 403; 145 E. R. 911.

Annotations:—*Mentd.* *Miller v. Foster* (1794), 2 Anst. 387, n.; *Jesus College v. Gibbs* (1835), 1 Y. & C. Ex. 145.

83. —.—To a bill for a commission to ascertain boundaries, all persons having any interest in the property are necessary parties.—*RAYLEY v. BEST* (1830), 1 Russ. & M. 659; 39 E. R. 253.

84. Appointment & number of commissioners—Proceedings by lessor—Numerous lessees.—On a bill by a prebendary against his lessees, for a commission to ascertain the boundaries of the prebendal lands, the prebendary is entitled to name as many commissioners as his lessees.—*WILLIS v. PARKINSON* (1818), 1 Swan. 9; 36 E. R. 276, L. C.; *subsequent proceedings*, 3 Swan. 233, L. C.

Annotation:—*Refd.* *Godfrey v. Littel* (1829), 1 Russ. & M. 59.

85. Review—Not allowed unless plaintiff's costs first paid.—On a bill to settle the boundaries of pltf.'s manor, pltf. obtained a final decree with costs. Deft. moved for leave to file a bill of review on the ground of the discovery of new evidence:—*Held*: this could not be allowed without first paying the costs decreed.—*DURIAM*

PART I. SECT. 1, SUB-SECT. 4.— B (b).

g. Parties to proceedings—Minors interested.—A petition was presented under 5 Geo. 2, c. 9, praying for a commission to inquire & ascertain the old mears & bounds of a commonage consisting of bog, moss, & lough, & if none existed then to lay out &

ascertain reasonable mears & bounds between petitioner & the neighbouring proprietors. It was objected that minors were interested parties, petitioner being seised for life only with a power of appointment to his children who were minors, & that there was no one before the ct. to represent those minors:—*Held*: before a commission could be issued, a bill must be

filed for the purpose of making the minors parties.—*Re O'BRIEN* (1840), 3 L. Eq. R. 161.—*IR.*

h. Service of petition—Outside jurisdiction.—The ct. has no jurisdiction to issue a commission for ascertaining boundaries & allotting waste bog, under 5 Geo. 2, c. 9, unless the petition be served personally on the party

Sect. 1.—Delimitation: Sub-sect. 4, B. (b) & C.]

(BP.) *v. LIDDELL* (1717), 2 Bro. Parl. Cas. 63; 1 E. R. 794; *sub nom. LYDDALL v. DURHAM* (BP.), 2 Eq. Cas. Abr. 175, pl. 13; 4 Vin. Abr. pl. 6, H. L.

Annotation:—Mentd. Lethuller v. Castlemain (1726), Cas. temp. King, 60.

86. Evidence as to how examination conducted—When receivable.]—A parish was divided into four tithings, A., B., C., & D. Each tithing maintained its own poor, & each had a churchwarden, elected at a vestry of the parish in general, but from & by its own inhabitants. A comr. of inclosure under a local Act & Inclosure (Consolidation) Act, 1801 (c. 109), s. 3, made an order settling the boundaries between the parish & another parish adjacent & adjudging certain lands to be in the latter; & he, within a month, served a description of the boundaries on a party then acting as churchwarden of tithing A. Until the order the lands in question had been rated to tithing B. On appeal against a poor rate made upon those lands as situate in tithing B., notwithstanding the comr.'s order:—*Held*: the sessions had acted rightly in rejecting evidence to show that the comr., in his inquiry into the boundaries, had not conducted his examination in the manner required by Inclosure (Consolidation) Act, 1801, s. 3.—*R. v. MARSH* (1836), 5 Ad. & El. 468; 2 Har. & W. 255; 6 Nev. & M. K. B. 668; 3 Nev. & M. M. C. 728; 111 E. R. 1243.

Annotations:—Mentd. R. v. Fenton (1841), 1 Gal. & Dav. 17; *Bray v. Somer* (1862), 2 B. & S. 374; *R. v. Green* (1874), 31 L. T. 543; *St. Sepulchre, London v. St. Sepulchre, Middlesex* (1879), 5 P. D. 64.

87. Costs—Commission refused.]—Pltf. was seised of copyhold lands of the manor of P. Within the manor there was a certain parcel of freehold land, containing about twelve acres, which the complainant suggested by his bill to be intermixed & undivided, & which deft. had recovered at law, as belonging to him; pltf. alleged that the metes & bounds of the freehold lands were destroyed & not to be discovered; & that he was willing to set out twelve acres of his copyhold lands in lieu thereof, so as he might be indemnified from a forfeiture to the lord of the manor, & prayed that a commission might issue for that purpose, to set out the twelve acres. By deft.'s answer, it appeared that the lands claimed by him were distinct, & an inclosed piece of ground, which he had recovered, known by the name of H., & not intermixed with the lands of the complainant:—*Held*: pltf. should forthwith deliver to deft. the possession of the lands called H., & should satisfy him for the mesne profits, from the time of the exemplification of the verdict, to be computed by the master, but without costs.—*DAVENPORT v. BROMLEY* (1673), Cas. temp. Finch, 17; 23 E. R. 10.

88. — To be paid by party in default.]—A bill was brought by the lord of a manor against deft., who continued in possession of a copyhold estate of the manor, after the lives for which it had been granted had expired, & had confounded the copyhold lands with part of his own freehold lands. The object of the bill was to distinguish the copyhold lands from deft.'s freehold lands, &

within the jurisdiction.—*M'KEON v. KILMOREY* (LORD) (1835), 3 Ir. L. Rec. N. S. 178.—IR.

k. Costs—Reference to master.]—Comrs. of perambulation applied that pltf. should pay their fees & expenses, the fees being at the rate of £3 3s. per day for each comr. The ct. required pltf. to state what was the proper sum, in his opinion, which would

be referred to the master to enquire what would be the proper amount, the defeated party to pay the costs of the reference.—*BROWNE v. COOTE* (1849), 2 Ir. Jur. 99.—IR.

PART I. SECT. 1. SUB-SECT. 4.—C.

92 i. In what actions boundary questions tried—Ejectment.]—In ejectment the question of boundary may

set out the boundaries, & if that could not be done, then that an equal quantity of land might be set out & held to be enjoyed as copyhold, & for an account of rents due after the expiration of the lives for which the copyhold had been granted:—*Held*: deft. should pay pltf. his costs.—*ABERGAVENNY (LORD) v. THOMAS* (1739), West. temp. Hard. 649; 3 Anst. 668, n.; 25 E. R. 1130, L. C.

Annotations:—Mentd. Wharton v. King (1796), 3 Anst. 659; *Walker v. Abingdon* (1841), 10 L. J. Ch. 289.

99. — Interests unequal—Neither party in default.]—Though the interest of one party is more inconsiderable than the interest of another, yet they shall bear equally the expense of a commission settling boundaries, & separating freehold & copyhold.

There does not seem to have been any default either in pltf. or deft., that these lands are mixed & confounded; & therefore it would be hard to throw the whole upon pltf. (*LORD HARDWICKE, C.*).—*NORRIS v. LE NEVE* (1744), 3 Atk. 82; 26 E. R. 850, L. C.

Annotations:—Consd. Calmady v. Calmady (1795), 2 Ves. 568. *Refd. Parker v. Gerard* (1754), Amb. 236; *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508.

90. One party succeeding partially.]—An information on behalf of a charity against a corpn. claimed certain lands long since confounded by the latter with its own property, & of which it had granted building leases. The claims of the charity only partially succeeded, & no fraud was imputable to the corpn. The information also prayed for a scheme in respect of the charity. The ct., to avoid the expense & difficulty of apportioning & setting off the costs, gave none to the corpn., & ordered those of other defts. & of the relators to be paid out of the charity funds.—*SOLICITOR-GENERAL v. BATH CORPN., A.-G. v. BLAIR* (1819), 18 L. J. Ch. 275; 13 L. T. O. S. 64; 13 Jur. 866.

For discovery, see Part IV., Sect. 8, *post*.

C. Other Proceedings.

91. In what actions boundary questions tried—Not in action for penalty under the game laws.]—In an action for a penalty under the game laws for shooting a pheasant, pltf. was non-suited, it appearing that deft. was gamekeeper of a manor & had as such constantly shot over the place where the pheasant was killed & no evidence being given that the place was out of the manor; in the circumstances, deft. would not be put to prove that the place was within the manor (though pressed by pltf.'s counsel so to do); for, in such an action, the boundaries of the manor would not be tried.—*HANKINS v. BAILEY* (1791), 4 Term Rep. 681, n.; 100 E. R. 1243.

92. — Not in ejectment.]—Where the principal subject in dispute is the locality of the lands of each, which have been confused while occupied by one person, an ejectment does not decide anything; & a Ct. of Equity will not allow the lessor of pltf. to take out his execution, so as to choose his own part of the lands.—*HARDCASTLE v. SHAFTO* (1794), 1 Anst. 184; 145 E. R. 839.

93. — — In trespass.]—Held: in an

be tried, to ascertain whether the land in question forms part of the lot claimed by pltf.—*SEXTON v. PAXTON* (1863), 2 E. & A. 219.—CAN.

92 ii. — —.]—A question of boundary may be tried in an action of ejectment.—*IRWIN v. SAGER* (1862), 21 U. C. R. 373; 22 U. C. R. 22.—CAN.

action of ejectment, where it was admitted that pltf. was entitled to recover a part of that which he claimed, a question of boundary could not be tried. The generality of the description of the premises in an action of ejectment precluded an inquiry as to the precise quantity which the party was entitled to recover. If he took too much on the execution of the writ of possession deft. might bring an action for trespass, in which the premises might be set out by metes & bounds. The action of ejectment decided nothing as to the quantities. —DOE d. DRAPER'S CO. v. WILSON (1819), 2 Stark. 477, N. P.

94. — Information to declare title of Crown —To alluvium gained from sea.]—An information for the purpose of having the title of the Crown to alluvium gained from the sea declared & established is analogous to a bill to ascertain boundaries, & requires lands in the possession of deft.

Where the witnesses in support of the information deposed that the alluvium had been added to the mainland, not gradually & imperceptibly, but rapidly:—*Held*: a sufficient case had been made for directing issues.—A.-G. v. CHAMBERS, A.-G. v. REES (1859), 4 De G. & J. 55; 33 L. T. O. S. 189; 23 J. P. 308; 5 Jur. N. S. 745; 7 W. R. 404; 45 E. R. 22, L. C.

Annotations:—*Refd.* R. v. Hughes (1865), 3 Moo. P. C. C. N. S. 439; Hindson v. Ashby, [1896] 2 Ch. 1. *Mentd.* Lind v. Isle of Wight Ferry Co. (1862), 7 L. T. 416; Hastings Corpn. v. Ivall (1874), L. R. 19 Eq. 558; London Sewers Comrs. v. Glasco, Epping Forest Case (1874), 44 L. J. Ch. 129; Foster v. Wright (1878), 4 C. P. D. 438; Webster v. Whewall (1880), 42 L. T. 868; A.-G. v. Reeve (1885), 1 T. L. R. 675; Ilchester v. Raishleigh (1889), 61 L. T. 477; Pearce v. Bunting, R. v. Wedd, *Ex p.* Pearce, [1896] 2 Q. B. 360; Brinckman v. Matley (1904), 73 L. J. Ch. 642; Philpot v. Bath (1904), 20 T. L. R. 589; Mellor v. Walmsley, [1905] 2 Ch. 164; Mercer v. Denne, [1905] 2 Ch. 538; A.-G. of Southern Nigeria v. Holt (Liverpool), [1915] A. C. 599.

See, generally, CONSTITUTIONAL LAW; WATERS & WATERCOURSES.

95. By jury — Issue — Particulars ordered.]—*Held*: each side should give a note to the other of what each claimed as their bounds, & if the jury found bounds different from the note given from either side, those different boundaries should be indorsed on the *postea*.—DURIAM (Bp.) v. LIDDELL (1717), 2 Bro. Parl. Cas. 63; cited *Cas. temp. King*, at p. 61; 12 Vin. Abr. 267, pl. 29; 1 E. R. 794, H. L.

Annotation:—*Folld.* Lethulier v. Castlemain (1726), *Cas. temp. King*, 60.

96. — View — Particulars ordered.]—Pltf., owner of the manor of A., claimed as part of his manor a pond & certain waste grounds. Deft.,

m. — — — *What plaintiff must show.]—*In ejectment to try disputed boundaries, pltf. has to show, beyond any reasonable doubt, that he is entitled to some land at least, of which deft. is in possession. Where the point is a doubtful one he must show a survey carefully made, & the proper steps taken which the law requires for ascertaining the exact position of any posts along the line which can still be discovered by inspection, or established by evidence, in order that the ct. & jury may see whether the two lots in question are, by the survey which pltf. is seeking to establish, made to occupy their proper position on the concession line.—BABAUN v. LAUSON (1868), 27 U. C. R. 399.—CAN.

n. — — — *Erroneous survey— Damages for improvements.]—**Held*: questions of boundary may be tried in ejectment; & damages may be assessed under C. S. U. C. c. 93, s. 53, by deft. for improvements made in

consequence of an erroneous survey on lands not his own.—MOZIER v. (1863), 13 C. P. 517.—CAN.

*When discouraged.]—*The ct. will discourage, except when bound by well-established rule, the practice of trying questions of boundary by actions of ejectment, the legitimate object of which is to try titles.—PETERS v. NIXON (1857), 6 C. P. 451.—CAN.

p. — — — *Proof of title.]—*In ejectment, where pltf. proves his title to possession of any part of the premises sued for, he must obtain a verdict, & the ct. will not go into the question of boundary, in order to determine the precise quantity of land he is entitled to recover.—DOE d. SHELDON v. RAMSAY (1850), 7 U. C. R. 446.—CAN.

r. — — — *Issue—Boundaries confused.]—*Where the boundaries have been confused, the question of boundary should be determined either by eject-

owner of the adjacent manor of W., had, in order to enlarge his park, cut the head of the pond, & taken part of the ground claimed by pltf. as waste of the manor of A. into his park, claiming right thereto as part of the manor of W. Pltf. by his bill claimed that deft. might admit the boundaries between the manors of pltf. & deft., or that a commission might issue to set out the boundaries. Deft. admitted pltf.'s right to the manor of A., & that he, deft., had enlarged his park, & had inclosed in it part of the waste, but denied that it was part of pltf.'s manor; & he admitted that he claimed all the waste ground, & the pond, which pltf. by his bill stated to be within the manor of A.:—*Held*: (1) the issues should be tried by a special jury of the county, the jury to be returned to be freeholders in other parts of the county; (2) each party should deliver to the other a note in writing, containing a particular of the boundary insisted on by them, & each boundary should be tried, & if the jury should find any other particular boundary, they were to mark it on the back of the *habeas corpora* or *distringas*; (3) the jury should have a view of the places in question before the trial, to be shown to them by two persons, one to be named by pltf., & the other by deft.—LETHULIER v. CASTLEMAIN (LORD) (1726), Dick. 46; *Cas. temp. King* 60; 2 Eq. Cas. Abr. 161, pl. 12; 21 E. R. 184, L. C.

Annotation:—*Refd.* Godfrey v. Littel (1829), 1 Russ. & M. 59.

97. — — —.]—An action was brought in the Ch. Div. for an injunction to restrain trespass on mines & for an account of minerals gotten. The case turned on the question whether the land from which the minerals had been gotten was part of pltf.'s estate or part of the waste of the manor. Pltf. applied for a trial by a special jury:—*Held*: though pltf. could not claim a jury as a matter of right, the importance of a view was so great that a trial by jury ought to be ordered.—JENKINS v. BUSBY, [1891] 1 Ch. 484; 60 L. J. Ch. 254; 64 L. T. 213; 39 W. R. 321; 7 T. L. R. 227, C. A.; *subsequent proceedings* (1893), 125 Lords Journals 177, H. L.

Annotations:—*Expld.* Mangan v. Metropolitan Electric Supply Co., [1891] 2 Ch. 551. *Mentd.* Baring v. North Western of Uruguay Ry. Co., [1893] 2 Q. B. 406; Jenkins v. Dunraven (1898), 62 J. P. 661.

98. Trial of feigned issue — Costs.]—On a bill to settle the boundaries of a manor, it was decreed that each party should give to the other a note of their boundaries, & that it should be tried in a feigned issue. The issue being found for deft. on the first, second, & third trial, deft. was

ment, or, if there be an outstanding legal estate, by an issue.—IRELAND v. WILSON (1851), 1 L. Ch. R. 623.—IR.

r. — — — *Suit for land — Local investigation.]—*In a suit for land, where the question was as to whether the land lay within the boundaries of pltf.'s or deft.'s land, the ct. suggested to the parties that the proper mode of determining the case was in the first instance to hold a local investigation, & such local investigation should be applied for by one or other of the parties. Both parties resolutely refused to make such application, & the ct. thereupon dealt with the case upon the materials before it & passed a decree. Upon appeal, the lower Appellate Ct. remanded the case for the purpose of a local investigation being held at the cost of pltf. in the first instance:—*Held*: the ct. was wrong in remanding the case.—JATINGA VALLEY TEA CO., LTD. v. CHERA TEA CO., LTD. (1885), 1 L. R. 12 Calo.—IND.

Sect. 1.—Delimitation: Sub-sect. 4, C.; sub-sect. 5, A.]

not only allowed the costs of all the trials at law, but also the costs in equity, in regard deft. had no bill, & pltf. might have tried it at law without coming into equity.—**METCALFE v. BECKWITH** (1726), 2 P. Wms. 376; 2 Eq. Cas. Abr. 240, pl. 19; 24 E. R. 773.

Annotation:—*Reid. Godfrey v. Littel* (1829), 1 Russ. & M. 59.

99. Onus of proof.]—Where there is a dispute as to boundaries or unity of possession, deft. must set forth how he is entitled.—**CHAMPERNOON v. TOTNESS BOROUGH** (1740), 2 Atk. 112; 26 E. R. 470, L. C.

100. Reference to official referee.]—Pltf., a landowner, filed a bill against an adjoining owner of land, praying for a declaration that the boundary between the two properties was marked out and prescribed as appeared in a plan annexed to the bill. Replication having been filed before Nov. 2, 1875, Pltf., on Nov. 17, obtained an order that

a. Suit to compel delimitation—When maintainable.]—A proprietor of land has no right to bring a suit to compel his neighbours to agree to a particular line of boundary being marked out between his lands & theirs, where he does not venture to say that they have by any overt act transgressed that boundary.—**AMEERONNISSA BEGUM v. GOPAL SAHOO** (1874), 22 W. R. 134.—**IND.**

99 i Onus of proof.]—Pltf. & deft. were owners of adjoining lots of land, the title to which was derived from the same original grantor. Pltf.'s lot was described as being bounded on the north by the south line of deft.'s lot. In an action for trespass pltf. complained that deft., in erecting a new fence, had placed it on a line different from the line of the fence which existed previously, & which was admitted to have been on the true line between the two lots. The question whether deft. had, as a matter of fact, departed from the old line or not, having been left undetermined:—**Held**: there must be a new trial.—**DIXON v. DAUPHINEE** (1901), 34 N. S. R. 239.—**CAN.**

99 ii. —.]—In trespass *quare clausum fregit*, to try the boundary line between lots 28 & 29 in the fifth concession of Ops, pltf. described in his declaration by metes & bounds the piece of land trespassed upon, alleging it to be part of 28, to which lot his title was not disputed. The jury were asked: (1) is the point contended for by defts. the place where the original post stood? (2) did pltf., when he moved his fence, do so on the understanding with defts. that they acknowledged his right, or was his possession to be subject to the correct adjustment of the line? They found the post had not been proved, & pltf. was given possession by defts.:—**Held**: (1) on the first answer the verdict should have been for defts., for the fact that defts. had not proved the post did not relieve pltf. from proving the true line; (2) the second question was not presented by the case.—**DARK v. HEPBURN** (1877), 27 C. P. 357.—**CAN.**

99 iii. — Conterminous tenants—Alteration of boundaries.]—In an interdict by one of two conterminous tenants under the same landlord against the other entering upon & cropping a piece of ground claimed by the former as part of his farm:—**Held**: as each farm had been taken under the name by which it was previously well known & with recognised boundaries the *onus* of proving any alteration of these boundaries lay on the party alleging it, & as deft. failed to prove his allegation, the interdict should be granted.—**SUTHERLAND v. M'BEATH** (1866), 1 Sc. L. R. 240.—**SCOT.**

the evidence at the hearing should be taken *viva voce*. After serving notice of trial, he took out a summons to show cause why the trial should not be referred to one of the official referees of the ct. **Semle**: pltf. having obtained an order under the new procedure as to the mode in which the evidence to be used at the trial should be taken, was not at liberty to change his mode of proceeding.

—**LASCELLES v. BUTT** (1876), 2 Ch. D. 588; 35 L. T. 122; 24 W. R. 659; 3 Char. Pr. Cas. 290.

Annotation:—*Mentd. Ward v. Pilley* (1880), 5 Q. B. D. 427.

SUB-SECT. 5.—BY LEGAL PRESUMPTION.**A. Hedges, Banks, and Ditches.**

101. Hedge & ditch—General rule.]—Where adjacent lands belong to two distinct owners, the legal presumption is that the ditch which divides them is a part of the soil of him to whom the hedge

99 iv. Acquiescence in survey—

Change in boundaries.]—Defts. claimed under a lease of 50 acres, described as commencing in the rear of 150 acres of the lot, & running back 43 chains 75 links, executed in 1824 by S., who in 1826 conveyed the remaining 150 acres to one L., describing it as commencing in front on lake Erie at the south-east angle of the lot, & running back 131 chains 25 links. L. had a survey made in 1828, & a post was then planted to mark his north boundary. It appeared that defts. never questioned this limit, but in 1858, when having their own 50 acres surveyed, they directed the surveyor to assume it as their southern line. They afterwards moved their north fence further back, which gave rise to this action:—**Held**: defts. who appeared to have their full 50 acres according to the old limits, must show their right to change the boundaries so long acquiesced in, & it was unnecessary for pltf. in the first instance to prove his claim by actual survey.—**ILLER v. NOLAN** (1861), 21 U. C. R. 309.—**CAN.**

99 v. — Subsequent purchaser without notice.]—H., the owner of lot 13, built a house thereon, but which on a survey made by B., was found to have encroached on lot 12, owned by R., seven & a half inches, whereupon the following agreement was entered into: "It is hereby agreed between R. & H. that the line as surveyed between the lots of the above parties on C. street, by B. is correct, but that H. be permitted to occupy her house during her life, & not be compelled to remove the same, notwithstanding a portion of it is on the land of R. but after the death of H., R. may claim the whole of his lot; & in the meantime R. shall occupy his lot up to the line in the rear of the house." Deft. had purchased from M. to whom H. had sold, M. at the time being aware of the agreement, but of which deft. when he bought had no notice. Deft. moved a fence, which pltf. had erected in rear of the house in accordance with B.'s survey, in a line with the house, & also veneered the house with brick so as to cause it to encroach one & a half inches further on pltf.'s lot. H. died within ten years before action commenced, which was brought to recover that part of lot 12 encroached on by deft.:—**Held**: the agreement signed by H. recognising the line run by B. as the true boundary between the lots, relieved pltf. from doing more than showing where that line ran, & imposed on deft., who claimed by mesne conveyance from H., the burden of showing that such line was incorrect.—**ROAN v. KRONSBELN** (1886), 12 O. R. 197.—**CAN.**

99 vi. — Conflicting grants—Question for jury.]—In trespass, pltf. claimed title under a grant & survey made in 1823; deft. claimed the same land under a prior grant to D., & conveyance from P. to E., & from E. to himself, made in 1834, under which he entered:—**Held**: pltf. could not recover on his possession alone, but was bound to prove that the line contended for by him was the true boundary between his grant & the grant to D., & that the question of boundary should have been submitted to the jury.—**BALDWIN v. BRAYDON** (1846), 3 Kerr, 169.—**CAN.**

99 vii. — Whether discharged sufficiently—Irregular survey.]—Pltf.'s & deft.'s lots were portions of a tract of land lying between W. & N. streets which had been sub-divided into town lots according to a plan then made. Pltf.'s surveyor, as it appeared, measured the distance between W. & N. streets & divided it into proportionate parts in proportion to the number & size of the lots shown upon a plan of that survey, thus arriving theoretically at where the lines should be:—**Held**: pltf., on whom the *onus* was to establish the line which he claimed as the true limit of his lot, had not discharged that *onus*, as pltf.'s surveyor had not adopted the proper way to find the lines & ought to have endeavoured to find where the lines were actually placed. **THORPSON v. AKIN** (1911), 18 W. L. R. 44.—**CAN.**

a. Ascertainment by court—Surveys lost.]—In an action of ejectment the question to be decided was whether the *locus* was situate within pltf.'s lot No. 5 in concession 18, or within deft.'s lot adjoining, No. 24 in concession 17. The grant through which pltf.'s title was originally derived gave the southern boundary of lot 5 as a starting point, the course being thence 84 chains more or less to the river. The original surveys were lost, & this starting point could not be ascertained:—**Held**: such southern boundary could not be ascertained by measuring back exactly 84 chains from the river.—**PLUMB v. STEINHOFF** (1887), 14 S. C. R. 739.—**CAN.**

b. — Acting as arbitrators.]—**GRAHAM v. RUDELL** (1909), 13 O. W. R. 518.—**CAN.**

c. — Correction of erroneous plan.]—In correcting errors in a plan, no deviation from the plan should be made beyond what is necessary to correct the error, & then only if it is the best mode of correcting it.—**RE SASKATOON SURVEY, SMITH v. MASTER OF TITLES** (1915), 32 W. L. R. 22.—**CAN.**

belongs.—**NOYE v. REED** (1827), 1 Man. & Ry. K. B. 63; 6 L. J. O. S. K. B. 5.

Annotation:—**Refd.** *Collis v. Amphlett*, [1918] 1 Ch. 232.

102. ———.]—*Qu.*: whether the presumption which arises where properties are separated by a hedge & ditch, that the ditch belongs to the owner of the hedge, applies where there is no indication that the ditch had an artificial origin.

—**MARSHALL v. TAYLOR**, [1895] 1 Ch. 641; 64 L. J. Ch. 416; 72 L. T. 670; 12 R. 310, C. A.

Annotations:—**Refd.** *Collis v. Amphlett* (1917), 16 L. G. R. 229. **Mentd.** *A.-G. v. Waring* (1899), 63 J. P. 789; *Mid. Ry. Co. v. Wright*, [1901] 1 Ch. 738; *Marshall v. Robertson* (1905), 50 Sol. Jo. 75; *Kynoch v. Rowlands*, [1912] 1 Ch. 527.

103. ——— **Tenants holding under same landlord.**]—*Semble*: the presumption that a ditch is a part of the soil of him to whom the hedge belongs will not arise where the entire property of such lands is in one landlord, who has let them out to different tenants; but it will be incumbent upon either tenant who shall bring trespass against the other to prove his right of exclusive possession of the ditch in order to sustain the action.—**NOYE v. REED** (1827), 1 Man. & Ry. K. B. 63; 6 L. J. O. S. K. B. 5.

Annotation:—**Refd.** *Collis v. Amphlett* (1917), 16 L. G. R. 229.

104. ——— **Trimming hedge & cleaning ditch.**]—Pltf. & deft. were owners of adjacent properties, separated by a hedge & ditch belonging to pltf., the ditch being on deft.'s side of the hedge. In 1868 pltf. filled up the ditch, & placed along its course a drain-pipe, which received the drainage from his house & the deft.'s. In 1875 deft. exercised various acts of ownership over the site of the ditch, for example, planting trees, laying out beds, erecting a fowl-house, & making a path, & he had ever since treated it as part of his garden. During the same period pltf. had annually trimmed the hedge from both sides, & he twice opened up the drain to cleanse it:—*Held*: there was an exclusive possession of the site of the ditch by deft., & a discontinuance of possession by pltf., & deft. had acquired a good statutory title thereto.—**MARSHALL v. TAYLOR**, [1895] 1 Ch. 641; 64 L. J. Ch. 416; 72 L. T. 670; 12 R. 310, C. A.

Annotations:—**Consd.** *Kynoch v. Rowlands*, [1912] 1 Ch. 527. **Refd.** *A.-G. v. Waring* (1899), 63 J. P. 789; *Mid. Ry. Co. v. Wright*, [1901] 1 Ch. 738; *Marshall v. Robertson* (1905), 50 Sol. Jo. 75; *Collis v. Amphlett*, [1918] 1 Ch. 232.

105. ———.]—Pltf. & deft. were adjoining owners of land, the lands being bounded by a bank with a fence, with a ditch on deft.'s side. For nearly fifty years deft. had trimmed the fence, pollarded the trees, & cleaned the ditch, but there was no evidence of knowledge on the part of pltf.:—*Held*: these acts of ownership did not rebut the presumption that the bank & fence were the property of pltf.—**HENNIKER v. HOWARD** (1904), 90 L. T. 157, D. C.

Annotation:—**Refd.** *Collis v. Amphlett*, [1918] 1 Ch. 232.

106. ——— **Repair of fence & removal of trees.**]—Pltf. was the owner of land, which was let to a tenant, adjoining defts.' land. The lands were bounded by a fence with a ditch on defts.' side. Defts. for many years had repaired the fence & cut trees in it, though those acts were known only to pltf.'s tenant, & not to pltf.:—*Held*: on the evidence, the presumption that the fence on the edge of a ditch separating the properties belonged to the owner of the land adjoining the fence was

not rebutted by alleged acts of ownership on the part of the owner of the adjoining land.—**CRAVEN (EARL) v. PRIDMORE** (1902), 18 T. L. R. 282, C. A.

Annotations:—**Consd.** *Henniker v. Howard* (1904), 90 L. T. 157. **Refd.** *Collis v. Amphlett* (1917), 16 L. G. R. 229.

107. Bank & ditch.]—If a person has a field fenced with a bank & ditch, it is not a necessary consequence that his ditch extends to the width of eight feet from the interior line of the foot of the bank, i.e. four for the base of the bank, & four feet for the ditch. Proof of the ancient width of the ditch is evidence that the owner's land did not extend beyond the outer edge thereof, & he has no right to cut away his neighbour's land for the purpose of widening the ditch.—**VOWLES v. MILLER** (1810), 3 Taunt. 137; 128 E. R. 54.

Annotations:—**Refd.** *Craven v. Pridmore* (1901), 17 T. L. R. 399; *Collis v. Amphlett* (1917), 89 L. J. Ch. 101. **Mentd.** *Hosking v. Phillips* (1848), 3 Exch. 168; *R. v. Otway* (1849), 4 Cox, C. C. 59; *Marshall v. Taylor* (1895), 12 R. 310.

108. ——— **Alongside highway—Ditch filled**—A field adjoining a public road was separated from it only by a hedge & bank. The trustees, who, under an Act of Parliament, constructed the road upwards of fifty years before the commencement of the suit, had made the hedge & bank, & had also made on the field side of the fence a ditch of three feet in breadth. This ditch had become filled up & obliterated, & had never been reopened by the trustees, but a ditch about a foot wide had been subsequently made by the occupier of the field, & that also had become obliterated. The owners of the land had always included the hedge in their leases, & the tenants had held & used the strip within the hedge as part of their field for much more than twenty years, & had at their own expense trimmed the hedge on both sides. During the same time the trustees had not interfered in any way with the site of the ditch:—*Held*: the circumstances were not sufficient to constitute adverse possession, & give the owners of the land a title under Stat. Limitations to the site of the three-foot ditch.—**SEARBY v. TOTTENHAM RY. CO.** (1868), L. R. 5 Eq. 409.

Annotation:—**Consd.** *Craven v. Pridmore* (1901), 17 T. L. R. 399.

109. Hedge between two ditches.]—If there are two ditches, one on each side of a hedge, the ownership of the hedge must be ascertained by proving acts of ownership.—**GUY v. WEST** (1808), cited in 2 Selwyn's Nisi Prius, 13th ed. at p. 1244.

Annotations:—**Refd.** *Collis v. Amphlett* (1918), 87 L. J. Ch. 216. **Mentd.** *Marshall v. Taylor* (1895), 64 L. J. Ch. 416.

110. Ditch alongside highway.]—T., owner of the land adjoining, & of a ditch along a highway, built a fence on the site of such ditch. On an information under Highway Act, 1864 (c. 101), s. 50, for unlawfully encroaching on the highway, it was proved that the fence was within seven feet of the centre of the highway:—*Held*: T. could not be convicted, for he put the fence only on his own land, the ditch being no part of the highway.—**FIELD v. THORNE** (1869), 20 L. T. 563; *sub nom.* **THORNE v. FIELD**, 33 J. P. 727.

Annotation:—**Distd.** *Chorley Corpn. v. Nightingale*, [1906] 2 K. B. 612.

111. ——— **Highway of specified width.**]—Where a highway of a specified width has been recently laid out there is no presumption that an adjoining ditch & hedge form part of the highway, if the highway is of the specified width without the ditch

PART I. SECT. 1, SUB-SECT. 5.—A.

107 i. Bank & ditch.]—Where the fence consists of a bank & a ditch the presumption of law is that the person on whose land the bank is, is owner of the ditch, & *prima facie* bound to

keep the whole in repair.—**GILMER v. MAYREN** (1898), 33 L. L. T. 35.—**IR.**

110 i. Ditch alongside highway.]—Where a road is bounded by ditches, there is no presumption that the space between the ditch & the fence of an

owner of land fronting on the road forms part of it.—**ST. FRANCOIS XAVIER DE BROMPTON CORPN. v. SALOIS** (1908), Q. R. 34 S. C. 238 — **CAN.**

Sect. 1.—Delimitation: Sub-sect. 5, A. & B. Sects.

or hedge.—*SIMCOX v. YARDLEY RURAL DISTRICT COUNCIL* (1905), 69 J. P. 66; 3 L. G. R. 1350.

Annotation:—Consd. Collis v. Amphlett, [1918] 1 Ch. 232.

112. ———.]—In pursuance of an Inclosure Act passed in 1788 allotments were made to the predecessors in title of pltf., & the allottees were directed to make & for ever maintain a sufficient fence & ditch on the south side thereof. The inclosure award set out a public highway on the south side of the allotments of the breadth of forty feet between & exclusive of the ditches & fences. Pltf. purchased the allotments in 1889, & upon several occasions he cleaned out the ditch. From time to time houses were built on portions of the allotments alongside the highway, & the ditch in front thereof was filled in & inclosed. In 1901 the remaining length of the ditch was piped in & filled up by defts. with the assent of pltf. The road had a seven-foot pavement alongside the site of the ditch, & inclusive of the footpaths, was about forty-seven feet wide. Many persons, however, walked over the site of the ditch, & it was used for purposes of passage without protest for nearly four years, when the pltf. inclosed the site of the ditch with a temporary paling fence. The council objected to this fence, but it remained until 1907 when it was replaced by a wall, which defts. pulled down:—*Held*: the site of the ditch belonged to pltf.—*WALMSLEY v. FEATHERSTONE URBAN DISTRICT COUNCIL* (1909), 73 J. P. 322; 7 L. G. R. 806.

113. — Or roadside waste.]—A ditch by the side of a highway or roadside waste is not necessarily part of the highway or waste. It may belong to & be the private property of the adjoining owner & he may lawfully inclose it.—*CHIPPENDALE v. PONTEFRACT RURAL DISTRICT COUNCIL* (1907), 71 J. P. 231.

114. — Dedication as highway.]—There is no rule of law that a ditch running alongside a highway between the road & the fence cannot be dedicated as part of the highway merely because it is not part of the roadway & cannot be used by the public for purposes of passage.—*CHORLEY CORPN. v. NIGHTINGALE*, [1907] 2 K. B. 637; 76 L. J. K. B. 1003; 97 L. T. 465; 71 J. P. 441; 23 T. L. R. 651; 51 Sol. Jo. 625; 5 L. G. R. 1114, C. A.

Annotations:—Consd. Chippendale v. Pontefract R. D. C. (1907), 71 J. P. 231. *Mentd. Leeds Corpn. v. Tetley* (1907), 71 J. P. Jo. 53.

—Circumstances (see No. 112, *ante*) in which:—*Held*: there had been no dedication of the site of the ditch as a highway.—*WALMSLEY v. FEATHERSTONE URBAN DISTRICT COUNCIL* (1909), 73 J. P. 322; 7 L. G. R. 806.

See, further, HIGHWAYS, STREETS, & BRIDGES.

116. Ditch between two banks adjoining highway.]—Pltf. was owner of a close adjoining a

public highway, & between the close & the highway was a strip of land averaging nine feet in width. Upon this strip of land ran a ditch, the bank of which, on pltf.'s side, was three feet in width, & covered with grass, & the bank on the road side was one foot in width, & covered with grass. At the side of the road were posts & rails about two feet high. Pltf. & his predecessors, the owners of the adjoining land, had from time to time, & the surveyors of highways two or three times during the last 40 years, repaired the posts & rails:—*Held*: this was not a ditch at the side of, or across a public road within a local Act of Parliament empowering a local board of health to cause ditches at the side of & across public roads to be filled up & to substitute pipe & other drains, & the local board had no power to fill it up & substitute a pipe or other drain, the presumption being that the ditch belonged to pltf., the owner of the adjoining land.—*TUTILL v. WEST HAM LOCAL BOARD OF HEALTH* (1873), L. R. 8 C. P. 447; 28 L. T. 597; 37 J. P. 455.

117. Hedge without ditch—Claim by owner of hedge to ditch-width.]—On a map attached to an award made under a local Act for the regulation of a common the boundaries of the common were delineated by a line drawn along the line of the "growers" in a hedge dividing the common from the land of an adjacent owner & belonging to such owner:—*Held*: there was no presumption that the owner was entitled to a "ditch-width" on the outside of the line of the growers in the absence of evidence that the hedge was originally planted inside the boundary line, & any fence erected outside the line of the growers was an encroachment on the common.—*COLLIS v. AMPHLETT*, [1920] A. C. 271; 89 L. J. Ch. 101; 122 L. T. 433; 18 L. G. R. 1, H. L.

B. Other Forms of Boundary.

118. Boundary plates of parish—Intervening space.]—In trespass against the overseers of the parish of St. Dunstan, pltfs. contended that Serjeants' Inn was not within the parish; *inter alia* it was proved that there was a parish boundary plate at each end of the Inn:—*Held*: the inference was that at one boundary mark the parish of St. Dunstan ended & at the other the parish began again, leaving the Inn out of the parish.—*LENS v. BROWN* (1824), 1 C. & P. 224, N. P.

Annotation:—Reid. Thorpe v. Adams (1871), L. R. 6 C. P. 125.

See, also, Part I., Sect. 1, ante.

See, further, COPYHOLDS; HIGHWAYS, STREETS, & BRIDGES; MINES, MINERALS, & QUARRIES; RAILWAYS & CANALS; WATERS & WATERCOURSES.

SECT. 2.—OWNERSHIP.

See Part II., Sect. 1, post.

PART I. SECT. 1, SUB-SECT. 5.—B.

e. Survey accepted by both parties—Erection of fence & house.]—When a survey is made & accepted by both owners & a fence is erected upon the boundary, & in a few years, while the matter is fresh in the minds of all, a house is erected either upon, or approximately upon, the same line, the presumption ought to be that this was the true line or that the parties agreed to accept it as a conventional boundary between the properties.—*HAMILTON MOTOR WORKS, LTD. v. BROWNE* (1918), 15 O. W. N. 90.—**CAN.**

f. Erroneous marking by surveyor—Lots in concession.]—A mistake of a surveyor in marking the number of

the concessions wrong on some of the posts of an original survey will not make it proper to assume the lots so marked as being in the concession numbered on the posts.—*JARVIS v. MORTON* (1854), 11 U. C. R. 431.—**CAN.**

g. March dyke—Wind & water shear line—Hill farms.]—In a dispute as to boundaries between two tenants of adjoining hill farms under the same landlord, it appeared that there was no specification of boundaries in the respective leases, the properties being described generally. A march dyke marked part of the boundary line; where it ceased, one tenant said the boundary was the wind & water shear

line up to a certain hill & thence a straight line to the top of another hill. The other tenant maintained that the wind & water shear line was the boundary throughout the whole extent of the farm from the point where the march dyke ceased:—*Held*: (1) while the wind & water or weather march was a very common boundary, when it was deviated from, the line usually was carried straight from one hill top to another; but while in some cases there may be a presumption in favour of the one line rather than the other, neither is necessarily the boundary of any farm, that depending entirely on the circumstances of each case.—*ANDERSON v. M'CALLUM* (1857), 20 Dunl. (Ct. of Sess.) 2.—**SCOT.**

SECT. 3.—DUTY TO MAINTAIN.

119. Upon whom duty devolves—In general.]—Given an estate consisting of two parishes vested in one person; and a habit of presenting one rector; till at length all traces of the boundaries are lost; which estate comes by descent to different lines of heirs; and different rectors are presented; one of whom under an idea of title received all the tithes, so getting without breach of faith what belonged to the other:—*Held*: in all such cases, the ct. must find some ratio of apportionment; deft. or other person under whom he claims has a duty imposed upon him to keep the subjects distinct; and, therefore, if he cannot point out the identical thing, he must set out the proportion if he knows the quantity; if there was no such duty, probably no relief could be given.—*GRIERSON v. EYRE* (1804), 9 Ves. 341; 32 E. R. 631, L. C.

120. — Tenant.]—It is the duty of the tenant to keep the boundaries; & the ct. will aid the reversioner to distinguish them; &, if they cannot be distinguished, will give him as much land.—*LEEDS (DUKE) v. STRAFFORD (EARL)* (1798), 4 Ves. 180; 31 E. R. 93, L. C.

Annotations:—*Consd.* *Searle v. Cooke* (1890), 43 Ch. D. 519. *Refd.* *Aston v. Exeter* (1801), 6 Ves. 288; *A.-G. v. Stephens* (1855), 1 K. & J. 724. *Mentd.* *Godfrey v. Littel* (1829), 1 Russ. & M. 59.

121. — —.]—There is an obligation on a tenant to preserve boundaries, &, if he permit them to be destroyed, so that the landlord's land cannot be distinguished from his, & restored specifically, to substitute land of equal value.—

A.-G. v. FULLERTON (1813), 2 Ves. & B. 263; 35 E. R. 319, L. C.

Annotation:—*Consd.* *Spike v. Harding* (1878), 7 Ch. D. 871.

122. — —.]—Where a tenant of land for life or for years or at will has lands of his own adjoining to that which he so holds as tenant, it is his duty to keep the boundaries between them clear & distinct, so that at the expiration of the tenancy the reversioner or remainderman may be able without difficulty to resume possession of what belongs to him; if the person having such partial interest neglects this duty, & suffers the boundaries to be confused so that the reversioner or remainderman cannot tell to what lands he is entitled, the Ct. of Ch. will give relief by compelling the persons who have occasioned the difficulty to make good out of what may be considered to lie in the nature of a common fund, that portion of it which belongs to another.—*A.-G. v. STEPHENS* (1855), 6 De G. M. & G. 111; 25 L. J. Ch. 888; 26 L. T. O. S. 189; 20 J. P. 70; 2 Jur. N. S. 51; 4 W. R. 191; 43 E. R. 1172, L. C. *Annotations*:—*Refd.* *Brown v. Wales* (1872), L. R. 15 Eq. 142; *Searle v. Cooke* (1890), 43 Ch. D. 519.

123. — —.]—*SPIKE v. HARDING*, No. 44, *ante*.

124. — Copyhold tenant.]—*SEARLE v. COOKE*, No. 47, *ante*.

See, further, Sect. 1, Sub-sect. 4, A. & B. (a), *ante*; COPYHOLDS; LANDLORD & TENANT.

SECT. 4.—TREES IN BOUNDARIES.

See AGRICULTURE, Vol. II., pp. 63 *et seq.*

Part II.—Fences.

T. 1.—OWNERSHIP.

125. Evidence of—Stone with inscription built into wall.]—The purchaser of a house in L. having taken various objections to the title, the vendor filed a bill for specific performance, & obtained the usual reference as to title. All the objections taken were overruled, but before the certificate had been signed the purchaser discovered in a long blank wall, which formed one side of the house & fronted on a street, a stone with an inscription, dated in 1776, stating that the wall had been built by and belonged to the E. I. Co., who had thrown the adjoining ground into the street. The wall had been rebuilt in 1831 by the tenant of the house, & the stone set up again; but in what circumstances did not appear. No rent had from that time been paid to the co., nor any acknowledgment of their title given; but their successors in title, on being applied to, claimed the wall as theirs, & the vendor obtained a release from them:—*Held*: the vendor

had not a good title when the bill was filed, for that there was no ground for holding a title to have been gained by possession adverse to the E. I. Co.—*PHILLIPSON v. GIBBON* (1871), 6 Ch. App. 428; 40 L. J. Ch. 406; 24 L. T. 602; 35 J. P. 676; 19 W. R. 661, L. JJ.

Annotation:—*Mentd.* *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557.

Ownership of hedges, banks, & ditches, *see ante*.

Ownership of trees in boundaries, *see* AGRICULTURE, Vol. II., pp. 63 *et seq.*

SECT. 2.—RIGHTS AND LIABILITIES OF OWNERS AND OCCUPIERS.

SUB-SECT. 1.—AT COMMON LAW.

A. No Liability to Fence, or to Exclude Animals, etc.

126. Contiguous closes.]—A commoner cannot bring an action on the case against the owner of a

PART II. SECT. 1.

*h. Evidence of—Valuation of commissioner.]—*In an action of trespass for pulling down a line fence between pltf.'s & deft.'s adjoining premises, it appeared that the fence had been erected by deft., & was on his own land. Pltf. had got the city comr. to value the fence, treating it as a line fence, but no bye-law was proved, the proceeding was wholly *ex p.*, & the award was uncertain:—*Held*: this clearly could give no right.—*BRAUER v. ROGERS* (1875), 25 C. P. 156.—**CAN.**

*k. — Situation—Ownership of freehold.]—*The original line fence, being wholly on pltf.'s land:—*Held*: it was the property of pltf., the fence being regarded as part of the freehold, & the ownership of the freehold determining

the ownership of the fence. *BOTTA v. PENE*, [1910] 15 W. L. R.

*l. Fence on boundary line.]—*On the boundary between two blocks, a bank erected a fence. Afterwards the bank surrendered the lands of which they were owners in fee to the Crown, & all improvements thereon:—*Held*: only a moiety of the fence passed to the Crown.—*LANDS MINISTER v. AUSTRALIAN JOINT STOCK BANK* (1900), 21 N. S. W. L. R. 209.—**AUS.**

*m. Rails of old fence—Adjoining owners—Jurisdiction of court.]—*A., intending to make a line fence between his land & that of B., by mistake made the fence on B.'s land. Afterwards, a correct line having been run, it was agreed that A. & B. should each make a portion of the fence on the correct

line. B., in making his share, used the rails of the old fence made by A. A. sued B. in the division ct. for the price of the rails so used, & the judge having decided in his favour, B. applied for a prohibition:—*Held*: the judge had jurisdiction.—*Re BRADSHAW v. DUFFY* (1867), 4 P. R. 50.—**CAN.**

*n. Mortgage of adjoining land—*9 Geo. 4, No. 12.]—Notice having been given under the above Act by pltf., to P. the owner of an adjoining property, mortgaged to deft., to erect a dividing fence, & not complied with, the fence was erected by pltf.:—*Held*: P., the mtgor., was owner within the Act, & deft., although as mtgee. technically owner, was not liable.—*RODD v. CAMPBELL* (1846), 1 Legge, 326.—**AUS.**

Sect. 2.—Rights and liabilities of owners and occupiers: Sub-sect. 1, A., B. (a) & (b), C. (a) & (b).]

close contiguous to the common, for not repairing his fences, whereby pltf. was afraid to use the common, lest his cattle should trespass on deft.'s close.—**SMITH v. BURTON** (1674), 1 Freem. K. B. 145; 89 E. R. 105.

127. Adjoining closes.]—Pltf. declared that he was possessed of a close adjoining deft.'s, & that the tenants & occupiers of that close had time out of mind made & repaired the fence between pltf.'s and deft.'s close, and that for want of repair deft.'s cattle came into pltf.'s close, etc.:—*Held*: this was a charge upon deft. against common right; for the law bounds every man's property, & is his fence, & this was obliging another to make a fence for him; but pltf. had made himself a sufficient title in this declaration by showing deft. bound to this charge by prescription.—**STAR v. ROOKESBY** (1710), 1 Salk. 335; 91 E. R. 295, Ex. Ch.

Annotations:—Refd. Hardy v. Hollyday (1765), 4 Term Rep. 718; Lawrence v. Jenkins (1873), L. R. 8 Q. B. 274. *Mentd.* McMahon v. Lennard (1858), 6 H. L. Cas. 970; Ellis v. Loftus Iron Co. (1874), 31 L. T. 483.

128. —.]—Where two persons are possessed of adjoining closes, neither being under any obligation to fence, each must take care that his cattle do not enter the land of the other.—**CHURCHILL v. EVANS** (1809), 1 Taunt. 529; 127 E. R. 939.

Annotation:—Refd. Ricketts v. East & West India Docks & Birmingham Junction Ry. Co. (1852), 12 C. B. 160.

129. —.]—An owner or occupier of lands, though bound to take care that his cattle do not wander from his own land, & stray upon the land of another, is under no legal obligation to put up or maintain a fence so as to prevent the cattle of his neighbour straying upon his land: such an obligation can only be founded upon a statutory obligation, or some agreement or covenant.—**HILTON v. ANKESSON** (1872), 27 L. T. 519.

130. —.]—At common law the owners of adjoining closes are not bound to fence either against or for the benefit of each other; but in the absence of fences each owner is bound to prevent his cattle or other animals from trespassing on his neighbour's premises (*per* CUR.).—**LAWRENCE v. JENKINS** (1873), L. R. 8 Q. B. 274; 42 L. J. Q. B. 147; 37 J. P. 357; 21 W. R. 577; *sub nom.* **LAURENCE v. JENKINS**, 28 L. T. 406.

Annotations:—Refd. Crowhurst v. Amersham Burial Board (1878), 4 Ex. D. 5; Corry v. G. W. Ry. Co. (1881), 29 W. R. 623; Coaker v. Willecocks, [1911] 2 K. B. 124.

Mentd. Sncesby v. L. & Y. Ry. Co. (1874), L. R. 9 Q. B. 263; Halestrap v. Gregory (1895), 43 W. R. 507.

See, also, No. 133, *post*.

131. Lessor & lessee.]—There is no implied obligation on part of a lessor to keep up the fences of closes which he retains in his own hands, abutting on land demised to a tenant, so as to prevent the tenant's cattle from straying on to them.—**ERSKINE v. ADEANE** (1873), 8 Ch. App. 756; 42 L. J. Ch. 835; 29 L. T. 234; 21 W. R. 802, L. JJ.

Annotations:—Mentd. Llanelly Ry. & Dock Co. v. L. & N. W.

PART II. SECT. 2, SUB-SECT. 1.— A.

o. General rule.]—A land owner in this country must fence against cattle.—**SPAFFORD v. HUBBLE** (1838), 2 Ont. Dig. 2785.—**CAN.**

p. —.]—A municipal council by bye-law, passed pursuant to Municipal Act, enacted that certain descriptions of animals & all four-footed animals known to be breachy, should not be allowed to run at large in the township, & provided for fixing the

height of fences. Pltf.'s cattle strayed from the highway into the lands of deft. W. whose fences were not of the height required by the bye-law. He distrained them & they were impounded:—*Held*: as the bye-law did not affirmatively authorise these cattle to run at large by negatively providing that certain other classes of animals should not be allowed to do so, pltf. was liable at common law for the damage done, irrespective of any question as to the height of deft.'s fences.—**CROWE v. STEEPER & WIL-**

Ry. Co. (1873), 8 Ch. App. 942; **Crowhurst v. Amersham Burial Board** (1878), 4 Ex. D. 5; **Saner v. Bilton** (1878), 7 Ch. D. 815; **Carter v. Salmon** (1880), 43 L. T. 490; **Heseltine v. Simmons**, [1892] 2 Q. B. 547; **Kennard v. Ashman** (1894), 10 T. L. R. 213; **Flight v. Provident Assocn. of London** (1895), 11 T. L. R. 391; **De Lassalle v. Guildford**, [1901] 2 K. B. 215; **Lloyd v. Sturgeon Falls Pulp Co.** (1901), 85 L. T. 162; **Baily v. British Equitable Assce.**, [1904] 1 Ch. 374; **Bristol Trams, etc., Carriage Co. v. Fiat Motors**, [1910] 2 K. B. 831; **Cheater v. Cater**, [1918] 1 K. B. 247.

See, further, AGRICULTURE, Vol. II., Nos. 412–416; ANIMALS, Vol. II., Nos. 126–134, 173–183.

B. Liability to Keep in Animals, etc.

(a) Animals.

132. Close adjoining waste of manor.]—If the lord of a waste of two hundred acres enclose another of fifty acres, the feoffee must inclose them, or keep his cattle from straying into the residue, & so must the lord of the residue.—**ANON.** (1580), 3 Dyer, 372 b, pl. 10; 73 E. R. 835.

Annotation:—Refd. Fletcher v. Rylands (1866), L. R. 1 Exch. 265.

133. Adjoining closes.]—If two persons are possessed of adjoining closes, neither being under any obligation to fence, each must take care that his cattle do not enter the land of the other.—**CHURCHILL v. EVANS** (1809), 1 Taunt. 529; 127 E. R. 939.

Annotation:—Refd. Ricketts v. East & West India Docks & Birmingham Junction Ry. Co. (1852), 12 C. B. 160.

See, also, No. 130, *ante*.

See, further, ANIMALS, Vol. II., Nos. 126–133, 173–183.

(b) Other Things.

134. Adjoining premises—Escape of sewage.]—If a house of office is separated from other premises by a wall, & that wall belongs to the owner of the house of office, he is of common right bound to repair it.

He must keep in the filth of his house of office, that it may not flow in upon & damnify his neighbour (**HOLT, C.J.**).—**TENANT v. GOLDWIN** (1704), 2 Ld. Raym. 1089; **Holt, K. B.** 500; 1 Salk. 21, 360; 6 Mod. Rep. 311; 92 E. R. 222.

Annotations:—Consd. Russell v. Shenton (1842), 3 Q. B. 449. *Distd.* Smith v. Kenrick (1849), 7 C. B. 515. *Apld.* Alston v. Grant (1854), 3 E. & B. 128; **Hodgkinson v. Egnor** (1863), 4 B. & S. 229. *Consd.* Fletcher v. Rylands (1866), L. R. 1 Exch. 265; **Ross v. Fedden** (1872), 26 L. T. 966; **Humphries v. Cousins** (1877), 2 C. P. D. 239; **Snow v. Whitehead** (1884), 27 Ch. D. 588; **Hobart v. Southend-on-Sea Corpn.** (1906), 75 L. J. K. B. 305. *Refd.* Rider v. Smith (1790), 3 Term Rep. 766; **Ricketts v. East & West India Docks & Birmingham Junction Ry. Co.** (1852), 12 C. B. 160; **R. v. Stephens** (1866), 7 B. & S. 710; **Wilson v. Newberry** (1871), L. R. 7 Q. B. 31; **Crowhurst v. Amersham Burial Board** (1878), 4 Ex. D. 5; **Ballard v. Tomlinson** (1885), 29 Ch. D. 115; **Grosvenor & West End Ry. & Terminus Hotel Co. v. Hamilton** (1894), 71 L. T. 362; **Ponting v. Noakes**, [1894] 2 Q. B. 281; **Foster v. Warblington U. D. C.**, [1906] 1 K. B. 648; **Holgate v. Bleazard**, [1917] 1 K. B. 443; **A.-G. v. Cory** (1919), 88 L. J. Ch. 410. *Mentd.* **Todd v. Flight** (1860), 9 C. B. N. S. 377; **White v. Bass** (1862), 7 H. & N. 722; **Ellis v. Manchester Carriage Co.** (1876), 1 C. P. D. 13; **Wheeldon v. Burrows** (1879), 12 Ch. D. 31; **Smith v. Hancock**, [1894] 2 Ch. 377; **Broomfield v. Williams**, [1897] 1 Ch. 602.

See, further, NEGLIGENCE; NUISANCE.

LIAMS (1881), 46 U. C. R. 87.—**CAN.**

q. — As between adjoining owners.]—As between adjoining owners, if there be no fence between them, each is bound to keep his cattle within his own boundaries, & if the cattle of one trespass upon the land of the other, the latter may impound them notwithstanding the absence of a fence.—**BUTCHER v. SMITH & CROMWELL** (1868), 5 W. W. & A. B. 223.—**AUS.**

See, generally,

*C. Lands Adjoining Highway.**(a) General Rule.*

135. No general obligation.]—*Seemle:* there is no general law imposing the obligation on the owner or occupier of lands abutting on a public road to keep up the fences.—*POTTER v. PERRY* (1859), 23 J. P. 644; 7 W. R. 182.

136. —.]—There is no duty by the common law on the owner or occupier of land adjoining a highway to fence the land so as to prevent animals from escaping on to the highway.

A carthorse had escaped from an adjacent field through a defective hedge & damaged a person passing along the highway:—*Held:* he had no right of action in respect of the damage.—*JONES v. LEE* (1911), 106 L. T. 123; 76 J. P. 137; 28 T. L. R. 92; 56 Sol. Jo. 125, D. C.

*Annotations:—**Refd.* *Ellis v. Banyard* (1911), 106 L. T. 51; *Heath's Garage v. Hodges*, [1916] 2 K. B. 370.

137. Escape of cattle—Only incurred if lawfully using highway.]—A plea in bar of an avowry for taking cattle damage feasant, that the cattle escaped from a public highway into the *locus in quo*, through the defect of fences, must show that they were passing on the highway when they escaped; it is not sufficient to state that being in the highway they escaped.—*DOVASTON v. PAYNE* (1795), 2 Hy. Bl. 527; 126 E. R. 684.

*Annotations:—**Distd.* *Fawcett v. York & N. Mid. Ry. Co.* (1851), 20 L. J. Q. B. 222. *Consd.* *Haigh & Baxter v. West* (1893), 68 L. T. 531; *Harrison v. Rutland*, [1893] 1 Q. B. 142. *Refd.* *Ricketts v. East & West India Docks & Birmingham Junction Ry. Co.* (1852), 12 C. B. 160; *M. S. & L. Ry. Co. v. Wallis* (1854), 14 C. B. 213; *R. v. Pratt* (1855), 4 E. & B. 860; *Dickinson v. L. & N. W. Ry. Co.* (1866), Har. & Ruth. 399; *Arnold v. Holbrook* (1873), 42 L. J. Q. B. 80. *Mentd.* *Dawes v. Hawkins* (1860), 8 C. B. N. S. 848; *Lawrence v. Hitch* (1868), L. R. 3 Q. B. 521; *Rangleley v. Mid. Ry. Co.* (1868), 3 Ch. App. 306; *Mercer v. Woodgate* (1869), L. R. 5 Q. B. 26; *St. Mary, Newington v. Jacobs* (1871), L. R. 7 Q. B. 47; *Cubitt v. Maxse* (1873), L. R. 8 C. P. 704; *Hawkins v. Rutter*, [1892] 1 Q. B. 668; *Hickman v. Malsey*, [1900] 1 Q. B. 752.

See, further, Nos. 157, 158, post.

(b) Excavations, etc.

138. Excavation or opening made before dedication.]—Where an erection or excavation exists upon land, & the land on which it exists, or to which it is contiguous, is dedicated to the public as a highway, the dedication must be taken to be made to the public & accepted by them, subject to the inconvenience or risk arising from the existing state of things.—*FISHER v. PROWSE, COOPER v. WALKER* (1862), 2 B. & S. 770; 31 L. J. Q. B. 212; 6 L. T. 711; 26 J. P. 613; 8 Jur. N. S. 1208; 121 E. R. 1258.

*ns:—**Consd.* *Robbins v. Jones* (1863), 15 C. B. N. S. 221. *Apld.* *Mercer v. Woodgate* (1869), L. R. 5 Q. B. 26. *Consd.* *Arnold v. Holbrook* (1873), 28 L. T. 23. *Apld.* *Warner v. Wandsworth District Board of Works* (1889), 53 J. P. 471; *Brackley v. Mid. Ry.* (1916), 85 L. J. K. B. 1596. *Refd.* *Cubitt v. Maxse* (1873), L. R. 8 C. P. 704; *Hamilton v. St. George, Hanover Square* (1873), L. R. 9 Q. B. 42; *Spice v. Peacock* (1875), 39 J. P. 581; *Moore v.*

Lambeth Waterworks Co. (1886), 17 Q. B. D. 462; *Owen v. De Winton* (1894), 58 J. P. 833; *G. O. Ry. v. Howlett*, [1916] 2 A. C. 511; *Selby v. Whitbread*, [1917] 1 K. B. 736. *Mentd.* *Folkestone Corpn. v. Brockman* (1914), 83 L. J. K. B. 745.

139. —.]—If a highway is dedicated to the public with a dangerous obstruction upon it, such as would have been a nuisance if placed upon an ancient way, as, a flight of steps, or a projecting flap, no action can be maintained against the person dedicating it for an injury caused thereby. Nor will an action lie against the owner of a house having a covered area adjoining a public footway, which area was in existence before & at the time of the dedication of the highway, & was dedicated to the public before the Highway Act, 1835 (c. 50), for an injury to an individual from the giving way of the covering of the area in consequence of the wear & tear occasioned by public user.

In 1830, houses were erected on land adjoining a new road constructed at a high level as an approach to a new bridge across the Thames. Between these houses & this road was a space which was covered over as a means of access to the houses, by a flagging in which were gratings to let light & air to the lower part of the buildings, which formed separate tenements, the entrance to which was upon the lower level at the rear. The space so covered had become, by dedication prior to Highway Act, 1835, a part of the public footway, & was used as such by the public. In 1862, in consequence of a large number of persons congregating upon the spot, the flagging & grating in front of one of the houses, having become weakened by user, gave way, & several persons were precipitated into the area below, a depth of about thirty feet, & one of them was killed. In an action by the widow of deceased, under Fatal Accidents Act, 1846 (c. 93):—*Held:* (1) there being in the circumstances no legal liability on the part of the lessee of the houses to keep the surface of this way in repair, the action was not maintainable, the gulf at the side of the causeway being the result of the road being raised by the makers of it, not by the land at the side being excavated by the proprietors of it.—*ROBBINS v. JONES* (1863), 15 C. B. N. S. 221; 3 New Rep. 85; 33 L. J. C. P. 1; 9 L. T. 523; 10 Jur. N. S. 239; 12 W. R. 248; 143 E. R. 768.

*Annotations:—**Consd.* *Gautret v. Egerton* (1867), L. R. 2 C. P. 371; *Silverton v. Marriott* (1888), 59 L. T. 61; *Cavalier v. Pope*, [1906] A. C. 428; *Horridge v. Makinson* (1915), 84 L. J. K. B. 1294. *Mentd.* *Hamilton v. St. George, Hanover Square* (1873), L. R. 9 Q. B. 42; *Lane v. Cox* (1896), 66 L. J. Q. B. 193; *Ryall v. Kidwell*, [1914] 3 K. B. 135; *Dobson v. Horsley*, [1915] 1 K. B. 631.

140. Ancient ditch by highway.]—Comrs. of Sewers used for the purpose of their sewerage an ancient tidal ditch which ran along the side of a public highway:—*Held:* the comrs. were under no obligation to fence the sewer, so as to protect persons frequenting the highway.—*CORNWELL v. METROPOLITAN COMRS. OF SEWERS* (1855), 10

PART II. SECT. 2, SUB-SECT. 1.—
C (a).

135 i. No general obligation.]—Though there is no duty upon the owner of land to fence between his land & a public highway, yet, if he does not fence, he is not entitled to impound cattle trespassing from such highway, until their owner has had a reasonable time for driving them off.—*BUTCHER v. SMITH & CROMWELL* (1868), 5 W. W. & A'B. 223.—*AUS.*

*r. — Cattle running at large.]—*In Nova Scotia it is not lawful to suffer cattle to run at large upon the public highway, the common law rule not being affected by the provincial Acts

in respect of fences.—*DICKIE v. GORDON* (1906), 39 N. S. R. 311.—*CAN.*

*s. — —.]—**Held:* (1) by common law, if cattle stray from the high road into the land of another & do damage there, the owner is responsible irrespective of any question of fencing; (2) by statute law, such is also the law unless varied by bye-law.—*CROWE v. STEEPER & WILLIAMS* (1881), 46 U. C. R. 87.—*CAN.*

PART II. SECT. 2, SUB-SECT. 1.—
C (b).

*a. Burn by highway.]—*A child when playing in part of a street which

was no longer used for traffic, but was greatly resorted to by children in the neighbourhood, was drowned by falling into a burn, which ran alongside that part of the street. The burn which was not fenced, was generally not more than six inches deep, but was occasionally, as it was at the time of the accident, flooded, when it became dangerous to children:—*Held:* defts. were liable in damages for leaving the burn unfenced.—*GIBSON v. GLASGOW POLICE COMRS.* (1893), 20 R. (Ct. of Sess.) 466.—*SCOT.*

*b. —.]—**BARRIE v. KILSYTH COMRS.* (1898), 1 F. (Ct. of Sess.) 194.—*SCOT.*

Sect. 2.—Rights and liabilities of owners and occupiers: Sub-sect. 1, C. (b).]

Exch. 771; 24 L. T. O. S. 244; 19 J. P. 313; 3 C. L. R. 417; 156 E. R. 652.

Annotation:—Folld. Fisher v. Prowse, Cooper v. Walker (1862), 2 B. & S. 770.

141. Excavation made after dedication—Liability of maker—Statutory obligation to fence upon third person.]—If an excavation has been made so near to a highway since its dedication & adoption as to create or increase danger to the public, & an accident happens thereby, the person making the excavation is not absolved from liability by reason that a statutory obligation to fence the highway is imposed upon other parties, who have neglected to do so.—*WETTOR v. DUNK* (1864), 4 F. & F. 298, N. P.

142. House area — Occupier liable.]—It is universally the duty of the occupier of a house having an area fronting a public street so to fence it as to make it safe to passengers; it is no defence to an action against him for neglecting to do so, where pltf. fell down into the area & was hurt, that when he took possession of the house, & as long back as could be remembered, the area was in the same open state as when the accident happened.—*COUPLAND v. HARDINGHAM* (1813), 3 Camp. 398, N. P.

Annotations:—Consd. Barnes v. Ward (1850), 9 C. B. 392.

Expld. Cornwell v. Metropolitan Sewers Comrs. (1855), 10 Exch. 771; Fisher v. Prowse, Cooper v. Walker (1862), 31 L. J. Q. B. 212. Refd. A.-G. v. Roe, [1915] 1 Ch. 235.

143. Pleading.]—A., being possessed of land abutting on a public footway, in the course of building a house on the land, excavated an area, which, by the negligence of his workpeople, was left unfenced, so that B., who was lawfully passing along the way, the night being dark, without any negligence or default of her own, fell into the area & was killed:—*Held*: A. was liable, under Fatal Accidents Act, 1846 (c. 93), to an action by the husband, as administrator, for the benefit of himself & B.'s infant children.

The declaration alleged that deft. was possessed of a messuage, with the appurtenances, near to a common & public footway, & that, in front of & before the messuage, & parcel of the appurtenances thereof, & close to, & by the side of, the footway, & abutting upon, & opening into, the same, there then was a large hole, vault, or area, which hole, vault, or area, deft., by reason of the possession of the messuage, with the appurtenances, before & at the time when, etc., ought to have so sufficiently guarded & fenced as to prevent injury to persons lawfully passing in & along the footway:—*Held*: the duty of deft. to fence the area was properly alleged.—*BARNES v. WARD* (1850), 9 C. B. 392; 19 L. J. C. P. 195; 14 Jur. 334; 137 E. R. 945.

Annotations:—Expld. Ricketts v. East & West India Docks & Birmingham Junction Ry. Co. (1852), 19 L. T. O. S. 109; Wallis v. M. S. & L. Ry. Co. (1853), 22 L. T. O. S. 286. Distd. Cornwell v. Metropolitan Sewers Comrs. (1855), 10 Exch. 771. Expld. Cornman v. Eastern Counties Ry. Co. (1859), 29 L. J. Ex. 94. Apprvd. Hardcastle v. South Yorkshire Ry. & River Dun Co. (1859), 4 H. & N. 67. Expld. Hounsell v. Smyth (1860), 7 C. B. N. S. 731. Consd. Fisher v. Prowse, Cooper v. Walker (1862), 2 B. & S. 770. Expld. Robbins v. Jones (1863), 15 C. B. N. S. 221. Apprvd. Re Williams v. Groucott (1863), 4 B. & S. 149. Consd. R. v. Dant (1865), 10 Cox, C. C. 102. Expld. Tarry v. Ashton (1876), 1 Q. B. D. 314; Murley v. Grove (1882), 46 J. P. 360. Consd. Wright v. Mid. Ry. Co. (1884), 51 L. T. 539. Folld. Silverton v. Marriott (1888), 59 L. T. 61. Refd. Arnell v. L. & N. W. Ry. Co. (1852), 12 C. B. 697; Corby v. Hill (1858), 4 C. B. N. S. 556; Marfell v. South Wales Ry. Co. (1860), 29 L. J. C. P. 315; Binks v. South Yorkshire Ry. & River Dun Co. (1862), 3 B. & S. 244; Witherley v. Regent's Canal Co. (1862), 12 C. B. N. S. 2; Hadley v. Taylor (1865), L. R. 1 C. P. 53; Orr Ewing v. Colquhoun (1877), 2 App. Cas. 839; Pearson v. Cox (1877), 2 C. P. D. 369; Owen v. De Winton (1894), 58 J. P. 833; Ponting v. Noakes, [1894] 2 Q. B. 281; A.-G. v. Roe (1914),

84 L. J. Ch. 322; *Crane v. South Suburban Gas Co.*, [1916] 1 K. B. 33. *Mentd. Ohrby v. Ryde Comrs.* (1864), 10 Jur. N. S. 1048; *Stansfeld v. Bolling* (1870), 22 L. T. 799; *Bathurst Borough v. Macpherson* (1879), 4 App. Cas. 256; *Lowery v. Walker*, [1909] 2 K. B. 433.

144. ———.]—Defts., owners of a house & premises, demised them on Apr. 1, 1853, to M. for thirty years, at a rent payable quarterly, with a right of re-entry if the rent should at any time be in arrear more than fifteen days. M. occupied the first-floor himself for some time, & let out the rest of the house to separate weekly lodgers, each of whom had a right to draw water from a tank in the area, & to use the area for the purpose of doing so. In March, M. let the first-floor to T., a weekly lodger, & then ceased to reside in the house, never paying the quarter's rent due at Lady-Day, 1858, or at the Midsummer following, & both were still in arrear at the time the action was brought. T. had the same privilege of using the area & tank as the other lodgers. In July, M. became insolvent, & about July 25 he gave up the lease to the official assignee, & was discharged upon the 30th. In the same month, defts. gave notice to the lodgers that the rent must be paid to them, & two of the lodgers did so pay the rent. Upon Aug. 4, pltf. suffered an injury by falling through a grating in an area belonging to the house, & being part of the premises so let with the house. On or about Aug. 7, a few days after the accident to pltf., T., the tenant of the first-floor, received a notice from the inspector of nuisances to repair the grating in front of the house. This notice was immediately handed by him to defts., & they repaired the grating. In Nov., defts. called upon the assignees to elect whether they would take the lease or not, & upon their refusal to take it, defts. took possession of it, & of the house & premises. It was admitted that the injury to pltf. was occasioned by the negligence of some person or persons in not keeping the grating in repair:—*Held*: there was no evidence to go to the jury that defts. before the time of the accident had avoided the lease & entered into possession of the premises, & had thus become answerable for the negligence by which pltf. was injured.—*BISHOP v. BEDFORD CHARITY TRUSTEES* (1859), 1 E. & E. 714; 29 L. J. Q. B. 53; 1 L. T. 214; 6 Jur. N. S. 220; 8 W. R. 115; 120 E. R. 1078, Ex. Ch.

145. Broken railing—No notice of breakage.]—Deft. was the owner in possession of a vacant house in a street, with an area which adjoined the highway. One of the rails of the area railings had been broken away by boys playing football in the street, & consequently, a gap had been created in the railings. Pltf., a child, got through this gap from the street, & was clambering along inside the railings, when he fell into the area, & sustained injuries through the fall. In an action brought on his behalf to recover damages from deft. in respect of his injuries, the jury found, in answer to questions left to them that the area was, when the accident happened, a nuisance, but that deft. did not know, at the time of the accident, that the rail had been removed, that such a time had not elapsed after its removal that he would have known of it at the time of the accident, if he had used reasonable care, & that he had used reasonable care to prevent the premises from becoming dangerous to persons using the highway:—*Held*: (1) upon the findings, deft. was not liable in respect of the nuisance created upon his premises by the action of trespassers; (2) the nuisance could not be regarded as the cause of pltf.'s injuries, inasmuch as he did not fall through the gap in the railings while using the highway, but got through the gap

in order to clamber along inside the railings.—**BARKER v. HERBERT**, [1911] 2 K. B. 633; 80 L. J. K. B. 1329; 105 L. T. 349; 75 J. P. 481; 27 T. L. R. 488; 9 L. G. R. 1083, C. A.

Annotations:—**Distd.** *Horridge v. Makinson* (1915), 84 L. J. K. B. 1294. **Refd.** *Latham v. Johnson*, [1913] 1 K. B. 398.

146. Open cellar.—Deft. occupied a cellar where workmen of his were engaged in scene-painting. The area over the cellar was open, & there was a protecting bar round the opening. A little girl was leaning against the rail looking down into the cellar, watching the men at their work, when it gave way, & she fell down into the area & was severely injured. The Judge held there was no case against deft. as the child was not, when she fell, using the highway, & had no right to lean against the bar:—**Held**: there was evidence of negligence which ought to have gone to the jury, & there must be a new trial.—**JEWSON v. GATTI** (1886), 2 T. L. R. 441, C. A.

Annotations:—**Consd.** *Harrold v. Watney*, [1898] 2 Q. B. 320; *Barker v. Herbert*, [1911] 2 K. B. 633. **Refd.** *Cooke v. Mid. G. W. Ry. of Ireland*, [1909] A. C. 229; *Latham v. Johnson*, [1913] 1 K. B. 398.

See, also, No. 152, *post*.

147. Hoist hole—Close to highway—Occupation.—Pltf. in passing along a highway at night, fell into a hoist-hole, which was within fourteen inches of the public way & unfenced. The hole formed part of an unfinished warehouse, one floor of which defts. were permitted to occupy whilst a lease was in course of preparation, & the aperture was used by defts. in raising goods from the basement to an upper floor:—**Held**: defts. had a sufficient occupation of the premises to cast upon them the duty of protecting the hoist-hole.—**HADLEY v. TAYLOR** (1865), L. R. 1 C. P. 53; 13 L. T. 368; 11 Jur. N. S. 979; 14 W. R. 59.

Annotation:—**Distd.** *Tarry v. Ashton* (1876), 1 Q. B. D. 314.

148. Disused quarry—Occupier liable—Though made before he came in.—Deft. owned & occupied land, being a worked-out quarry, immediately adjoining a public highway vested in an urban district council & repairable by the inhabitants at large. A prior owner of the land had, in 1865, made the excavation in order to quarry for limestone, & until then the surfaces of the road & the land had been on the same level. The excavation being a source of danger & obstruction to persons using the road, the excavator, to protect them & the road, built alongside the road a wall, the bottom of which rested on a ledge of limestone left ungotten for the purpose & served as a retaining wall for the subsoil of the road & as a fence wall above its surface. In Feb., 1913, part of the wall collapsed & fell into the quarry, & in consequence a considerable part of the subsoil of the road & of its surface fell in also, the road thus becoming impassable, a source of danger to persons attempting to use it, & a nuisance, liable under Quarry (Fencing) Act,

148 i. Disused pit.—Applt. had acquired right to an estate in which there was a pit not then in use, & which had remained so, uncovered & unfenced, for many years previous to his purchase, situated at the side of a public road. A passenger on horseback having on a dark night deviated from the path, & fallen into the pit:—**Held**: applt., as owner of the land in which the pit was, was liable for not fencing the pit.—**CADELL v. BLACK** (1812), 5 Pat. App. 567.—**SCOT**.

148 ii. —.—Pltfs. alleged that at a public roup they hired a pasture field for the current year, in which to graze a number of horses; that about twenty yards from their park was an old ironstone pit situated within less than a yard of a turnpike road without any

fence either surrounding the mouth of the pit or betwixt the road & the pit; that one of their horses was found killed by falling into the pit. The defence was that the tenant of the minerals & not the proprietor was the person responsible for the neglect to fence:—**Held**: the proprietor was primarily liable.—**MACK v. ALLEN & SIMPSON** (1832), 28 Fac. Coll. 262.—**SCOT**.

e. Deposit of building materials—Pond rendered dangerous.—In an action for damages on account of the death of a child seven years of age, pltf. averred that deft. was engaged in building operations adjoining a public street; that the street on one side was separated from a mill pond ten feet deep by a stone wall eight feet high;

1887 (c. 19), s. 3, to be dealt with summarily under Public Health Act, 1875 (c. 55):—**Held**: there was a common law obligation on the possessor of the excavation to keep it fenced off whether it was made before or after his possession began, & whether he was or was not liable to his landlord, if any.—**A.-G. v. Roe**, [1915] 1 Ch. 235 84 L. J. Ch. 322; 112 L. T. 581; 79 J. P. 263 13 L. G. R. 335.

149. Opening left by highway authority—Occupier not liable.—On premises adjoining a highway, which were the property of & occupied by deft., there was a coal shoot formed by an opening at the bottom of the wall of the house, abutting on the pavement, which was part of the highway. In 1901 the local highway authority, acting under the provisions of the Private Street Works Act, 1892 (c. 57), raised the level of the pavement, & to preserve access to the coal shoot, left an opening in the pavement. This condition of the pavement remained until Oct. 1914, when pltf., in passing along the pavement, put her foot into the hole, & suffered personal injuries, for which she brought her action against deft.:—**Held**: the action failed, inasmuch as, where a nuisance is created by a highway authority on a highway under their control, the owner or occupier of the land adjoining the highway is not liable for an accident caused by the nuisance.—**HORRIDGE v. MAKINSON** (1915), 84 L. J. K. B. 1294; 113 L. T. 498; 79 J. P. 484; 31 T. L. R. 389; 13 L. G. R. 868, D. C.

150. Evidence of dedication.—In an action on the case for an injury resulting to pltf. from falling down an unprotected area, the declaration stated, that deft. was possessed of the premises, & that they were adjoining "a certain common & public street & highway." Deft. had agreed with the owner of the premises, two carcasses of houses, to finish one of them, for doing which he was to have the other, & workmen employed by him were then actually at work upon them; but it did not appear that any conveyance had been made to him. The street in question, which had been forming for six years, & led from a public street to a new road across fields, over which the way had been publicly used for five or six years, was unfinished, one half only being lighted, the other neither lighted nor paved; but the inhabitants had paid the highway & paving rates:—**Held**: this was sufficient evidence to go to a jury of a possession in deft., & of a dedication of the street to the public.—**JARVIS v. DEAN** (1826), 3 Bing. 447; 11 Moore, C. P. 351; 4 L. J. O. S. C. P. 144; 130 E. R. 585.

Annotations:—**Consd.** *Barnes v. Ward* (1850), 9 C. B. 392; *Fisher v. Prowse*, *Cooper v. Walker* (1862), 2 B. & S. 770.

151. No evidence of dedication.—In an action for an injury to the wife of pltf. through the negligence of deft. in leaving an open vault or

that deft. deposited a large heap of building materials close to this wall & reaching to within thirty inches from its top; that the child, while playing with other children on the top of this heap, fell over the wall into the pond & was drowned; that deft. in heaping up the material close to the wall made the pond a practically unprotected source of danger to the public; that he knew that children were in the habit of playing on the top of the heap; & that in depositing the heap & failing to take precautions for the safety of children playing on it, deft. was guilty of gross negligence, in consequence of which the child lost its life:—**Held**: pltf.'s averments were irrelevant.—**HORSBURGH v. SHEACH** (1900), 3 F. (Ct. of Sess.) 268.—**SCOT**.

Sect. 2.—Rights and liabilities of owners and occupiers:

cellar on his own premises unfenced, whereby she fell in & was injured, it was proved that many persons were in the habit of going across the spot where the vault was, for the purpose of making a short cut from a street to the main road, by avoiding an angle, but that the owner of the premises, as often as he saw them, turned them back:—*Held*: there was no evidence for the jury of a "public way."—*STONE v. JACKSON* (1855), 16 C. B. 199; 19 J. P. 313; 139 E. R. 732.

Annotation:—*Distd.* *Corby v. Hill* (1858), 4 C. B. N. S. 556.

Statutory liability, *see* Nos. 199 *et seq.*, *post*.

See, further, Nos. 157, 158, *post*.

See, generally, HIGHWAYS, STREETS, & BRIDGES; & NUISANCE.

(c) Fences.

152. Property abutting on highway—Projecting wall.]—Where property abutting on a highway becomes through the wrongful act of strangers a nuisance to the public lawfully using the highway, the owner of such property has a duty cast upon him from the moment he becomes aware of the danger to take steps to prevent his property becoming a source of injury to the public.—*SILVERTON v. MARRIOTT* (1888), 59 L. T. 61; 52 J. P. 677, D. C.

Annotation:—*Refd.* *Leicester Urban Authority v. Holland* (1888), 52 J. P. 788.

See, also, Nos. 145, 146, *ante*.

153. Barbed wire fence.]—Pltf. was walking along a footpath one side of which was bounded by a stone wall, & the other side by a barbed wire fence dividing the road from deft.'s field. As pltf. was turning the corner, the macintosh coat which he was wearing at the time was caught by a gust of wind & thrown against the barbed wire, the result being that it was considerably damaged. Damage had occurred to pltf.'s clothing on another occasion on the same path, & his wife had also torn her glove by the fence on another occasion. It was contended that the fence was at the present day an ordinary one; that it was not dangerous in the sense of any decision of the cts.; that pltf. had ample notice of the nature of the fence; & that pltf. having such notice, had not used ordinary care in passing round the corner:—*Held*: the fence, so constructed & placed, was dangerous to the public using the path & a nuisance, & pltf. was entitled to recover, unless he had been guilty of contributory negligence in not taking, after notice of the existence & nature of the fence, due care.—*STEWART v. WRIGHT* (1893), 57 J. P. 137; *affd.* 9 T. L. R. 480, D. C.

154. Spikes on low wall.]—At the trial of an action in the county ct. to recover damages for personal injury, pltf., a child of between five & six years of age, was not called as a witness, but evidence was given that defts. had erected in a recess in premises belonging to them a wall eighteen inches high, with iron spikes four & a half inches

long upon the top, immediately abutting upon a highway, & that pltf. was found near thereto with her arm bleeding from a recent injury which might have been caused by the spikes. On this evidence the jury found that the spikes were a nuisance, that the injury was caused by them, & that there was no contributory negligence on the part of pltf.:—*Held*: there was evidence to go to the jury that the injury was caused by the spikes to pltf. whilst properly using the highway.—*FENNA v. CLARE & Co.*, [1895] 1 Q. B. 199; 64 L. J. Q. B. 238; 11 T. L. R. 115; 15 R. 220, D. C.

155. Defective fence.]—Deft. was the owner of a fence abutting on a highway. Pltf., a child of four years of age, attracted by some boys at play on the other side of the fence, put his foot on it, & it fell on & injured him. In an action for damages for the injuries so sustained, the jury found that the fence was very defective, but actually fell through pltf. standing wholly or partly on it, though not for the purpose of climbing over:—*Held*: the defective fence being a nuisance, & the cause of the injuries to pltf., deft. was liable.—*HARROLD v. WATNEY*, [1898] 2 Q. B. 320; 67 L. J. Q. B. 771; 78 L. T. 788; 46 W. R. 642; 14 T. L. R. 486; 42 Sol. Jo. 609, C. A.

Annotations:—*Expld.* *McDowall v. G. W. Ry. Co.*, [1903] 2 K. B. 331. *Consd.* *Barker v. Herbert*, [1911] 2 K. B. 633; *Latham v. Johnson*, [1913] 1 K. B. 398. *Refd.* *Giles v. L. C. C.* (1903), 68 J. P. 10; *Hardy v. C. L. Ry. Co.*, [1920] 3 K. B. 459.

See, also, No. 169, *post*.

156. Door opening outwards into street.]—In an action of damages against the corpn. of E. & against the owners of a tenement in the city, the pursuer averred that while he was proceeding along a street which adjoined the garden wall of the tenement a door in the wall suddenly opened outwards on to the street & struck him on the face, causing him serious injuries; that the door as constructed formed an obstruction to the street; & that it constituted a grave danger to the public, & a danger which was obvious to the defenders. He averred fault against the owners for having on their premises a door of this dangerous construction:—*Held*: the pursuer had not stated a relevant case against the owners, because having a door opening outwards upon a street did not *per se* infer negligence on their part.—*EVANS v. EDINBURGH CORPN.*, [1916] 2 A. C. 45; 85 L. J. P. C. 200; 114 L. T. 911; 32 T. L. R. 396, H. L.

See, generally, HIGHWAYS, STREETS, & BRIDGES; NEGLIGENCE; NUISANCE.

D. Lands near Highways.

157. Person straying from path.]—The owner or occupier of land, along which there is a right of way, leaving unprotected an excavation or reservoir of water, is not liable for the injury or death of a person falling into it in the dark, in consequence of his straying out of the way by mistake. When an excavation is made at some distance from the

PART II. SECT. 2, SUB-SECT. 1.—C (c).

153 i. Barbed wire fence.]—Deft. was alleged to have placed a fence composed in whole or in part of four barbed wires on the dividing line between his property & a public road. The fence was on the level of the road & in no way separated therefrom. Deft. pleaded that between the fence & the road there was an intervening space or verge of about three feet which was his property:—*Held*: the fence was a source of danger to persons lawfully travelling along the road, including horses, cattle &

sheep, & must be removed.—*ELGIN COUNTY ROAD TRUSTEES v. INNES* (1886), 14 R. (Ct. of Sess.) 48.—**SCOT.**

153 ii. —.]—*Held*: a fence of barbed wire placed alongside a public road or footpath is a public nuisance.—*COLLIER v. ELLIS* (1893), 28 L. L. T. 8.—**IR.**

PART II. SECT. 2, SUB-SECT. 1.—D.

157 i. Person straying from path—Dangerous slope.]—A member of the public, in proceeding along a public road on a dark night, strayed on to a

private road which, leading without a gate from the high road, ran alongside it, was unfenced, & rose gradually to a higher level. At a point fifty feet from the entrance he fell over the slope, sustaining injuries from which he died. In an action by deceased's representative against the owners of the private road:—*Held*: the place where the accident happened was not in immediate proximity to the highway & the action was irrelevant.—*MELVILLE v. RENFREWSHIRE COUNTY COUNCIL* (1919), 57 Sc. L. R. 68.—**SCOT.**

157 ii. Disused quarry.]—*Held*

way, & the person falling into it would be a trespasser upon defts.' land before he reached it, defts. would not be liable. The true test of legal liability is, whether the excavation be substantially adjoining the way.—**HARDCASTLE v. SOUTH YORKSHIRE RY. & RIVER DUN CO.** (1859), 4 H. & N. 67; 28 L. J. Ex. 139; 32 L. T. O. S. 207; 23 J. P. 183; 5 Jur. N. S. 150; 7 W. R. 326; 157 E. R. 761.

Annotations:—**Consd.** *Binks v. South Yorkshire Ry. & River Dun Co.* (1862), 3 B. & S. 244. **Refd.** *Hounsell v. Smyth* (1860), 7 C. B. N. S. 731; *Bolch v. Smith* (1862), 10 W. R. 387; *R. v. Dant* (1865), L. & Ca. 567; *Pearson v. Cox* (1877), 2 C. P. D. 369; *Latham v. Johnson* (1912), 82 L. J. K. B. 258.

Sec. further, Sub-sect. 1, C., ante; No. 159, post.

158. —.]—A declaration alleged that defts. were seised in fee of waste land, & before the grievance alleged, a quarry had been opened on the land, which was worked by leave of defts., who received a royalty; that the waste was open to the public, & all persons having occasion to cross it had been used to cross it with a licence of the owners; that the quarry was situate near to & between two public highways leading over the waste, & was dangerous to persons who might accidentally deviate, or have occasion to cross the waste, for the purpose of crossing from one road to the other; that defts., well knowing the premises, left the quarry unfenced, & pltf., having occasion at night to cross the waste to get from one of the roads into the other, & not being aware of the existence of the quarry, fell into it & was injured:—**Held:** the declaration disclosed no cause of action.—**HOUNSELL v. SMYTH** (1860), 7 C. B. N. S. 731; 29 L. J. C. P. 203; 1 L. T. 440; 6 Jur. N. S. 897; 8 W. R. 277; 141 E. R. 1003.

Annotations:—**Apld.** *Bolch v. Smith* (1862), 7 H. & N. 736. **Consd.** *Binks v. South Yorkshire Ry. & River Dun Co.* (1862), 3 B. & S. 244; *Gallagher v. Humphery* (1862), 27 J. P. 5; *Re Williams v. Groucott* (1863), 4 B. & S. 149. **Refd.** *Witherley v. Regent's Canal Co.* (1862), 12 C. B. N. S. 2; *Robbins v. Jones* (1863), 33 L. J. C. P. 1; *R. v. Dant* (1865), L. & Ca. 567; *Indermaur v. Dames* (1866), L. R. 1 C. P. 274; *Lowery v. Walker*, [1910] 1 K. B. 173; *Latham v. Johnson*, [1913] 1 K. B. 398; *Crane v. South Suburban Gas Co.*, [1916] 1 K. B. 33. **Mentd.** *Pickard v. Smith* (1861), 4 L. T. 470.

159. Must be dangerous to user of road.]—The owner of land adjoining a public road is under no obligation to fence excavations in his land unless they are so near to the road as to be danger-

ous to persons lawfully using it.—**BINKS v. SOUTH YORKSHIRE RY. & RIVER DUN CO.** (1862), 3 B. & S. 244; 32 L. J. Q. B. 26; 122 E. R. 92; *sub nom.* *BINCKS v. SOUTH YORKSHIRE RY. & RIVER DUN CO.*, 1 New Rep. 50; 7 L. T. 350; 27 J. P. 180; 11 W. R. 66.

Annotations:—**Refd.** *Hadley v. Taylor* (1865), L. R. 1 C. P. 53; *R. v. Dant* (1865), L. & Ca. 567; *Lowery v. Walker*, [1910] 1 K. B. 173. **Mentd.** *Latham v. Johnson*, [1913] 1 K. B. 398.

See, further, Sub-sect. 1, C., & No. 157, ante.

160. Railings of steps leading to house.]—Pltf., a boy of four years, accompanied his sister, who was going on business to deft.'s house. A flight of steps, protected on either side by railings, led up to the front door. One of these railings had been for some time displaced, leaving a gap of eighteen inches between the rails on either side of it. Across this gap rope had been interlaced, but had worn away & had not been renewed. The sister had frequently been to the house, & had shortly before noticed that the rail was missing. On the day in question the sister went up the steps, but pltf. in following fell through the gap & was injured:—**Held:** pltf. could maintain no action against deft. for the injury he had sustained, as the only duty on the part of deft. towards him was to take care that there was no concealed danger, & of this there was no evidence.—**BURCHELL v. HICKISSON** (1880), 50 L. J. C. P. 101.

Annotation:—**Mentd.** *Latham v. Johnson*, [1913] 1 K. B. 398.

See, further, NEGLIGENCE.

161. Road widened.]—Defts., the owners of land on each side of a highway, which was originally 10 feet wide, having on one side a declivity gradually sloping down to a brook, widened the highway by increasing its width to about 34 feet on the side towards the brook, & it became necessary to bank up that side. The highway had never been fenced. It was in a mountainous district, & was steep. Pltf. was leading his horse with a cart up the highway, & drew the horse across the widened part of the road to rest it. The horse staggered, & fell over the embankment. Pltf. brought an action for damages, complaining that defts. had created a new danger alongside of the highway:—**Held:** defts. were not liable.—**OWEN v. DE WINTON** (1894), 58 J. P. 833; 10 T. L. R. 534, C. A.

the proprietor of a disused quarry more than 150 yards from the nearest point of the public road, was under no obligation to fence it, & was not liable to the representatives of a person, who in straying from the public road, had fallen into the quarry & was killed.—**PRENTICES v. ASSETS CO., LTD.** (1890), 17 R. (Ct. of Sess.) 484.—**SCOT.**

157 iii. — Quarry near private road.]—A proprietor let the fire clay on his lands to a brick manufacturer, with leave to him to erect works & houses & to make roads. The tenant erected his works & built houses for his workmen near an unfenced quarry on the lands, the road or path used by the workmen in going to the works from the houses passing within twelve feet of the quarry. One of the workmen, who had one dark morning fallen into the quarry & been injured, raised an action of damages against the proprietor:—**Held:** the proprietor having authorised the erection of the cottages & the making of the road, was in fault in allowing the quarry to remain in a dangerous condition, & was liable in damages.—**M'FEAT v. RANKIN'S TRUSTEE** (1879), 6 R. (Ct. of Sess.) 1043.—**SCOT.**

157 iv. — Pond—Private road off highway.]—A private road led from a public road to the vicinity of a pond,

which was situated at a distance of 265 yards from the public road. Pltf. when going along the public road on a dark night, turned by mistake into the private road, & fell into the pond. In an action for damages:—**Held:** there was no duty laid upon defts. to fence the pond.—**PATON v. UNITED ALKALI CO., LTD.** (1894), 32 Sc. L. R. 19.—**SCOT.**

157 v. — Unused ground near private road.]—A child was drowned by falling into a disused clay pit situated in the centre of an unused piece of ground near a block of workmen's houses. His father brought an action of damages against the proprietor of the ground. He averred the clay pit was unfenced; that it was the duty of defts. to fence it; that the unused piece of ground was constantly used as a playground by the children of the district with the consent or, at least, without the disapproval of defts. & that the clay pit was 25 yards from the nearest road which was a private road & unfenced. It was admitted that the ground on which the clay pit was situated had for some years been let to tenants:—**Held:** pltf. had not set forth a relevant case.—**DEVLIN v. JEFFREY'S TRUSTEES** (1902), 40 Sc. L. R. 92.—**SCOT.**

157 vi. — Disused shaft.]—A mining co. left unfenced a disused shaft, 60

feet deep & 5 feet in diameter, situated 82 feet from a public veld road. The road & the shaft were on the same level, & there was no ditch, fence or other obstacle between them. The locality was considerably populated. A person strayed from the road in the dark & falling into the shaft, received severe injuries:—**Held:** the co. was liable for the damages sustained.—**FLEMING v. RIETFOURTEIN DEEP GOLD MINING CO., LTD.** (1905), T. S. 111.—**S. AF.**

g. Mining machinery—Waste ground.]—Pltf. in suing for damages in respect of injuries sustained by his son, averred that defts. used for the purpose of hauling waggons a horizontal grooved wheel, round which a wire rope passed; that the wheel was situated 18½ yards from the public road on waste ground which was not fenced or walled in & which was used as a playground by children of the neighbourhood; & pltf.'s son while playing beside the wheel was caught between the rope & the wheel, on its being set in motion without any warning:—**Held:** there was no obligation on defts. to fence their property so as to prevent members of the public straying from the road on to the property or to fence the wheel.—**CUMMINGS v. DARNAGAIL COAL CO., LTD.** (1903), 10 S. L. T. 660.—**SCOT.**

Sect. 2.—Rights and liabilities of owners and occupiers: Sub-sect. 1, D., E. & F.]

162. Gate left open—Cart track over level crossing.]—In a field belonging to defts., & abutting on a highway, children were in the habit of playing. A cart track crossed the field to a level crossing over a railway, & on the other side of the railway there was a piece of land used for the purpose of tipping rubbish. By arrangement with the railway co., defts. had the use of the tip, & their carts were constantly crossing the field to the tip. Pltf., a child of one year & nine months, who had been playing in the field wandered to the level crossing, & then along the railway line, where she was injured by a passing train. There was no evidence that any child playing in the field had ever before gone over the level crossing. The jury found that defts. were negligent in leaving both the gate from the highway into the field, & also the level-crossing gate open:—*Held*: pltf. was not entitled to recover, inasmuch as the facts did not establish any duty on the part of defts. towards pltf., & there was no evidence that the accident was in fact caused by any act or omission of defts.' servants.—*SCHOFIELD v. BOLTON CORPN.* (1910), 26 T. L. R. 230; 54 Sol. Jo. 213, C. A.

Annotations:—*Refd.* Latham v. Johnson, [1913] 1 K. B. 398. *Mentd.* Jenkins v. G. W. Ry., [1912] 1 K. B. 525.

163. Waste heaps—Accessible by a path.]—Defts. were owners of a plot of unfenced waste land from which old houses had been cleared. It did not adjoin any public highway, but was accessible by a path leading from the back of the house in which pltf., a child between two & three years old, lived with her parents. The public were allowed by defts. to traverse the land, & children of all ages were in the habit of playing upon heaps of sand, stone, & other materials which from time to time were deposited there by defts. Pltf. went upon the land unaccompanied by any older person & was shortly afterwards found upon a heap of paving stones, one of which had fallen upon her hand & injured it. There was no evidence to show how the accident happened. The jury found that children played upon the land with the knowledge & permission of defts.; that there was no invitation to pltf. to use the land unaccompanied; that defts. ought to have known that there was a likelihood of children being injured

162 i. Gates left open.]—Two children were drowned in a pond in private ground near a public thoroughfare. In an action by their father against the proprietor it was proved there was an entrance to the ground from the thoroughfare by a gate in the boundary wall, but that nearer the pond there was a paling with a gate which had been left open by some one unknown & it appeared the children strayed by these means from the public road to the pond:—*Held*: the death of the children was not attributable to the fault of deft.—*ROSS v. KERR* (1888), 26 Sc. L. R. 55.—*SCOT*.

PART II. SECT. 2, SUB-SECT. 1.—E.

k. Disused quarry in private ground.]—In deft.'s property was a disused quarry, which it was alleged was insufficiently fenced. Members of the public, including children, had largely frequented the place although private ground. Pltf.'s child first trespassed into private ground not belonging to deft. & then by climbing or getting through a fence got to the quarry & was drowned in it. It was proved that at the time of the accident there was a gap of fourteen feet in deft.'s fence largely made by adult & child trespassers:—*Held*: the owner

not having invited people to come upon his property & there being no public right to enter his ground, the general rule not requiring dangerous places on private property to be fenced, applied.—*HOLLAND v. DISTRICT COMMITTEE OF MIDDLE WARD OF LANARKSHIRE*, [1909] 2 S. L. T. 7.—*SCOT*.

l. —.]—Pltf. was owner & occupier of the surface of certain lands on which there was an unfenced quarry, the mining rights in which were leased to the predecessor in title of defts. These rights passed by will to defts., who paid the rent reserved by the lease, but did not work the mine, & left it in the unfenced condition in which they found it. One of pltf.'s bullocks fell into the quarry & was killed:—*Held*: pltf. was entitled to recover damages from defts. for the loss of his bullock, there being a continuing liability on the part of defts. to keep the quarry so as not to be a danger & a nuisance to their neighbour.—*M'MORROW v. LAYDON*, [1919] 2 I. R. 529.—*IR*.

m. Sandpit—Near public park.]—Pltf. averred that defts. were the owners of ground abutting on a public park & separated therefrom by a hedge in which there were gaps; that on the ground there was an unfenced sandpit

by the stones, & that defts. did not take reasonable care to prevent children being injured thereby:—*Held*: there being neither allurement nor trap, nor invitation, nor dangerous object placed upon the land, defts. were not liable.—*LATHAM v. JOHNSON (R.) & NEPHEW, LTD.*, [1913] 1 K. B. 398; 82 L. J. K. B. 258; 108 L. T. 4; 77 J. P. 137; 29 T. L. R. 124; 57 Sol. Jo. 127, C. A.

Annotations:—*Expld.* Crane v. South Suburban Gas Co., [1916] 1 K. B. 33. *Consd.* Ruoff v. Long, [1916] 1 K. B. 148; Wilson Sons v. Barry Ry. Co. (1916), 110 L. T. 71. *Refd.* Norman v. G. W. Ry., [1914] 2 K. B. 153; Pritchard v. Peto, [1917] 2 K. B. 173. *Mentd.* Elliott v. Roberts, [1916] 2 K. B. 518; Hayward v. Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899; Maclean v. Segar, [1917] 2 K. B. 325.

See, further, NEGLIGENCE; NUISANCE.

E. Dangerous Excavations and Openings not adjoining or near Highways.

164. Pit in common.]—An action will not lie for digging a pit in a common; by means of which a stray mare tumbles in and perishes.—*BLYTH v. TOPHAM* (1607), Cro. Jac. 158; 79 E. R. 139.

Annotations:—*Consd.* Deane v. Clayton (1817), 1 Moore, C. P. 203; Jordan v. Crump (1841), 8 M. & W. 782. *Apld.* Harcastle v. South Yorkshire Ry. & River Dun Co. (1859), 4 H. & N. 67. *Consd.* Hounsell v. Smyth (1860), 7 C. B. N. S. 731. *Refd.* Groncott v. Williams (1863), 32 L. J. Q. B. 237.

165. Quarry in field.]—*Quare*: whether, if two persons have the concurrent possession of land for the purpose that each may take profits of a special nature, & distinct from, but not inconsistent with, the right of the other, either one is bound to guard against casual damage, which during, & by the fair enjoyment of his right, may happen to the other.

A. having the exclusive right to dig stone in a certain close, avowed distraining the cattle of B., who had the exclusive right of pasture there, as damage feasant, for having broken the stones. B. pleaded that there was no fence to keep them off, nor did A. otherwise guard or protect the stones. A. replied that he was not bound to fence; on demurrer:—*Held*: the replication was bad.—*CHURCHILL v. EVANS* (1809), 1 Taunt. 529; 127 E. R. 939.

Annotation:—*Mentd.* Ricketts v. East & West India Docks & Birmingham Junction Ry. Co. (1852), 12 C. B. 160.

166. —.]—Pltf. was in the occupation of the surface of a field, & defts. were in the occupation

80 yards from the park; that children were in the habit of entering the ground & using the pit as a playground; that defts. knew of this practice & allowed it; that pltf.'s child was killed by a fall of sand while playing in the pit, & that defts. knew, before the accident happened, that the face of the sand was at a dangerous angle & liable to fall, but took no steps to have the danger removed or to exclude the children:—*Held*: pltf.'s averments were relevant.—*MACKENZIE v. FAIRFIELD SHIPBUILDING & ENGINEERING CO., LTD.*, [1913] S. C. 213.—*SCOT*.

n. Pond in fenced field—Opening in fence—Access to well.]—A farm servant occupied a cottage on his employer's farm which adjoined a field containing a shallow pond, used for watering cattle, 25 yards distant from the cottage. The field was fenced, but there was a small opening in the fence, close to the cottage, which was used as an access to a well. One of the farm servant's children having fallen into the pond was drowned. In an action of damages brought by the father against his employers:—*Held*: the pond was not a dangerous place, & defts. were under no obligation to fence it.—*ROYAN v. M'LENNANS* (1889), 17 R. (Cl. of Sess.) 103; 27 Sc. L. R. 79.—*SCOT*.

of a quarry in the same field. Both held under the same landlord. The quarry was entirely unfenced. One of pltf.'s bullocks fell into the quarry & was killed:—*Held*: pltf. was entitled to recover damages from defts. for the loss of his bullock.—*HAWKEN v. SHEARER* (1887), 56 L. J. Q. B. 284; 3 T. L. R. 557, D. C.

167. Mine shaft.]—Appls. were in occupation of the minerals under a field which was in the occupation of resp., & had sunk a shaft in the field for the purpose of getting the minerals beneath it. When they had ceased to work the shaft, they covered it over in such a manner as not to afford a proper & effectual protection for horses in the field. Resp. turned out a mare to feed in the field, & she fell down the shaft & was killed, without any negligence on the part of resp.:—*Held*: applts. were liable to an action in respect of the injury caused to resp. by reason of the loss of his mare.—*Re WILLIAMS v. GROUCOTT* (1863), 4 B. & S. 149; 2 New Rep. 419; 8 L. T. 458; 27 J. P. 693; 9 Jur. N. S. 1237; 11 W. R. 886; 122 E. R. 416; *sub nom.* *GROUCOTT v. WILLIAMS*, 32 L. J. Q. B. 237.

Annotations:—*Consd.* *Great Laxey Mining Co. v. Clague* (1878), 4 App. Cas. 115. *Apld.* *Hawken v. Shearer* (1887), 56 L. J. Q. B. 284.

See, also, ANIMALS, Vol. II., No. 131.

168. Canal & docks — Private land.]—The declaration stated that defts. were possessed of land with a canal & cuttings intersecting the land, & of bridges across the canal & cuttings communicating with & leading to certain docks of defts., which land & bridges were used with the consent & permission of defts. by persons proceeding to & coming from the docks; that they wrongfully & improperly kept & maintained the land, canal, cuttings, & bridges, & suffered them to be in so improper a state & condition as to render them unsafe for persons lawfully passing along & over the land & bridges towards the docks; & that G. lawfully passing over & using the bridges,

c. Pumping machinery near waste ground—Open gate.]—In an action of damages at the instance of the parents of a child, who had been killed by the pumping apparatus in a shale mine, against the owners of the mine, it was proved that the parents' house was situated within the works & about 30 yards from the place where the accident occurred, the intervening space being waste ground where the miners' children played. The pump was surrounded by a fence in which there was a lifting gate. An engine-man on going to the pump, took off the lifting gate to enable him to get at the machinery. He then returned to the engine house to put on steam, & on his return found that the child had strayed from the house, passed through the open gate in the fence, & been killed by the machinery:—*Held*: there was fault on the part of the owners of the mine in not keeping the pump fenced.—*HAMILTON v. HERMAND OIL CO., LTD.* (1893), 20 R. (Ct. of Sess.).—995.—SCOT.

p. Rubbish heap in field—Field insufficiently fenced.]—A father brought an action of damages against a burgh authority for the death of his daughter, who had received fatal injuries through her clothes becoming ignited at a fire burning upon a rubbish heap or "coup" where the burgh rubbish was deposited. He averred this coup was situated in a grass field in the neighbourhood of his house & was not fenced off from the field, nor was the field sufficiently fenced to exclude the public, who in fact used it as a public park, & that children were in the habit of playing upon the coup, all of which

was known to defts. He further averred, it was the practice of defts., or of those for whom they were responsible, to collect & burn inflammable material upon the coup, & this practice had been followed by rag pickers, with the acquiescence of defts. He alleged fault on the part of defts., in respect that they had failed to fence the coup or field or to take other precautions to exclude the public therefrom:—*Held*: these averments were irrelevant to found an issue against defts., for it appeared therefrom that they were not owners of the field or coup, & had neither the right nor the duty to fence them.—*JOHNSTONE v. LOCHGELLY MAGISTRATES*, [1913] S. C. 1078.—SCOT.

PART II. SECT. 2, SUB-SECT. 1.—F.

q. Defective fence—Duty to maintain—Question of fact.]—In trespass *quare clausum fregit* & for taking pltf.'s horses, it appeared that defts. had distrained several of pltf.'s horses for trespassing on defts.' farm which adjoined that of pltf. It was alleged that the animals escaped through defect of fences which it was pltf.'s duty to keep in repair. The question arose as to the respective portions of a division fence which pltf. & defts. respectively were bound to maintain. The jury found that defts. were liable for the portion of the fence through which the animals escaped:—*Held*: the matter was properly left to the jury to decide as if the jury were fence viewers.—*LAMB v. MULHOLLAND* (1836), 5 O. S. 109.—CAN.

r. Barbed wire.]—He who, in

through the wrongful, negligent, & improper conduct of defts., fell into one of the cuttings & was drowned:—*Held*: the declaration disclosed no actionable breach of duty on the part of defts.—*GAUTRET v. EGERTON* (1867), L. R. 2 C. P. 371; 36 L. J. C. P. 191; 15 W. R. 638.

Annotations:—*Distd.* *Sandys v. Florence* (1878), 47 L. J. Q. B. 598. *Consd.* *Heaven v. Pender* (1883), 11 Q. B. D. 503. *Apld.* *Keeble v. East & West India Dock Co.* (1889), 5 T. L. R. 312. *Consd.* *Coldrick v. Partridge, Jones*, [1909] 1 K. B. 530; *Lowery v. Walker*, [1910] 1 K. B. 173; *Shrimpton v. Hertfordshire County Council* (1910), 74 J. P. 305; *Wilson Sons v. Barry Ry. Co.* (1916), 86 L. J. K. B. 432. *Refd.* *Cale. Ry. Co. v. Mulholland*, [1898] A. C. 216; *Harris v. Perry*, [1903] 2 K. B. 219; *French v. Hills Plymouth Co.* (1908), 24 T. L. R. 644; *Latham v. Johnson*, [1913] 1 K. B. 398; *R. v. Broad*, [1915] A. C. 1110; *Hayward v. Drury Lane Theatre & Moss' Empires*, [1917] 2 K. B. 899; *Hardy v. C. L. Ry. Co.* [1920] 3 K. B. 459. *Mentd.* *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B. 391; *Salaman v. Secretary of State for India*, [1906] 1 K. B. 613.

See, further, MINES, MINERALS, & QUARRIES.

F. Dangerous and Defective Fences.

169. Adjoining lands—Decayed wire fence.]—Pltf. & defts. respectively occupied adjoining lands as tenants under the same landlord. By the terms of their lease defts. were bound to fence the land in their occupation for the benefit of the lessor & his tenants. About twenty years ago the predecessors of defts. had fenced their land with wire rope, & defts. allowed this fence to remain, & from time to time partially repaired it. From long exposure the strands of the wires composing the rope decayed, & pieces of it fell to the ground & lay hidden in the grass of the adjoining pasture occupied by pltf. Pltf.'s cow grazing there swallowed one of these pieces, & died in consequence:—*Held*: defts. were liable to compensate pltf. for the loss of the cow.—*FIRTH v. BOWLING IRON CO.* (1878), 3 C. P. D. 254; 47 L. J. Q. B. 358; 38 L. T. 568; 42 J. P. 470; 26 W. R. 558.

Annotations:—*Consd.* *Ponting v. Noakes*, [1894] 2 Q. B. 281. *Refd.* *Hawken v. Shearer* (1887), 56 L. J. Q. B.

order to enclose his land, makes use of a barbed wire fence, is liable for the damage done to an animal when the fence is not well made.—*BESSETTE v. HOWARD* (1885), 8 L. N. 170.—CAN.

s. —.]—The erection of a barbed wire fence around the boundaries of farm land which a licensee has crossed for years is not placing a trap, especially where the occupier places warnings visible in the day time: he is not obliged to place lights on it at night.—*ROBINSON v. DODGE*, [1918] 1 W. W. R. 812; 28 Man. L. R. 533; 39 D. L. R. 679.—CAN.

t. — Apprehension of possible injury.]—The tenant of a labourer's cottage & plot substituted barbed wire for the original fence erected by the district authority. Through fear of possible injury to his stock, the owner of the adjoining property was unwilling to put his horses in the field next the boundary fence, & claimed damages for loss of grazing:—*Held*: assuming that barbed wire was dangerous & likely to cause substantial mischief to stock, pltf. was not entitled to recover damages in a civil bill where there had been no trespass & no actual damage & where the supposed tort was founded on pltf.'s fears, which might prove to be unfounded & unreasonable.—*MEARA v. DALY* (1914), 48 I. L. T. 223.—IR.

a. Mine insufficiently fenced.]—A. demised lands to B., reserving mines, minerals, etc., & demised the mines, etc., to a mining co. The co. opened a mine on the lands, & appointed C. to be manager of the mining concerns, & "captain" of the mine. The mine

BOUNDARIES, FENCES AND PARTY-WALLS.

Sect. 2.—Rights and liabilities of owners and occupiers, F., G., H. & I.; sub-sect. 2, A.]

284. **Mentd.** Crowhurst v. Amersham Burial Board (1878), 4 Ex. D. 5; Jones v. Llanrwst U. C., [1911] 1 Ch. 393.

See, also, Nos. 145, 146, 148, 153–156, 160, 167, *ante*; & AGRICULTURE, Vol. II., Nos. 412–416, 970; ANIMALS, Vol. II., Nos. 126–129, 131–134, 173–183, 224, 226; & *further*, HIGHWAYS, STREETS, & BRIDGES; NEGLIGENCE; NUISANCE; RAILWAYS & CANALS.

G. Repair of Fences.

Liability for repair—In general.]—*See cases, infra*, & cases in Sub-sect. 1, A.—F., *ante*.

— **As between landlord & tenant.]—***See* LANDLORD & TENANT.

II. Lands fronting the Sea.

170. Removal of shingle—Injunction.]—On a motion for an injunction to restrain deft. from digging or removing any earth, stones, shingles, or beach, from or immediately under a bank belonging to pltf. which protected his land from the inundations & irruptions of the sea:—**Held**: the injunction should be granted, pltf. having previously established his right at law.—**CHALK v. WYATT** (1810), 3 Mer. 688; 36 E. R. 264, L. C. *Annotation*:—**Refd.** Ripon v. Hobart (1834), 3 My. & K. 169.

— **It is the duty of the Crown** to protect the realm from the inroads of the sea by maintaining the natural barriers, or by raising artificial barriers; no subject is entitled to destroy a natural barrier against the sea, & if the destruction of such natural barrier would cause an injury

was not surrounded by sufficient fences, & a cow, the property of B., died from having drunk of the deleterious matter contained in the mine:—**Held**: B. was entitled to compensation for the damages sustained by reason of the insufficiency of the fences about the mine, & C. was personally responsible for the damage.—**HARRISON v. M'GULVEY** (1840), 2 Craw. & D. 1.—**IR.**

b. —.]—Held: the proprietor of lands in which a coal pit not sufficiently fenced was situated, was liable in damages to the father of an unmarried woman who accidentally fell into the pit & was killed.—**HISLOP v. DURHAM** (1842), 4 Dunl. (Ct. of Sess.) 1168.—**SCOT.**

PART II. SECT. 2, SUB-SECT. 1.—G.

c. Duty to repair—Presumptions of law.]—Where there is no evidence to rebut it, the presumption of law is that the owner of a fence is bound to keep it in repair, & where the fence consists of a bank & a ditch the presumption is that the person on whose land the bank is, is *prima facie* bound to keep the whole in repair.—**GILMER v. MAYBEN** (1898), 33 L. L. T. 35.—**IR.**

d. — Tenant for life.]—If land comes into the possession of a tenant for life with a fence which was when erected a sufficient fence within the Fencing Act then in force, it is the duty of the tenant for life to keep it in repair by renewing the portions as they fall out of repair, & so maintain a good fence. But if the fence was never a sufficient fence within the Act, then the land must be looked upon as being practically unfenced, & the expense of putting up a sufficient fence must come out of capital.—**Re PHARAZYN, PHARAZYN v. PHARAZYN** (1903), 23 N. Z. L. R. 237.—**N.Z.**

e. — Adjoining closes.]—Declaration, that pltf. & defts. possessed adjoining closes, & that by reason thereof it became the duty of defts.

to keep in repair the division fence; in another count it was charged, that defts. for the same reason were bound to keep in repair half of the fence:—**Held**: both counts bad, as showing no facts from which the duty alleged would accrue.—**OTTO v. PELAN** (1852), 9 U. C. R. 363.—**CAN.**

f. Right to repair—Pruning party hedge—Ultimate improvement.]—One of two neighbouring tenants under the same landlord having cut down part of a thorn hedge between the farms, but not in a way which was alleged to be prejudicial, or unnecessary for the ultimate improvement of the hedge, offered to put up a temporary fence at the joint expense of himself & his neighbour. The latter refused this offer:—**Held**: he was not entitled to reparation for damage suffered in consequence of the want of a fence.—**THOMPSON v. PURVES** (1829), 7 Sh. (Ct. of Sess.) 730.—**SCOT.**

g. —.]—Applt. pruned his half of an old quince hedge, separating his from resp.'s property, in such a way that, though likely to increase the ultimate effectiveness of the hedge, it temporarily decreased its effectiveness as a barrier & screen, & exposed gaps in it:—**Held**: applt. had a right to do as he had done.—**ELS v. JANSEN** (1915), E. D. L. 367.—**S. AF.**

h. — Without notice to adjoining owner—Expenses.]—Where a fence has been destroyed by neglect of one adjoining owner, the other adjoining owner may repair without giving notice & recover the cost from the owner in default.—**STORREY v. LOCKHART** (1915), 11 Tas. L. R. 163.—**AUS.**

k. Neglect to repair—Gates of drawbridge.]—Defts. were incorporated to build a drawbridge over a river, & authorised to take tolls, & their charter empowered them to let & farm the tolls. They leased the tolls accordingly, & the lessee covenanted to open & close the drawbridge, & cause it to

to a neighbouring landowner, he is entitled to an injunction to restrain it.

In an action by the owner of a piece of land adjoining the foreshore, an injunction was granted to restrain deft., the owner of the foreshore, from removing shingle therefrom, so as to expose pltf.'s land to the inroads of the sea; although the shingle was removed for sale in a natural & ordinary user of the land.—**A.-G. v. TOMLINE** (1880), 14 Ch. D. 58; 49 L. J. Ch. 377; 42 L. T. 880; 44 J. P. 617; 28 W. R. 870, C. A.

Annotations:—**Consd.** West Norfolk Farmers' Manure Co. v. Archdale (1886), 16 Q. B. D. 754. **Refd.** Musselburgh Real Estate Co. v. Musselburgh, [1905] A. C. 491; A.-G. of Southern Nigeria v. Holt, Liverpool, [1915] A. C. 599.

172. Defect in sea wall repaired by adjoining frontager.]—Pltf. was the occupier of land & deft. the owner of adjoining land, both fronting to a creek communicating with the sea. It was necessary for the protection of his land that each person having land fronting the creek should maintain a sea wall to keep out the high tides, & such sea wall had been maintained along the creek time out of mind. Pltf.'s wall was continuous with deft.'s, & the level of deft.'s land was higher than that of pltf.'s. It became necessary from time to time to put fresh materials on the top of the walls to keep them up to the proper height; deft. had neglected so to top his wall, & owing to an extraordinary high tide, the water flowed over his wall, & so from deft.'s land on to pltf.'s land, doing considerable damage:—**Held**: (1) the mere fact that each frontager had always maintained the wall in front of his land, & that no one had thought it necessary to erect a wall to protect his land from the water which might

be properly attended to. Pltf.'s horses while going down a hill ran away & threw out the driver, & then ran on the bridge. The draw had just been opened to let a vessel pass, & there being no bar or gate to close the bridge, the horses went over the opening into the water & were drowned. There had been gates there to close the bridge while the draw was open, but they had been broken about two months previously, & the new gates which had been made were not up. The jury found that gates would have prevented the accident, & that there was no negligence on the driver's part:—**Held**: pltf.'s right of action, if any, was against the lessee, & defts. were not liable. *Semble*: defts. were not bound to have gates to stop runaway horses.—**PRICE v. CATARAQUI BRIDGE CO.** (1874), 35 U. C. R. 314.—**CAN.**

l. Rebuilding fence—Adjoining proprietors—Trespass.]—Pltf. & deft. were adjoining proprietors, their respective lots being divided by an ordinary post & board fence. This fence was blown down, & deft. employed persons to build a new one, which differed from the old in that the posts had "shoes." The excavations necessary for the posts & "shoes" were made by defts. partly on his own & partly on pltf.'s land:—**Held**: deft. had no right to excavate or build upon pltf.'s land.—**HUNTER v. RONNE** (1870), 8 N. S. R. 113.—**CAN.**

PART II. SECT. 2, SUB-SECT. 1.—H

m. Parapet wall—On road leading by shore.]—In an action of damage against the magistrates of L. for injury sustained in consequence of the alleged neglect to fence & protect parapet wall at N., on the road leading by the shore from L. to G.:—**Held** as the road in question had not been placed by statute under the charge of the magistrates, but remained under the county turnpike district road trustees, there was no liability attaching to the magistrates either at common

come from his neighbour's land, was no sufficient evidence to establish a prescriptive liability on the part of deft. to maintain the wall for the protection of the adjoining landowners; (2) by the common law, apart from prescription, no such liability was cast on deft. as a frontager.—HUDSON v. TABOR (1877), 2 Q. B. D. 290; 46 L. J. Q. B. 463; 36 L. T. 492; 42 J. P. 20; 25 W. R. 740, C. A.

Annotations :—*Distd.* A.-G. v. Tomline (1880), 14 Ch. D. 58. *Refd.* L. & N. W. Ry. v. Fobbing Levels Sewer Comrs. (1896), 66 L. J. Q. B. 127; Rundle v. Hearle, [1898] 2 Q. B. 83.

See, also, sub-sect. 5, post; &, generally, WATERS & WATERCOURSES.

I. Commons.

See COMMONS & RIGHTS OF COMMON.

SUB-SECT. 2.—BY PRESCRIPTION OR SPURIOUS EASEMENT.

A. Duty to Repair.

173. Right by prescription—Forest inclosure.]—On a *quo warranto* that deft. had without warrant within the bounds of the King's Forest of Sherwood kept a park with a pale, hedge, & ditch inclosed, the A.-G. alleged that the park had been so slightly inclosed that the King's deer of the forest had entered & been unjustly killed by deft. in the park. Def. did not answer this allegation but justified the killing of all deer, time out of mind, being in the park :—*Held* : in law deft. could not prescribe to keep his fence or ditch so low without & so high within that the King's deer could not get out again when they had come in, to the destruction of the King's franchise of forest.—R. v. BYRON (1622), J. Bridg. 23; 123 E. R. 1173.

Annotation :—*Mentd.* Malvern Hills Conservators v. Whitmore (1909), 8 L. G. R. 179.

174. Liability by prescription.]—Pltf. declared that he was possessed of a close adjoining to deft.'s, & that the tenants & occupiers of that close had time out of mind made & repaired the fence between pltf.'s & deft.'s closes, & that for want of repair deft.'s cattle came into pltf.'s close :—*Held* : pltf. had made himself a sufficient title in the declaration, by showing deft. bound to this charge by prescription, which was sufficiently alleged.—STAR v. ROOKESBY (1710), 1 Salk. 335; 91 E. R. 295, Ex. Ch.

Annotations :—*Refd.* Hardy v. Hollyday (1765), 4 Term Rep. 718, n.; Lawrence v. Jenkins (1873), L. R. 8 Q. B. 274. *Mentd.* McMahon v. Lennard (1858), 6 H. L. Cas. 970; v. Loftus Iron Co. (1874), 31 L. T. 483.

175. In nature of spurious easement.]—By prescription a landowner may be bound to maintain a fence upon his land for the benefit of the occupier of the adjoining close. This obligation is described as in the nature of a spurious easement affecting the land of the party who is bound to maintain the fence (*per Cur.*).—LAWRENCE v. JENKINS (1873), L. R. 8 Q. B. 274; 42 L. J. Q. B. 147; 37 J. P. 357; 21 W. R. 577; *sub nom.* LAURENCE v. JENKINS, 28 L. T. 406.

Annotations :—*Distd.* Corry v. G. W. Ry. Co. (1880), 6 Q. B. D. 237. *Refd.* Coaker v. Willcocks, [1911] 2 K. B. 124. *Mentd.* Sneesby v. L. & Y. Ry. Co. (1874), L. R. 9 Q. B. 263; Crowhurst v. Amersham Burial Board (1878), 4 Ex. D. 5; Halestrap v. Gregory (1895), 43 W. R. 507.

176. — As defence to action of trespass.]—

law, or under General Police Act, 1862.—HARRIS v. LEITH MAGISTRATES (1881), 8 R. (Ct. of Sess.) 613.—SCOT.

n. Extension of boundary.]—*Held* : if one of the boundaries, in a bounding title is the unappropriated sea-shore, a party might, if there be no interjecting property, extend his

boundary towards the sea.—STURRIE v. GORDON (1837), 15 Sh. (Ct. of Sess.) 1037.—SCOT.

o. — Encroachment on foreshore—Public user.]—A proprietor of ground, described by his title as being of a specified extent, & as bounded by the sea-shore, has no right to enclose

, deft. may plead that pltf. is

to repair the fences.—NOWEL v. (1599), Cro. Eliz. 709; 78 E. R. 943.

Annotation :—*Refd.* Lawrence v. Jenkins (1873), L. R. 8 Q. B. 274.

177. — Sea wall—Adjoining frontagers.]—HUDSON v. TABOR, No. 172, *ante*.

178. Proof of liability—Occasional repairs.]—Where the owner of two adjoining closes, A. & B., separated by a fence & gate, which had always been repaired by the occupier of B., sold A. to pltf., & two years afterwards sold B. to deft. :—*Held* : the latter was not bound to repair the gate, unless he or his vendor had made some specific bargain with pltf. to that effect, & the doing of occasional repairs was not evidence of such bargain.—BOYLE v. TAMLYN (1827), 6 B. & C. 329; 9 Dow. & Ry. K. B. 430; 5 L. J. O. S. K. B. 134; 108 E. R. 473.

Annotations :—*Consd.* Barber v. Whiteley (1865), 34 L. J. Q. B. 212. *Refd.* Ricketts v. East & West India Docks Ry. Co. (1852), 12 C. B. 160; Lawrence v. Jenkins (1873), L. R. 8 Q. B. 274. *Mentd.* Russell v. Shenton (1842), 3 Q. B. 449; Smith v. Kenrick (1849), 7 C. B. 515.

179. — Repairs during many years.]—The owners & occupiers of an ancient copyhold inclosure, & they alone, had from time to time repaired the fence belonging to the inclosure between it & the common waste land of the manor :—*Held* : the proper inference for a jury to draw was that at the time the lord granted the exclusive possession of the land, he granted it subject to the obligation on the part of the grantee to keep it fenced as against the cattle of the lord & the other copyholders turned out on the wastes of the manor, & that the owner or occupier was therefore bound to keep up the fence as against adjoining occupiers after the wastes of the manor were inclosed under a modern Inclosure Act.—BARBER v. WHITELEY (1865), 34 L. J. Q. B. 212; 29 J. P. 678; 11 Jur. N. S. 822; 13 W. R. 774.

Annotation :—*Mentd.* Ellis v. Loftus Iron Co. (1874), 23 W. R. 246.

180. — —.]—Pltf. was the occupier of a field, separated from a field in the occupation of deft. by a hedge or fence. In consequence of this fence being out of repair, pltf.'s cattle strayed into the field of deft., & were seized by him as a distress damage feasant. Upon an action brought by pltf. for this seizure of the cattle, the pleadings raised the issue of whether or not deft. was bound to repair the hedge through which the cattle escaped, the only evidence of liability consisted in the practice for fifty years & upwards, of deft. & his predecessors to repair such hedge :—*Held* : this was in itself no proof of such liability.—HILTON v. ANKESSON (1872), 27 L. T. 519.

No notice necessary.]—Deft. was the occupier of a close adjoining a close occupied by pltf. Deft.'s close was woodland, & he sold the fallage of the timber to H., continuing himself to occupy the close. H. felled a tree in a negligent manner, so that it fell over the fence between the two closes & made a gap in it. Two cows of pltf. soon afterwards got from pltf.'s close through the gap into deft.'s close, & fed on the leaves of a yew tree which had been felled there by H., & died in consequence. Deft. had had no notice of the fence having been broken down before the escape of pltf.'s cows. There was

that part of the shore which is covered by the sea only in ordinary spring tides, over which the public has been from time immemorial in the habit of passing, & over which he cannot prove any past use or possession by himself.—SMITH v. STAIR (EARL) (1849), 6 Bell, Sc. App. 487.—SCOT.

Sect. 2.—Rights and liabilities of owners and occupiers: Sub-sect. 2, A. & B.; sub-sects. 3 & 4.]

evidence that deft. & his predecessors had for more than forty years repaired the fence, which was on his land, between the two closes whenever repairs were necessary, & that for the last nineteen years the fence had been repaired by deft. & his predecessors upon notice by the occupier for the time being of pltf.'s close. Whenever the fence was so repaired it was for the purpose of preventing cattle on pltf.'s close from escaping into deft.'s close:—*Held*: the evidence showed a prescriptive obligation on the part of deft. to maintain the fence so as to keep in the cattle in pltf.'s close.—*LAWRENCE v. JENKINS* (1873), L. R. 8 Q. B. 274; 42 L. J. Q. B. 147; 37 J. P. 357; 21 W. R. 577; *sub nom.* *LAURENCE v. JENKINS*, 28 L. T. 400.

Annotations:—*Distd.* *Corry v. G. W. Ry. Co.* (1880), 6 Q. B. D. 237. *Refd.* *Crowhurst v. Amersham Burial Board* (1878), 4 Ex. D. 5; *Coaker v. Willcocks*, [1911] 2 K. B. 124. *Mentd.* *Sneesby v. L. & Y. Ry. Co.* (1874), L. R. 9 Q. B. 263; *Halestrap v. Gregory* (1895), 43 W. R. 507.

182. — — —.]—Where an onerous liability has been asserted & submitted to for a long series of years, although the evidence begins well within modern times, anything not manifestly absurd which will support & give a legal origin to such a custom will be presumed. Therefore, a liability to repair a sea-wall submitted to since 1818 ought to be presumed to have a legal origin.—*LONDON & NORTH WESTERN RY. v. FOBBING LEVELS SEWERS COMRS.* (1896), 66 L. J. Q. B. 127; 75 L. T. 629; 41 Sol. Jo. 128.

183. Who is liable—Possessors of land.]—*Quære*: whether in an action on the case against a wrongdoer, for not repairing fences, a declaration prescribing that all the possessors of the close had used to make the hedges is sufficient.—*HOLBACH v. WARNER* (1623), Cro. Jac. 665; Palm. 331; 79 E. R. 576.

Annotations:—*Consd.* *Powell v. Salisbury* (1828), 2 Y. & J. 391. *Refd.* *R. v. Bucknall* (1702), 2 Ld. Raym. 804; *Rider v. Smith* (1790), 3 Term Rep. 766.

Purchasers of lands formerly liable as a whole.]—Where a farm has been subject *ratione tenuræ* to repair a sea wall, such liability attaches to every part of the land comprising the farm, though the farm has been sold & has become vested in several different purchasers.—*LONDON & NORTH WESTERN RY. v. FOBBING LEVELS SEWERS COMRS.* (1896), 66 L. J. Q. B. 127; 75 L. T. 629; 41 Sol. Jo. 128.

185. — — — Occupiers.]—In an action upon the case pltf. declared, that defts., the tenants & occupiers of a parcel of land adjoining to pltf.'s, had time out of mind maintained a fence; & that the fence lay open, & that pltf.'s mare went through the gap, & fell into a ditch, & was drowned:—*Held*: the declaration was good though the prescription was laid in occupiers, for pltf. was a stranger, & presumed ignorant of the estate; but otherwise if deft. had prescribed.—*ANON.* (1674), 1 Vent. 264; 86 E. R. 177.

Annotations:—*Refd.* *Rider v. Smith* (1790), 3 Term Rep. 766; *Powell v. Salisbury* (1828), 2 Y. & J. 391; *Lawrence v. Jenkins* (1873), L. R. 8 Q. B. 274. *Mentd.* *Blizard v. Kelly* (1823), 3 Dow. & Ry. K. B. 519.

—.]—Where a man is obliged to make fences against another, it is enough to say, all occupiers ought to repair, etc., because that lays a charge upon the right of another, which it may be, he cannot particularly know (*HOLT, C.J.*).—*R. v. BUCKNALL* (1702), 2 Ld. Raym. 804; *Holt, K. B.* 128; 7 Mod. Rep. 54; 92 E. R. 37.

Annotations:—*Refd.* *Rider v. Smith* (1790), 3 Term Rep. 766; *Powell v. Salisbury* (1828), 2 Y. & J. 391. *Mentd.* *R. v. Sutton* (1835), 3 Ad. & El. 597; *Baker v. Greenhill* (1842), 3 Q. B. 148; *Metcalf v. Hetherington* (1855), 11 Exch. 257.

187. — — —.]—An action on the case for not repairing fences, whereby another party is damaged, can only be maintained against the occupier, & not against the owner of the fee, who is not in possession.—*CHEETHAM v. HAMPSON* (1701), 4 Term Rep. 318; 100 E. R. 1041.

Annotations:—*Refd.* *Todd v. Flight* (1860), 9 C. B. N. S. 377. *Mentd.* *Russell v. Shenton* (1842), 3 Q. B. 449; *Gwinnell v. Eamer* (1875), L. R. 10 C. P. 658.

See, also, No. 190, *post*.

Liability for injury to animals consequent on failure to repair, *see* ANIMALS, Vol. II., Nos. 126–133.

B. When and how Duty Extinguished.

188. By unity of ownership or possession.]—A duty to fence will be extinguished by unity of possession.—*DAY & DRAKE'S CASE* (1605), cited in Palm. at p. 446; Poph. at p. 172; 81 E. R. 1164; *sub nom.* *DREW v. PRAKE*, cited in Noy. at p. 84. *Annotation*:—*Refd.* *Sury v. Pigot* (1626), Poph. 166.

189. — — — Purchase of adjoining land by owner liable to fence.]—If a man is bound to fence against land & purchases that land, his liability is at an end.—*SACKVILLE v. MILWARD* (1444), Y. B. 22 Hen. 6, fo. 7, pl. 12; Vin. Abr. tit. Fences, A. 1.

190. — — — Not revived by subsequent severance.]—In an action in trespass for impounding oxen, deft. pleaded that V. was seised of a close L. in fee, & had let it to him for 99 years, that the cattle came upon the close, & so justified for damage feasant. Pltf. replied, that V. was seised of an adjoining close, B., & alleged a custom in P., in which town both the closes were, that all the occupiers of close L. had maintained a fence against B., & that the cattle came upon the land in default of a fence. The custom having been proved & verdict given for pltf., it was moved in arrest of judgment (1) that this was in the nature of a prescription, & not a custom; (2) that if it had been alleged by way of prescription, it should be laid in him that had the inheritance; & (3) that by the unity of possession the duty of fencing was extinguished, & did not revive though the closes came afterwards into several hands:—*Held*: the duty of fencing was extinguished.—*POLUS v. HENSTOCK* (1670), 1 Vent. 97; 86 E. R. 67; *sub nom.* *BOLUS v. HINSTORKE*, T. Raym. 192; 2 Keb. 686, 707.

Annotations:—*Mentd.* *Sharp v. Lowther* (1736), Lee temp. Hard. 292; *Hardcastle v. Slater* (1745), 1 Amb. 41.

See, generally, EASEMENTS & PROFITS À PRENDRE.

191. Not by construction of new highway—Fence removed before old highway stopped up.]—Upon the diversion of a turnpike road after the new road had been completed, but before the old road was stopped up, the trustees, by the permission of B., broke down his fence to make a passage from the new road to the close of A., but did not put up a gate or fence to protect the latter close:—*Held*: the trustees were wrong-doers, & B. was responsible for their acts.—*WINTER v. CHARTER* (1829), 3 Y. & J. 208; 2 Man. & Ry. M. C. 177; 148 E. R. 1197.

192. Not by inclosure of wastes under modern Inclosure Act.]—The owners & occupiers of an ancient copyhold inclosure, & they alone, had from time to time repaired the fence belonging to the inclosure between it & the common waste land of the manor:—*Held*: the proper inference for a jury to draw was that at the time the lord granted the exclusive possession of the land, he granted it subject to the obligation on the part of the grantee to keep it fenced as against the cattle of the lord & the other copyholders turned out on the wastes of the manor, & that the owner or occupier was therefore bound to keep up the fence as against

adjoining occupiers after the wastes of the manor were inclosed under a modern Inclosure Act.—**BARBER v. WHITELEY** (1865), 34 L. J. Q. B. 212; 29 J. P. 678; 11 Jur. N. S. 822; 13 W. R. 774.
Annotation :—**Reid**. *Ellis v. Loftus Iron Co.* (1874), 23 W. R. 246.

See, further, COPYHOLDS.

SUB-SECT. 3.—BY CONTRACT.

193. Defence to action for trespass.—To trespass, it is not sufficient for deft. to plead that pltf. by agreement ought to repair; for he may have a remedy upon the covenant.—**NOWEL v. SMITH** (1599), Cro. Eliz. 709; 78 E. R. 943.

Annotation :—**Mentd**. *Lawrence v. Jenkins* (1873), L. R. 8 Q. B. 274.

194. Whether running with land—Fence between land & proposed road.—A former purchaser of lands had entered into a covenant to make & maintain the boundary fences between the lands & a road afterwards made, which became vested in the local board of health, & a question was raised whether this covenant ran with the land, & was binding upon a future purchaser:—*Held*: the question was too doubtful to admit of the title being forced upon a purchaser.—**POTTER v. PERRY** (1859), 23 J. P. 614; 7 W. R. 182.

195. Breach of covenant—What amounts to.—A lease contained a covenant for fencing with good & substantial walls or quick fences; fences had been made upon a part of the premises, not much exposed, without posts or rails, which were usual fences in that part of the country, & existed in the fences upon the other parts of the demised premises. The jury having found that the fences were in as good a condition as could be expected in the circumstances:—*Held*: the covenant had been substantially performed.—**DOE D. MENCE v. HADLEY** (1849), 14 L. T. O. S. 102.

196. ———.—A purchaser covenanted to fence the land purchased with a fence consisting of “a dwarf wall with iron palisading & gates either of wood or iron”:—*Held*: a large permanent hoarding for advertisements was a breach of the covenant.—**NUSSEY v. PROVINCIAL BILL POSTING CO. & EDDISON**, [1909] 1 Ch. 734; 78 L. J. Ch. 539; 100 L. T. 687; 25 T. L. R. 489; 53 Sol. Jo. 418, C. A.

Annotation :—**Mentd**. *Tubbs v. Esser* (1909), 26 T. L. R. 145.

197. ——— For supply of wood—No request.—To a declaration against a tenant for not using proper fences in husbandlike manner, in repairing fences, etc., on his implied promise so to do, a plea that the fences became out of repair by natural decay, & that there was not proper wood (without specifying it) which deft. had a right to cut for repairing the fences, & pltf. ought to have set out proper wood for the purpose of repairs, which pltf. neglected to do, without averring any request on pltf. so to do or a custom of the country in this respect, is bad.—**WHITFIELD v. WEEDON** (1772), 2 Chit. 685.

198. ——— Measure of damages.—The grantees of certain land had covenanted with the grantor, since deceased, that the land, except as to the entrance to be made by them towards an intended new road, should be & be kept inclosed

on all the sides abutting on the land of the grantor with a brick wall seven feet high. The grantees not having erected a wall in pursuance of the covenant, an action was brought against them by the exors. & devisees of the grantor for damages for the breach of covenant. In the events that had happened, the value of the adjoining land of pltf. was not decreased by the non-erection of the wall to anything like the amount which it would have cost to build the wall:—*Held*: the true measure of damages being the pecuniary amount of the difference between the position of pltf. upon the breach of contract & what it would have been if the contract had been performed, in the circumstances of the case the amount that it would cost to build the wall was not the correct measure of the damages.—**WIGSELL v. SCHOOL FOR INDIGENT BLIND** (1882), 8 Q. B. D. 357; 51 L. J. Q. B. 330; 46 L. T. 422; 30 W. R. 474, D. C.
Annotations :—**Reid**. *Joyner v. Weeks*, [1891] 2 Q. B. 31.
Mentd. *Marshall v. Mackintosh* (1898), 78 L. T. 750.

See, further, Sub-sect. 5, *post*; LANDLORD & TENANT.

SUB-SECT. 4.—BY STATUTE.

199. Ditch by public highway.—Comrs. of sewers used for the purpose of their sewerage an ancient tidal ditch which ran along the side of a public highway:—*Held*: the comrs. were under no obligation to fence the sewer, so as to protect persons frequenting the highway.—**CORNWELL v. METROPOLITAN COMRS. OF SEWERS** (1855), 10 Exch. 771; 24 L. T. O. S. 244; 19 J. P. 313; 3 C. L. R. 417; 156 E. R. 652.

Annotation :—**Reid**. *Fisher v. Prowse*, *Cooper v. Walker* (1862), 2 B. & S. 770.

200. Goit by public footpath—Towns Improvement Clauses Act, 1847 (c. 34)—Public Health Act, 1848 (c. 63), s. 68.—Defts., a local board, left unfenced a goit adjoining a public footpath within their district, by reason of which pltf.'s husband, while using the footpath, fell into the goit & was drowned:—*Held*: defts. were not liable under Towns Improvement Clauses Act, 1847, s. 83, as the goit was not a hole within the meaning of that sect. nor under Public Health Act, 1848, s. 68, since that sect. only gives a discretionary power to the local board to place & keep in repair fences, etc., & does not impose upon them an absolute duty to do so.—**WILSON v. HALIFAX CORPN.** (1868), L. R. 3 Exch. 114; 37 L. J. Ex. 44; 17 L. T. 660; 32 J. P. 230; 16 W. R. 707.

Annotations :—**Consd**. *Jolliffe v. Wallasey L. B.* (1873), L. R. 9 C. P. 62. **Mentd**. *Gibson v. Preston Corpn.* (1870), L. R. 5 Q. B. 218; *Hammond v. St. Pancras Vestry* (1874), L. R. 9 C. P. 316; *Holland v. Northwich Highway Board* (1876), 34 L. T. 137.

201. Footpath diverted—Under statutory powers.—A duty is cast upon those who, in the exercise of statutory powers, divert a public footpath, to protect, by fencing or otherwise, reasonably careful persons using the footpath from injury through going astray at the point of diversion.—**HURST v. TAYLOR** (1885), 14 Q. B. D. 918; 49 J. P. 359; 33 W. R. 582; 1 T. L. R. 386, D. C.

Annotations :—**Reid**. *Evans v. Rhymney L. B.* (1887), 4 T. L. R. 72; *McClelland v. Manchester Corpn.*, [1912] 1 K. B. 118.

PART II. SECT. 2, SUB-SECT. 3.

p. Whether affected by statute.—An agreement between parties respecting division fences between their respective properties is not affected by 4 Will. 4, c. 12.—**LAMB v. MULHOLLAND** (1836), 5 O. S. 109.—**CAN.**

q. ——— Verbal agreement.—Ad-

joining owners may agree verbally to erect any kind of fence along their common boundary without reference to or without complying with Fencing Act, 1895.—**COGHLAN v. JOHNSON** N. Z. L. R. 1002.—**N.Z.**

r. Agreement to repair—Implied term.—Pltf. & deft. who were owners

of adjoining land agreed to repair the dividing fence, each paying half the cost. The fence was entirely on deft.'s land, but had long been used as a party fence:—*Held*: there was an implied promise on part of deft. not wilfully to impair the efficiency of the fence.—**VICKERY v. JENNER** (1896), 17 N. S. W. L. R. 438.—**AUS.**

Sect. 2.—Rights and liabilities of owners and occupiers: Sub-sects. 4 & 5.]

202. Excavation made near highway—After dedication—Statutory obligation to fence highway—Liability of person making excavation.]—If an excavation has been made so near to a highway since its dedication & adoption as to create or increase danger to the public, & an accident happens thereby, the person making the excavation is not absolved from liability by reason that a statutory obligation to fence the highway is imposed upon other parties, who have neglected to do so.—*WETTOR v. DUNK* (1864), 4 F. & F. 298, N. P.

203. Fence broken down & removed—Lessee of land allotted under Inclosure Act—Form of order.]—On an award under an Inclosure Act, a plot, of which deft. was the present lessee, was allotted to L. & it was ordered that L., her heirs & assigns, should maintain & repair the fences between her plot & a plot allotted to pltf. In an action to restrain deft. from permitting the fences to remain broken down & removed, the ct. ordered deft., who was in a humble position in life, to restore & replace the fences which he had broken down & removed, instead of making a negative order restraining him from permitting the fences to remain broken down & removed.—*BIDWELL v. HOLDEN* (1890), 63 L. T. 105.

204. Excavation on land adjoining highway—Public Health Amendment Act, 1907 (c. 53).]—The words, "If in any situation fronting, adjoining, or abutting on any street or public footpath, any . . . excavation . . . or bank is . . . dangerous to the persons lawfully using the street or

footpath," in Public Health Acts Amendment Act, 1907, s. 30 cover the case of any excavation, or bank, that is sufficiently near to any street, or footpath, to cause danger to those who are lawfully using it, even though the excavation, or bank, does not itself actually front, adjoin, or abut on the street or footpath. The owner of such excavation or bank, may therefore be required by the local authority under s. 30 to erect a fence to prevent any danger to the persons using the highway.—*CARSHALTON URBAN COUNCIL v. BURRAGE*, [1911] 2 Ch. 133; 80 L. J. Ch. 500; 104 L. T. 306; 75 J. P. 250; 27 T. L. R. 280; 9 L. G. R. 1037.

Annotation:—Expld. Cheshire Lines Com. v. Heaton Norris U. C., [1913] 1 K. B. 325.

205. — Disused quarry.]—Deft. owned & occupied land, being a worked-out quarry, immediately adjoining a public highway vested in an urban district council & repairable by the inhabitants at large. A prior owner of the land had, in 1865, made the excavation in order to quarry for limestone, & until then the surfaces of the road & the land had been on the same level. The excavation being a source of danger & obstruction to persons using the road, the excavator, to protect them & the road, built alongside the road a wall, the bottom of which rested on a ledge of limestone left ungotten for the purpose & served as a retaining wall for the subsoil of the road & as a fence wall above its surface. In Feb., 1913, part of the wall collapsed & fell into the quarry, & in consequence a considerable part of the subsoil of the road & of its surface fell in also, the road thus becoming impassable, a source of danger to persons attempting to use it, & a nuisance, liable under Quarry

PART II. SECT. 2, SUB-SECT. 4

a. Excavation near highway—Statutory obligation to fence highway—Crown land.]—A municipality is not compelled by Local Government Act, 1874, to fence a hole near a road, if on unalienated Crown land.—*BISP v. COLLINGWOOD CORPN.* (1883), 9 V. L. R. —AUS.

202 i. — — — Liability of person making excavation.]—By bye-laws of a municipality persons digging a hole, near a public highway, were to fence it in. P. owned land having a much used footpath running across it. He dug a deep hole on this land near the footpath, & only fenced it on one side. W. walking along the footpath fell in & was injured:—*Held*: P. liable in damages.—*WRIGHT v. PATERSON, BRISTOW v. PATERSON* (1864), 5 E. D. C. 390.—S. AF.

t. Lands fronting a river—Whether fencing compulsory.]—Lands bounded by a public navigable river were occupied by manufacturing premises, enclosed on the river side by a wall, leaving a narrow strip of ground between the wall & the river; the public had a right of way over this strip:—*Held*: under Glasgow Police Act, 1866, the owners of the land could not be ordered to erect a fence between the footpath & river.—*LANG v. KERR, ANDERSON & Co.* (1878), 15 Sc. L. R. 386; 5 R. (Ct. of Sess.) 65.—SCOT.

a. Division fences—Contribution towards cost—Adjoining owners—Cattle Trespass Act, 1882.]—*RAMSAY v. OFFER* (1918), 20 W. A. L. R. 65.—AUS.

b. — — — — — Fences Act, 1915.]—*ALI GUNNER KHAN v. FAWAZ* (1919), 27 C. L. R. 289.—AUS.

c. — — — — — Fencing Act, 1881.]—A covenant by a lessee to fence does not disentitle him to claim contribution under the above Act from his lessor as owner & occupier of lands adjoining those leased, even though

the latter owned & occupied the adjoining lands at the date when the covenant was entered into.—*PUBLIC TRUSTEE v. McKEOWN* (1898), 16 N. Z. L. R. 611.—N.Z.

d. — — — — —.]—Where an owner of land gives an adjoining owner notice to fence, & by arrangement, puts up the fence himself, he cannot charge as part of the cost of the fence sums paid to a surveyor for ascertaining the exact line of boundary, nor the cost of ascertaining a proper "give-and-take" line which was ascertained before the agreement to fence was made, nor interest on progress-payments, nor for his own supervision.—*HANDYSIDE v. NEWMAN* (1886), 7 N. Z. L. R. 261.—N.Z.

e. — — — — — Applicability of Fences (Dividing) Act, N.S.W., 1828.]—*TURNER v. SHERRARD* (1883), Udal, 90.—FIJI.

f. — — — — — Fence viewers — Duties.]—A fence viewer may not establish a boundary between adjoining owners. He must decide what proportion of fence each proprietor is to make when the line is fixed or assented to, & must make the fence thereon in case either proprietor, after due notice, shall neglect to make it.—*HUNTER v. RONNE* (1870), 8 N. S. R. 113.—CAN.

g. — — — — —.]—The action of the fence viewer will not have the effect of establishing the line.—*DOHERTY v. McDEVITT* (1892), 31 N. B. R. 526.—CAN.

h. — — — — — Survey in aid.]—The Line Fences Act, 1897, enables a surveyor to be called in to aid fence viewers.—*DELAMATTER v. BROWN* (1909), 13 O. W. R. 58, 862.—CAN.

j. — — — — — Reference to three—Award by two.]—Three fence viewers were notified to view a line fence. One did not view the fence & the other two made an award without concurrence of the third:—*Held*: the award should be set aside, there being no evidence that the third fence viewer had refused

to act.—*MILLER v. MCKENZIE* (1909), 11 O. W. R. 512.—CAN.

k. — — — — — Award conclusive as to sufficiency of fence.]—On the question of the sufficiency of a fence according to township regulations, the award of fence viewers is conclusive.—*STEDMAN v. WASLEY* (1841), 1 U. C. R. 464.—CAN.

l. — — — — — Legality of fence.]—Under Municipal Institutions Act, s. 360, the award is conclusive as to the legality of the fence.—*SHORT v. PARMER* (1865), 24 U. C. R. 633.—CAN.

m. S. P. Re CAMERON & KERR (1866), 25 U. C. R. 533.—CAN.

n. — — — — — Appeal from award.]—*Re McDONALD & CATTANACH* (1870), 30 U. C. R. 432.—CAN.

o. — — — — — Fees.]—A fence viewer may recover his fees though there is a *bona fide* dispute as to the boundary line & the line on which he directed the fence to be put is not the true line.—*DOHERTY v. McDEVITT* (1892), 31 N. B. R. 526.—CAN.

p. — — — — — Costs of erecting fence.]—*CROSS v. LEGAG* (1907), 41 N. S. R. 419.—CAN.

q. — — — — — When not recoverable.]—Pltfs. who were fence viewers sued to recover expenses directed & incurred by them as fence viewers in building deft.'s portion of a line fence between deft. & an adjoining owner. Pltfs., before entering upon the duties of their office, had failed to subscribe the oath of qualification required:—*Held*: pltfs. could not recover.—*HANNIGAN v. McLEOD* (1915), 48 N. S. R. 340.—CAN.

r. — — — — — Person employed by—Liability of occupier.]—A person employed by a fence viewer to repair a division fence on failure of the occupier to make repairs, may sue the occupier for the amount of such repairs.—*STEVENSON v. STANTON* (1845), 2 Kerr, 670.—CAN.

(Fencing) Act, 1887 (c. 19), s. 3 to be dealt with summarily under Public Health Act, 1875 (c. 55):—*Held*: in an action by the A.-G. at the relation of the council, a mandatory order must be made on deft. to abate the nuisance by rebuilding the wall or providing some other reasonable fence between the road & the quarry.—*A.-G. v. ROE*, [1915] 1 Ch. 235; 84 L. J. Ch. 322; 112 L. T. 581; 79 J. P. 263; 13 L. G. R. 335.

See, generally, BURIAL & CREMATION; HIGHWAYS, STREETS, & BRIDGES; MINES, MINERALS, & QUARRIES; RAILWAYS & CANALS.

SUB-SECT. 5.—HOW SATISFIED.

206. Liability to "fence"—Satisfied by deep ditch.]—A ditch is a fence within Inclosure Consolidation Act, 1801 (c. 109). A local Inclosure Act required that the allotments "should be inclosed & fenced on all such parts & sides as should not be directed to be fenced by any other proprietor, or as should not adjoin to any inclosed land, or be bounded by any river or other sufficient fence"; part of the *locus in quo* was bounded by an old deep ditch:—*Held*: this was a sufficient fence within the meaning of the Act.—*ELLIS v. ARNISON* (1822), 1 B. & C. 70; 2 Dow. & Ry. K. B. 161; 1 Dow. & Ry. M. C. 193; 1 L. J. O. S. K. B. 24; 107 E. R. 27; *subsequent proceedings* (1823), 3 Dow. & Ry. K. B. 27.

207. — "Dwarf wall with iron palisading"—Hoarding insufficient.]—A building estate on which residential houses were intended to be built was put up for sale in lots according to a general sale plan & subject to conditions of sale which provided that all the lots should be subject to certain restrictive covenants for the general benefit of the estate. The conveyances to the purchasers contained, amongst others, covenants to fence off the lots from the road, the fence to consist of a dwarf wall with iron palisading & gates either of wood or iron, & to maintain the same & no other kind of fence in repair. A purchaser of two lots leased the same to a co. for seven years for bill-posting purposes, & the co. erected along the boundary of the land where it adjoined a plot belonging to another purchaser a hoarding of a permanent nature 156 feet long & 15 feet high, & covered the hoarding with advertisements. The owner of this plot brought an action for a mandatory injunction for the pulling down of the hoarding:—*Held*: the hoarding was a "fence," & the erection of the same was a breach of the covenant as to fencing.—*NUSSEY v. PROVINCIAL BILL POSTING CO. & EDDISON*, [1909] 1 Ch. 734; 78 L. J. Ch.

PART II. SECT. 2, SUB-SECT. 5.

t. Liability to fence—Mode of construction.]—A boundary fence, under Line Fence Act, 1887, should be so placed that the vertical centre of the wall will coincide with the limit between the lands of the parties, each owner being bound to support it by appliances placed on his own land.—*COOK v. TATE* (1894), 26 O. R. 403.—**CAN.**

a. — Low wall—Insufficient.]—A pit lay about 4 feet from a road which was frequently used. There was a wall of stone & lime about 18 inches high round the mouth of the pit:—*Held*: the wall was insufficient.—*BLACK v. CADDELL* (1804), 13 Fac. Coll. 320; *sub nom.* *CADDELL v. BLACK* (1812), 5 Pat. App. 567.—**SCOT.**

b. — — — — —.]—The parapet wall of a bridge on a public road did not exceed 14 inches in height, its top being 15 feet above the bed of a stream

below. In an action by a person who had fallen over the parapet on a dark night:—*Held*: the height of the parapet was insufficient.—*M'INTYRE v. LOCHABER DISTRICT COMMITTEE* (1901), 4 F. (Cl. of Sess.) 188.—**SCOT.**

c. — Or repair—Fence of different kind.]—The erection of a new fence of a different character to the old is not a repair or renewal under Boundary Fences Act, 1908, which will enable a party to recover the cost of repairs under the Act.—*STOREY v. LOCKHART* (1915), 11 Tas. L. R. 163.—**AUS.**

d. — — — — —.]—A notice to repair does not give a right to pull down an old fence & put up a new one in another place.—*TANNER v. THOMSON* (1888), 7 N. Z. L. R. 71.—**N.Z.**

e. — — — — —.]—A notice to repair does not entitle the giver of it to erect a new fence of a description differing from that in existence at the time the notice was given.—*TIBBITS v.*

539; 100 L. T. 687; 25 T. L. R. 489; 53 Sol. Jo. 418, C. A.

Annotation:—*Mentd.* *Tubbs v. ESSER* (1909), 26 T. L. R. 145.

208. Fence ordinarily sufficient—Fence knocked down by horse & cart.]—Deft., a contractor for the construction of a railway line, made an excavation within five yards of, & fenced it off from a highway. Pltf.'s horse, attached to a cart containing a load of a ton weight, came into contact with the fence, which gave way, & the horse was killed by the fall into the excavation:—*Held*: the fence was sufficient within the requirements of Highways Act, 1835 (c. 50), s. 70 & there was no legal duty imposed upon deft. to construct a fence of such strength as to withstand such a shock as that described.—*BLAKELEY v. BAKER* (1878), 39 L. T. 359.

209. — Exceptionally active sheep.]—Sheep of pltf., having strayed from uninclosed land forming part of Dartmoor Forest, over which pltf. had rights of common, including the right of pasturage for sheep & other commonable beasts, into an adjoining close which belonged to deft., were there distrained by him damage feasant, & were impounded by him in a pound within the same hundred, but more than three miles distant from the place where the distress was taken. In an action by pltf. against deft. for a wrongful distress, it was admitted by deft. for the purposes of the case that he was bound to fence his holding against moorland cattle, including sheep. Pltf. alleged that the distress was wrongful because the sheep had strayed into deft.'s close through deft.'s breach of his obligation to fence, in having insufficient fences. The sheep in question were Scotch sheep, which possessed extraordinary powers of jumping. Neither deft.'s fences, nor Dartmoor fences generally, were constructed to keep out Scotch sheep, for which kind of sheep special fences were necessary, but deft.'s fences were sufficient for keeping out the ordinary moorland sheep:—*Held*: the obligation upon deft. was only to maintain fences such as were usual on Dartmoor, & sufficient to keep out ordinary sheep, & not such fences as would keep out sheep which, like Scotch sheep, possessed extraordinary jumping powers.—*COAKER v. WILLCOCKS*, [1911] 2 K. B. 124; 80 L. J. K. B. 1026; 104 L. T. 769; 27 T. L. R. 357, C. A.

210. Repairs to sea wall—Extraordinary storm.]—A. was a frontager in a level on the E. shore of the Thames under the jurisdiction of comrs. of sewers. An ancient sea wall protected the level against incursions of the sea. There was evidence proving a prescriptive liability on the frontagers

GERRAND (1896), 14 N. Z. L. R. 678.—**N.Z.**

f. — — — — —.]—Pulling down an old fence & re-erecting it, & altering its character, is not repairing within Fencing Act, 1895.—*McSAVENY v. SMITH* (1904), 24 N. Z. L. R. 245.—**N.Z.**

g. — Encroachment on neighbour's land.]—Deft. so repaired a fence as to encroach on the property of pltf.:—*Held*: pltf. was entitled to recover.—*ARMSTRONG v. ANNETT* (1903), 2 O. W. R. 692.—**CAN.**

h. S. P. HOOEY v. TRIPP (1912), 21 O. W. R. 493; 3 O. W. N. 738; 25 O. L. R. 578; 2 D. L. R. 136.—**CAN.**

i. — to enter on another's land.]—Except under statute a person has no right to enter on another's land for the purpose of erecting a fence on his own land.—*TANNER v. THOMSON* (1888), 7 N. Z. L. R. 71.—**N.Z.**

Sect. 2.—Rights and liabilities of owners and occupiers: Sub-sects. 5 & 6. Part III. Sect. 1:

in the level to maintain & repair the portions of this wall respectively fronting their lands. Part of the wall in front of A.'s land was destroyed by an extraordinary storm & high tide. This part of the wall was previously in good repair and in a proper condition to resist the flow of ordinary tides & the force of ordinary storms:—*Held*: in the absence of evidence that the prescriptive liability of the frontagers extended to the repair of damage caused by extraordinary violence of the sea, the liability to repair the damage thus caused to the wall fell not upon A. but upon the whole of the level.—*FOBBING SEWERS COMRS. v. R.* (1886), 11 App. Cas. 449; 56 L. J. M. C. 1; 55 L. T. 493; 51 J. P. 227; 34 W. R. 721; 2 T. L. R. 750, H. L.; *affg. S. C. sub nom. R. v. ESSEX SEWERS COMRS.* (1885), 14 Q. B. D. 561, C. A.

Annotations:—*Consd. Noith v. Walthamstow U. C.* (1898), 67 L. J. Q. B. 972; *Reid. Baker v. Parry* (1905), 3 L. G. R. 684.

SUB-SECT. 6.—HOW ENFORCED.

211. Injury to fences—Action.]—One cannot have an action of trespass for the breaking of another man's fence; but if he be damnified by the breaking of it, he may have an action on the case against the party who broke it.—*COOPER v. ST. JOHN* (1648), Sty. 130; 82 E. R. 586.

212. Failure to repair—Not by indictment.]—To an indictment against deft., that he unlawfully suffered his fences to be down, to the great damage, etc., exception was taken that it was a non-feasance & not indictable:—*Held*: the indictment should be quashed.—*R. v. BINGLEY* (1714), Sess. Cas. K. B. 25; 93 E. R. 25

213. Repair of sea wall—Presentment of jury—Commissioners of sewers.]—A. was a frontager in a level on the E. shore of the Thames under the jurisdiction of comrs. of sewers. An ancient sea wall protected the level against incursions of

the sea. There was evidence proving a prescriptive liability on the frontagers in the level to maintain & repair the portions of this wall respectively fronting their lands. Part of the wall in front of A.'s land was destroyed by an extraordinary storm & high tide. This part of the wall was previously in good repair & in a proper condition to resist the flow of ordinary tides & the force of ordinary storms. The presentment of a jury at a ct. of sewers in 1861 found that the then owner of A.'s land was bound by reason of his tenure to repair a portion of the sea wall fronting the land so as to prevent the influx of the waters. In 1881–2 the comrs. of sewers made orders upon A. as the owner of the land to repair this portion of the wall, it having been destroyed by the extraordinary storm & high tide. These orders were made "upon reading the presentment" of 1861. One of the comrs. who made the orders was personally interested as an owner of lands within the level:—*Held*: (1) Sewers Act, 1833 (c. 22), s. 13, which enables orders to be made upon a previous presentment does not authorise an order upon a person who has become owner of the land since the presentment, & the presentment being only of the ordinary liability did not justify an order to make good damage caused by an extraordinary storm & the orders were bad & must be quashed; (2) if the comrs. had made the orders under the powers of Land Drainage Act, 1861 (c. 133), s. 33, they must themselves have found as a fact A.'s liability; & if they had exercised such a jurisdiction they would have been acting judicially, in which case the orders would have been invalidated by the fact that one of the comrs. was disqualified by reason of interest.—*FOBBING SEWERS COMRS. v. R.* (1886) 11 App. Cas. 449; 56 L. J. M. C. 1; 55 L. T. 493; 51 J. P. 227; 34 W. R. 721; 2 T. L. R. 750, H. L.; *affg. S. C. sub nom. R. v. ESSEX SEWERS COMRS.* (1885), 14 Q. B. D. 561, C. A.

Annotations:—*Reid. Baker v. Parry* (1905), 3 L. G. R. 684; *Mentd. North v. Walthamstow U. C.* (1898), 67 L. J. Q. B. 972.

Part III.—Party-Walls.

SECT. 1.—OUTSIDE METROPOLITAN OR LONDON BUILDING ACTS.

SUB-SECT. 1.—DEFINITIONS.

214. Four meanings.]—The term "party-wall" may be used in four different senses, as meaning (1) a wall of which two adjoining owners are tenants in common; (2) a wall divided longitudinally into two strips one belonging to each of the

adjoining owners; (3) a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements; (4) a wall divided longitudinally into two moieties, each moiety being subject to a cross easement in favour of the owner of the other moiety.

The most ordinary & the primary meaning of

PART II. SECT. 2, SUB-SECT. 6.

211 i. Injury to fences—Action.]—Deft. tore down a fence marking the boundary of their respective properties without pltf.'s consent:—*Held*: pltf. entitled to recover damages for destruction of the fence.—*HUCKELL v. POMMERVILLE* (1912), 21 O. W. R. 681; 3 O. W. N. 845.—CAN.

l. — Injunction.]—*DICKIE v. CHICHIGIAN* (1912), 23 O. W. R. 268; 4 O. W. N. 303; 6 D. L. R. 911.—CAN.

m. Failure to repair—Statutory remedy.]—The remedy of an adjoining owner who discovers that a fence, repairable by his neighbour, is out of repair, is to proceed under Fencing Act, 1881, ss. 26, 27.—*OLSEN v. BAILEY* (1888), 6 N. Z. L. R. 713.—N.Z.

PART III. SECT. 1, SUB-SECT. 1.

n. Characteristics—Separation of premises of different owners.]—To constitute party walls they should separate the adjoining properties of different owners.—*R. v. CORP* (1889), 17 O. R. 738.—CAN.

o. Whether a party wall—Long user.]—User by an adjoining owner of a wall not on his land for over 20 years does not constitute the wall a party wall.—*JAMES v. CLEMENT* (1886), 13 O. R. 115.—CAN.

p. — Opening for joists.]—The fact that there were openings in a wall between two old buildings for the insertion of joists & timbers of the adjoining building, does not constitute such wall a party wall where all other evidence points to a different con-

clusion.—*HOME BANK OF CANADA v. MIGHT DIRECTORIES, LTD.* (1913), 25 O. W. R. 665; 5 O. W. N. 690.—CAN.

q. — Wall erected as party wall—Though not so used in its entirety.]—Under separate agreements made by them respectively, pltf. & deft. held adjoining plots of land for building. The agreements contained the same stipulations among which was the following: "The buildings to be continuous, with party walls common to both adjoining houses." Pltf. upon his land erected a house, the north wall of which was built as a party wall in pursuance of the conditions contained in the agreement. After pltf.'s house had been completed, deft. built his house upon the adjoining land & used a portion of the party wall as the southern wall of his house, but did not

the term is a wall of which the adjoining owners are tenants in common.—*WATSON v. GRAY* (1880), 14 Ch. D. 192; 49 L. J. Ch. 243; 42 L. T. 294; 44 J. P. 537; 28 W. R. 438.

Annotations:—*Consd.* *Newton v. Huggins* (1906), 50 Sol. Jo. 617. *Refd.* *Mason v. Fulham Corp.*, [1910] 1 K. B. 631.

See, also, cases in Sub-sect. 2, post.

SUB-SECT. 2.—OWNERSHIP.

215. One half of wall on land of each owner—Wall built at joint expense.—If two persons have a party-wall, one-half of the thickness of which stands on the land of each, they are not therefore tenants in common of the wall, or of the land on which it stands, although the wall was erected at the joint expense of the two proprietors. The property in a wall erected at a joint expense ensues the property of the land whereon it stands.—*MATTS v. HAWKINS* (1813), 5 Taunt. 20; 128 E. R. 593.

Annotations:—*Distd.* *Wiltshire v. Sidford* (1827), 1 Man. & Ry. K. B. 404. *Consd.* *Cubitt v. Porter* (1828), 8 B. & C. 257. *Refd.* *Watson v. Gray* (1880), 14 Ch. D. 192.

216. Presumption from common user of wall.—The common user of a wall separating adjoining lands belonging to different owners, is *prima facie* evidence that the wall, & the land on which it stands, belongs to the owners of those adjoining lands in equal moieties as tenants in common.—*CUBITT v. PORTER* (1828), 8 B. & C. 257; 2 Man. & Ry. K. B. 267; 6 L. J. O. S. K. B. 306; 108 E. R. 1039.

Annotations:—*Consd.* *Standard Bank of British South Africa v. Stokes* (1878), 9 Ch. D. 68; *Watson v. Gray* (1880), 14 Ch. D. 192; *Jolliffe v. Woodhouse* (1894), 10 T. L. R. 553; *Newton v. Huggins* (1906), 50 Sol. Jo. 617; *Adams v. Marylebone B. C.* [1907] 2 K. B. 822. *Refd.* *Bradbee v. Christ's Hospital* (1842), 4 Man. & G. 714; *Murray v. Hall* (1849), 7 C. B. 441; *Colebeck v. Girdlers Co.* (1876), 1 Q. B. D. 234; *Mason v. Fulham Corp.*, [1910] 1 K. B. 631; *Vine v. Wenham* (1915), 84 L. J. Ch. 913. *Mentd.* *Holmes v. Bellingham* (1859), 6 Jur. N. S. 534; *Minturn v. Barry* (1912), 76 J. P. 441.

217. Title derived from common predecessor.—Pltf. & deft. occupied contiguous premises bounded by a wall, which premises they had, severally, purchased at the same auction from the then owner of the whole. The lots were afterwards conveyed to pltf. & deft. by separate deeds, in which the premises were described as being in the occupation respectively of H. & R., together with all buildings, ways, etc., known or reputed to be parcel thereof:—*Held*: deft. might give in evidence conditions of sale distributed at the time of the auction, describing the premises by measurement, there being probable evidence that these conditions were seen by pltf.'s agent at the sale;

use the rear portion of the wall, as his house did not extend so far to the rear as the house of pltf.:—*Held*: the part of the wall not used by deft. was a party wall, having regard to the agreement under which the wall was erected.—*COVERJI LUDDA & KESSERBAI v. MORARJI PUNJA* (1885), 1 L. R. 9 Bom. 183.—*IND.*

PART III. SECT. 1, SUB-SECT. 2.

215 i. One half of wall on land of each owner—Wall built at joint expense.—Pltf. & defts. agreed to erect a wall to be used as a party wall between buildings which they proposed to erect on their respective adjoining lots; under the agreement either pltf. or defts. might build the wall, & the others were to pay for half of it. Pltf. built the wall:—*Held*: pltf. & defts. were tenants in common of the party wall.—*ALBERTA LOAN & INVESTMENT CO. v. BEVERIDGE & JOHNSTON* (1913), 24

W. L. R. 255; 4 W. W. R. 995; 12 D. L. R. 292.—*CAN.*

216 i. Presumption from common user of wall.—Common user of a party wall is *prima facie* evidence of a tenancy in common of the land covered by it.—*ST. LEGER v. EATON* (1904), 4 O. W. R. 205.—*CAN.*

217 i. Title derived from common predecessor.—M., owner of two warehouses, the dividing wall of which was necessary for the support of both, executed a deed of one by way of marriage settlement on his daughter:—*Held*: upon the execution of the deed by way of marriage settlement the wall common to the two warehouses became a party wall of which the owners of the warehouses were tenants in common.—*LEWIS v. ALLISON* (1899), 30 S. C. R. 173.—*CAN.*

219 i. Wall extending beyond adjoining building.—Pltf. & deft. held adjoining plots of land for building under the same lessor: their leases

inasmuch as the conditions were used, not to control or construe, but to apply, the language of the deeds.—*MURLY v. M'DERMOTT* (1838), 8 Ad. & El. 138; 3 Nev. & P. K. B. 356; 1 Will. Woll. & H. 226; 7 L. J. Q. B. 242; 112 E. R. 789; *sub nom.* *MURPHY v. M'DERMOTT*, 2 Jur. 806.

Annotation:—*Mentd.* *Stedman v. Smith* (1857), 8 E. & B. 1.

218. —.]—The owners in fee of two adjoining houses derived title to them from a common predecessor in title. In the conveyances from that predecessor to the two owners respectively, was contained a declaration that the wall which divided the yards at the back of the two houses should be & remain a party-wall:—*Held*: the two owners were tenants in common of the wall.—*WATSON v. GRAY* (1880), 14 Ch. D. 192; 49 L. J. Ch. 243; 42 L. T. 294; 44 J. P. 537; 28 W. R. 438.

Annotations:—*Refd.* *Newton v. Huggins* (1906), 50 Sol. Jo. 617; *Mason v. Fulham Corp.*, [1910] 1 K. B. 631.

219. Wall above adjoining building.—A wall may be a party-wall to such height as it belongs in common to two buildings, & cease to be a party-wall for the rest of its height. An Improvement Act, enacted that no opening should be made in any party-wall except for communication from building to another. Pltf. had a house, one wall of which was to the height of the first storey a party-wall between pltf.'s house & a building belonging to defts., but above that height had ancient windows opening to the external air. Pltf. pulled down his house, & proposed to rebuild it with windows in the same position as before. Before doing this, he gave notice to defts., under the Act that the wall, which he described as a party-wall was out of repair, & a certificate of two surveyors was given directing the party-wall to be rebuilt at the joint expense of pltf. & defts. Defts. afterwards proceeded to erect a building which would obstruct the light coming to the ancient windows of pltf.:—*Held*: the wall above defts.' building was not a party-wall.—*WESTON v. ARNOLD* (1873), 8 Ch. App. 1084; 43 L. J. Ch. 123; 22 W. R. 284, L. J.J.

Annotations:—*Folld.* *Knight v. Pursell* (1879), 11 Ch. D. 412. *Consd.* *Drury v. Army & Navy Auxiliary Co-op. Supply*, [1896] 2 Q. B. 271.

220. Wall above wall held in severalty.—Pltf. was the owner in fee simple of certain premises consisting of four dwelling rooms built over an archway & bounded on the western side by a public house belonging to deft. co. While rebuilding the public house, deft. co. pulled down part of the wall which divided pltf.'s premises from their own. The wall was an 18-inch wall from the ground to the first floor, i.e. under the archway, & 13½ inches from the first floor upwards. The

stipulated that the buildings should be continuous, with party walls common to both adjoining houses. Pltf. erected a house upon his plot, the north wall of which was built as a party wall in pursuance of the agreement. After pltf.'s house had been completed, deft. built his house upon the adjoining land, & he used a portion of the party wall. The rear portion of the wall extended beyond deft.'s building & was not used by him, but pltf. claimed that part of the wall as his own property:—*Held*: pltf. was not entitled to the full right of ownership over it.—*COVERJI LUDDA & KESSERBAI v. MORARJI PUNJA* (1885), 1 L. R. 9 Bom. 183.—*IND.*

s. Walls outside boundaries of user's land—Users of walls.—Users of party walls erected beyond the boundaries of the user's land have not, under City of Sydney Improvement Act, 1879, any title to the walls.—*HORNING v. PINK* (1913), 13 S. R. N. S. W. 529.—*AUS.*

Sect. 1.—Outside Metropolitan or London Building Acts: Sub-sects. 2 & 3, A., B. & C. (a) & (b).]

wall had been built up again by defts.:—*Held*: the wall involved was the wall of defts. being the external wall on that side of their premises; the upper part of the wall, the 13½ inch wall, was a party-wall.—**NEWTON v. HUGGINS & Co., LTD.** (1906), 50 Sol. Jo. 617.

221. External original wall raised—Whether ownership or easement.]—Pltf. & deft. were in possession of adjoining houses, both of which were ancient messuages. Pltf.'s house was considerably higher than deft.'s house, & was built up against the western wall of deft.'s house, to the height to which such western wall extended. Up to this height there was no other wall between the two houses, but pltf. alleged that on the top of the western wall, & above the roof of deft.'s house, an external wall was erected at the time of the building of pltf.'s house, forming part thereof, & supporting the roof thereof. The western wall, on the top of which the external wall had been erected, was admitted by pltf. to be the property of deft., subject to all rights & easements over the same in favour of pltf.'s house. The external wall erected on the top of deft.'s western wall was, pltf. alleged, his property. Deft. being desirous of adding to the height of his house, removed some of the stones comprising the external wall, & inserted in the holes thereby made certain beams, for the purpose of supporting a new roof to his house at a greater height than his old roof. Pltf. claimed an injunction to restrain such acts, on the ground that deft. was a trespasser. Deft. alleged that the wall was his, but admitted that pltf. had certain rights in respect to the wall which he, deft., had not in any way interfered with:—*Held*: pltf. had been in enjoyment of an easement but not in possession; & nothing had occurred to displace deft.'s original title to the wall, & the action failed.—**WADDINGTON v. NAYLOR** (1889), 60 L. T. 480.

222. Question for jury.]—Pltf. & deft. owned adjoining houses in London; a wall divided the two houses, & on deft.'s side was the back wall of one of his buildings. Pltf. produced the lease of the premises, dated in 1767, wherein the dimensions of the premises were minutely expressed by admeasurement, & which included one-half of the wall. The girder of pltf.'s house was placed into the wall to the extent of at least one-half; there had been a sort of gable roof upon this supposed party-wall, which deft. removed, & built upon what pltf. believed to be his party-wall a workshop & other conveniences overlooking pltf.'s premises, whereupon an action was brought for so building. On a motion for new trial:—*Held*: the question whether the wall was a party-wall or not was one entirely for the jury; the jury had determined it, & it must be undisturbed.—**THORNHILL v. DAVIES** (1850), 32 L. T. O. S. 261.

223. —.]—In the absence of evidence as to the ownership of a party-wall, a jury is entitled to find that it is owned by the adjoining proprietors as tenants in common.—**STANDARD BANK OF BRITISH SOUTH AMERICA (AFRICA) v. STOKES** (1878), 9 Ch. D. 68; 47 L. J. Ch. 551; 38 L. T. 672; 43 J. P. 91; 26 W. R. 492.

Annotations:—**Mentd.** Lewis & Solome v. Charing Cross, Euston, & Hampstead Ry. Co., [1906] 1 Ch. 508; Minton v. Barry (1912), 76 J. P. 441; Selby v. Whitbread, [1917] 1 K. B. 736.

t. Admission of ownership by agreement—Adjoining owners.]—**ROSEYEAR v. HALLIDAY** (1911), 19 O. W. R. 758; 2 O. W. N. 1425.—**CAN.**

PART III. SECT. 1, SUB-SECT. 3.—A.

a. Wall pulled down—No intention to rebuild—Damages.]—Taking

SUB-SECT. 3.—RIGHTS AND REMEDIES OF OWNERS IN COMMON INTER SE.

A. Trespass.

224. General rule.]—An action of trespass cannot be maintained by one part-owner of a party-wall against the other part-owner.

When the builder of two houses grants off one it is more reasonable to presume he grants the whole wall in undivided moieties than that he should leave to either party the power of cutting the wall in half (**BAILEY, J.**).—**WILTSHIRE v. SIDFORD** (1827), 8 B. & C. 259, n.; 1 Man. & Ry. K. B. 404; 6 L. J. O. S. K. B. 151; 108 E. R. 1040.

Annotations:—**Apld.** Cubitt v. Porter (1828), 8 B. & C. 257. **Mentd.** Watson v. Gray (1880), 14 Ch. D. 192; Mayfair Property Co. v. Johnston, [1894] 1 Ch. 508; Vine v. Wenham (1915), 84 L. J. Ch. 913.

225. Where rights in wall disputed.]—Pltf. brought an action of trespass against deft. for breaking, etc., a wall of pltf., bounded on the north by a workshop of deft. Deft. pleaded that the wall was not the wall of pltf. The wall was a party wall, standing partly on pltf.'s & partly on deft.'s land. The roof of deft.'s workshop rested on the top of the wall on deft.'s side, & the trespass was committed partly on pltf.'s half of the wall:—*Held*: pltf. must be understood to have brought his action for the whole wall, & even if the party-wall were treated as two walls, deft.'s part could not be considered as part of the workshop, & therefore the description in the declaration, with the abutments, comprehended the whole wall, & consequently, pltf. had not proved his property in the wall described in the declaration, & deft. was entitled to the verdict.

Deft. also pleaded, that the wall was a party-wall, partly on the land of pltf., & partly on the land of deft. A verdict having been found for the deft. on this plea:—*Qu.*: whether pltf. was entitled to judgment, *non obstante veredicto*, for so much of the party-wall as belonged to him.—**MURLY v. M'DERMOTT** (1838), 8 Ad. & El. 138; 3 Nev. & P. K. B. 356; 1 Will. Woll. & H. 226; 7 L. J. Q. B. 242; 112 E. R. 789; *sub nom.* **MURPHY v. M'DERMOTT**, 2 Jur. 806.

Annotation:—**Mentd.** Stedman v. Smith (1857), 8 E. & B. 1.

226. Where ouster from possession—Wall raised.]—Pltf. & deft. occupied adjacent plots of ground, divided by a wall, of which they were tenants in common. There was a shed in deft.'s ground contiguous to the wall, the roof of which rested on the top of the wall across its whole width. Deft. took the coping stones off the top of the wall, heightened the wall, replaced the coping stones on the top, & built a wash-house contiguous to the wall, where the shed had stood, the roof of the wash-house occupying the whole width of the top of the wall, & let a stone into the wall, with an inscription on it stating that the wall & the land on which it stood belonged to him:—*Held*: on these facts a jury might find an actual ouster by deft. of pltf. from the possession of the wall which would constitute a trespass upon which pltf. might maintain an action against deft.—**STEDMAN v. SMITH** (1857), 8 E. & B. 1; 26 L. J. Q. B. 314; 3 Jur. N. S. 1248; 120 E. R. 1.

Annotations:—**Consd.** Watson v. Gray (1880), 14 Ch. D. 192. **Refd.** Colebeck v. Girdlers Co. (1876), 1 Q. B. D. 231. **Mentd.** Cresswell v. Hedges (1862), 1 H. & C. 421; Mayfair Property Co. v. Johnston, [1894] 1 Ch. 508.

227. Wall raised & pulled down.]—If one proprietor of a party-wall adds to the height of it & the other pulls down the addition, the first may

down a wall without an intention to rebuild, being trespass, the injury done by so doing is an element for the consideration of a jury in determining

maintain trespass for pulling down so much of it as stood on the half of the wall which was erected on pltf.'s soil.—**MATTS v. HAWKINS** (1813), 5 Taunt. 20; 128 E. R. 593.

Annotations :—**Distd.** *Wiltshire v. Sidford* (1827), 8 B. & C. 259, n. **Consd.** *Cubitt v. Porter* (1828), 8 B. & C. 257. **Mentd.** *Watson v. Gray* (1880), 14 Ch. D. 192.

See, also, cases in Sub-sect. 3, B., post.

B. Total Destruction or Ouster.

228. Hedge grubbed up.]—One tenant in common of a hedge may maintain trespass against his co-tenant, if the latter grub it up. But a mere clipping of the hedge may be justified under the general issue.—**VOYCE v. VOYCE** (1820), Gow. 201, N. P.

Annotation :—**Mentd.** *Wilkinson v. Haygarth* (1846), 16 L. J. Q. B. 103.

229. Wall raised & removed.]—If one of the two tenants in common of a party-wall excludes the other from the use of it by placing an obstruction on it, the only remedy of the excluded tenant is to remove the obstruction.—**WATSON v. GRAY** (1880), 14 Ch. D. 192; 49 L. J. Ch. 243; 42 L. T. 294; 44 J. P. 537; 28 W. R. 438.

Annotations :—**Refd.** *Newton v. Huggins* (1906), 50 Sol. Jo. 617; *Mason v. Fulham Corp.*, [1910] 1 K. B. 631.

230. Wall raised—Stone inscribed with right in severalty.]—**STEDMAN v. SMITH**, No. 226, *ante*.

231. —.]—A wall divided the houses of pltfs. & defts., & it was disputed whether it belonged to pltfs. with an easement for support in defts., or to defts. with an easement of support in pltfs., or was a party-wall. Previously to 1867 pltfs.' ground-floor was laid out with a passage & a shop, the passage being next to the wall, & the floor above the passage was supported by a beam inserted in the wall. In 1867 pltfs. took away the partition, so as to extend the shop to the full breadth of the house, & fixed a new beam in substitution for the former one, extending across the whole shop, so that the entire weight of the floor above rested on the end of the beam inserted in the wall. The wall was prolonged at the rear of the house, & there pltfs. had added some courses of bricks to its height to allow of a slanting roof being placed on a shed on their side. Defs.' evidence went to show that the insertion of the new beam caused a settlement in his house, & he threatened to cut off the end of the beam & demolish the brickwork on the end of the wall. In an action to restrain the defts. from interference with the wall :—**Held** : (1) apart from the question of the ownership of the wall, an easement for support entitled the owner of the dominant tenement to put any amount of weight on the wall which did not endanger its stability; (2) the wall was either pltfs.' or was a party-wall, & in either case they had made a proper use of it.—**SHEFFIELD IMPROVED INDUSTRIAL & PROVIDENT SOCIETY v. JARVIS**, [1871] W. N. 208.

232. Wall pulled down—With intention to rebuild.]—An ancient wall separating adjoining

the amount of damages.—**JONES v. READ** (1876), 1 R. 10 C. L. 315.—**IR.**

b. Wall raised—Without notice—Removal of addition.]—One of two tenants in common of a party wall raised its height with a view to build a superstructure on his own tenement. The other tenant in common had not consented to the alteration, but had suffered no inconvenience therefrom; he sued to enforce the removal of the raised portion :—**Held** : pltf. was entitled to the relief sought.—**KANAKAYYA v. NARASIMHULU** (1895), 1 L. R. 19 Mad. 38.—**IND.**

c. Pleading.]—A count complaining

of injuries to a "party wall" ought to state either that pltf. & defts. are tenants in common of the "party wall," or that pltf. is seised of one half & defts. of the other; if it does neither it is ambiguous, & will be set aside as embarrassing.—**INGRAM v. MOONEY** (1871), 1 R. 5 C. L. 357.—**IR.**

PART III. SECT. 1, SUB-SECT. 3.—B.

232 i. Wall pulled down—Without intention to rebuild—Evidence of ouster.]—Defts. took down a portion of a party wall & it was shown that defts. did not intend to rebuild the wall as it had originally stood :—**Held** : there was

lands belonging to adjoining owners was pulled down by one of the two tenants in common, with the intention of rebuilding the same, & a new wall was built of a greater height than the old one :—**Held** : this was not such a total destruction of the wall as to entitle one of the two tenants in common to maintain trespass against the other.—**CUBITT v. PORTER** (1828), 8 B. & C. 257; 2 Man. & Ry. K. B. 267; 6 L. J. O. S. K. B. 306; 108 E. R. 1039.

Annotations :—**Consd.** *Murray v. Hall* (1849), 7 C. B. 441; *Standard Bank of British South America v. Stokes* (1878), 9 Ch. D. 68; *Adams v. Marylebone B. Co.*, [1907] 2 K. B. 822. **Apld.** *Vine v. Wenham* (1915), 84 L. J. Ch. 913. **Refd.** *Bradbee v. Christ's Hospital* (1842), 2 Dowl. N. S. 164; *Colebeck v. Girdlers Co.* (1876), 1 Q. B. D. 234; *Watson v. Gray* (1880), 14 Ch. D. 192; *Jolliffe v. Woodhouse* (1894), 10 T. L. R. 553; *Newton v. Huggins* (1906), 50 Sol. Jo. 617; *Mason v. Fulham Corp.*, [1910] 1 K. B. 631. **Mentd.** *Holmes v. Bellingham* (1859), 6 Jur. N. S. 534; *Minturn v. Barry* (1912), 76 J. P. 441.

233. Foundations temporarily undermined.]—A co-owner of a party-wall could not at common law maintain an action against the other co-owner for temporarily undermining the foundation of the wall & replacing it with a new foundation when the work was unattended with danger to the security of the wall.—**STANDARD BANK OF BRITISH SOUTH AMERICA (AFRICA) v. STOKES** (1878), 9 Ch. D. 68; 47 L. J. Ch. 554; 38 L. T. 672; 43 J. P. 91; 26 W. R. 492.

Annotations :—**Consd.** *Lewis & Solome v. Charing Cross, Euston, & Hampstead Ry. Co.*, [1906] 1 Ch. 508. **Refd.** *Selby & Whitbread*, [1917] 1 K. B. 736. **Mentd.** *Minturn v. Barry* (1912), 76 J. P. 441.

See, also, cases in Sub-sect. 3, A., ante.

C. Building and Rebuilding.

(a) Right to Take Down and Rebuild.

234. At common law.]—At common law there was no action against a tenant in common for pulling down a party-wall for the purpose of building a new one, or for repairing a party-wall, or for replacing an old foundation by a new one, even without notice to the adjoining owner.—**STANDARD BANK OF BRITISH SOUTH AMERICA (AFRICA) v. STOKES** (1878), 9 Ch. D. 68; 47 L. J. Ch. 554; 38 L. T. 672; 43 J. P. 91; 26 W. R. 492.

Annotations :—**Consd.** *Lewis & Solome v. Charing Cross, Euston, & Hampstead Ry. Co.*, [1906] 1 Ch. 508. **Refd.** *Selby v. Whitbread*, [1917] 1 K. B. 736. **Mentd.** *Minturn v. Barry* (1912), 76 J. P. 441.

235. With reasonable despatch.]—A person who seeks to knock down a party-wall for the purpose of rebuilding it has a right to do so both at common law & by statute, but it is his duty to rebuild it with reasonable despatch.—**JOLLIFFE v. WOODHOUSE** (1894), 10 T. L. R. 553; *sub nom.* **JOLIFFE v. WOODHOUSE**, 38 Sol. Jo. 578, C. A.

(b) Liability for Negligence.

236. Action by tenant of adjoining house—Delay in completion—Through fault of builder or architect.]—Pltf. the tenant of premises adjoining those of defts. had a cause of action against defts. for the breach of his duty to rebuild with reasonable

evidence of ouster by defts. of his co-tenant.—**JONES v. READ** (1876), 1 R. 10 C. L. 315.—**IR.**

PART III. SECT. 1, SUB-SECT. 3.—C (a).

234 i. At common law.]—One of two tenants in common of a ruinous wall may take it down with the intention of rebuilding it.—**JONES v. READ** (1876), 1 R. 10 C. L. 315.—**IR.**

PART III. SECT. 1, SUB-SECT. 3.—C (b).

d. Action by tenant of adjoining house—Evidence of negligence.]—**BACKUS v. SMITH** (1880), 5 A. R. 341.—**CAN.**

Sect. 1.—Outside Metropolitan or London Building Acts: Sub-sect. 3, C. (b), (c) & (d), D.]

despatch a party-wall knocked down by him:—*Held*: it was no answer to say that deft. had delegated that duty to his builder or architect. A man could not delegate a duty, & the class of cases in which an employer who had engaged a competent contractor was held not liable for the negligence of the contractor had no application. Deft. might employ a contractor if he chose, but that did not enable him to get rid of the responsibility for the breach of the duty which he owed to pltf.—*JOLLIFFE v. WOODHOUSE* (1894), 10 T. L. R. 553; *sub. nom.* *JOLIFFE v. WOODHOUSE*, 38 Sol. Jo. 578, C. A.

See, also, No. 230, *post*, & cases in Sect. 2, sub-sect. 3, B., *post*.

237. Action by owner in common of party-wall—Wall taken down by both owners.]—In an action against deft. for the negligence of his agent in pulling down the party-wall between the houses of pltf. & deft., it is a good defence to show that pltf. appointed an agent to superintend the work jointly with the deft.'s agent, & that both agents were to blame.—*HILL v. WARREN* (1818), 2 Stark. 377, N. P.

238. — Underpinning.]—The houses of pltf. & defts. were separated by a party-wall. Defts. pulled down their house:—*Held*: defts. were liable for negligence in underpinning their half of the wall, though it did not appear that they had encroached upon, or meddled in any way with pltf.'s half.—*BRADBEE v. CHRIST'S HOSPITAL* (1842), 4 Man. & G. 714; 2 Dowl. N. S. 164; 5 Scott, N. R. 79; 11 L. J. C. P. 209; 134 E. R. 294.

Annotation:—*Mentd.* *R. v. Loughton Gas Co.* (1860), 29 L. J. M. C. 118.

239. — Against builder—Unreasonable delay—Damage to fixtures & loss of business.]—In an action by one tenant in common of a party-wall against a builder employed by the other tenant, for pulling it down carelessly & rebuilding it with unreasonable delay, special damage being laid in damage to fixtures, loss to business, etc., one count being as trespass, the other being grounded on a want of due care & diligence:—*Held*: (1) the tacit assent of pltf. to the work being commenced supported a plea of leave & licence as to the count for trespass; (2) the plea was not applicable to the second count, alleging delay & negligence in rebuilding the wall, supposing that the action was maintainable.—*PFLUGER v. HOCKEN* (1858), 1 F. & F. 142, N. P.

See, also, No. 236, *ante*.

240. — Negligence of contractor.]—Applt. & resp. were owners of adjoining houses between which was a party-wall, the property of both. Applt.'s house also adjoined B.'s house & between them was a party-wall. Applt. employed a builder to pull down his house & rebuild it on a plan which involved the tying together of the new house & the party-wall between it & resp.'s house, so that if one fell the other would be damaged. In the course of the rebuilding the builder's workmen in fixing a staircase, negligently & without the knowledge of applt., cut into the party-wall

between applt.'s house & B.'s house, in consequence of which applt.'s house fell, & the fall dragged over the party-wall between it & resp.'s house & injured resp.'s house. The cutting into the party-wall was not authorised by the contract between applt. & his builder:—*Held*: (1) the law cast a duty upon applt. to see that reasonable care & skill were exercised in those operations which involved a use of the party-wall belonging to himself & resp., exposing it to the risk above mentioned; (2) applt. could not get rid of responsibility by delegating the performance to a third person, & was liable to resp. for the injury to his house.—*HUGHES v. PERCIVAL* (1883), 8 App. Cas. 443; 52 L. J. Q. B. 719; 49 L. T. 189; 47 J. P. 772; 31 W. R. 725, H. L.; *affg.* S. C. *sub nom.* *PERCIVAL v. HUGHES* (1882), 9 Q. B. D. 441, C. A. *Annotations*:—*Consd.* *Hardaker v. Idle District Council*, [1896] 1 Q. B. 335; *Cribb v. Kynoch*, [1907] 2 K. B. 548. *Refd.* *Crawford v. Consett L. B.* (1891), 55 J. P. Jo. 218; *Jolliffe v. Woodhouse* (1894), 10 T. L. R. 553; *Blake v. Woolf*, [1898] 2 Q. B. 426; *Holliday v. National Telephone Co.*, [1899] 2 Q. B. 392; *Newton v. Huggins* (1906), 50 Sol. Jo. 617. *Mentd.* *Barham v. Ipswich Dock Comrs.* (1885), 54 L. T. 23; *Black v. Christchurch Finance Co.*, [1894] A. C. 48; *Penny v. Wimbledon U. C.* (1899), 68 L. J. Q. B. 704; *Newcombe v. Yewen & Croydon R. D. C.* (1913), 29 T. L. R. 299; *Cox v. Coulson*, [1916] 2 K. B. 177; *Selby v. Whitbread*, [1917] 1 K. B. 736.

(c) Expense of Building Wall.

241. Verbal agreement to pay what is right & fair.]—A. a builder proposed to B., the occupier of the adjoining house, to build a party-wall & stated the expense. B. answered, "Very well, I expect to pay what is right & fair," & the wall was built:—*Held*: A. was entitled to recover from B. his share of the expense without reference to Building Act, 1774 (c. 78).—*STUART v. SMITH* (1816), 7 Taunt. 158; 2 Marsh. 435; 129 E. R. 63. *Annotations*:—*Mentd.* *Lambe v. Hemans* (1819), 2 B. & Ald. 467; *Collins v. Wilson* (1828), 4 Bing. 551.

242. Houses erected on building estate—Evidence of custom.]—Under a declaration for the share of the expense of building a party-wall (not within the operation of Building Act, 1774 (c. 78)), with a count for use & occupation of a wall, pltf. cannot give evidence of a custom at a particular place for parties making use of an adjoining wall to contribute to the expense; even supposing the declaration to be applicable, such evidence of custom cannot be admitted to create a contract.

On the part of pltf. a conveyance to him of a plot of building land of certain specified dimensions, part of a larger plot or piece of land divided into building lots, was put in evidence. On this plot of land pltf. had erected a house. An adjoining piece of land was subsequently purchased in trust for the erection of a certain chapel called S. Chapel. Defts. were two of the trustees of this chapel & in its erection a piece of the wall forming pltf.'s house was cut out, & the timbers of the chapel inserted. A part of the wall of pltf.'s house was also cut out from the top to the bottom, to tie in a chimney stack of the chapel. The roof of the chapel was also supported by pltf.'s wall. The total width of the wall was fourteen inches, & the cuttings were from four-and-a-half to nine inches. A surveyor was asked what the custom at C. was with reference to the use of a wall in these circumstances:—*Held*: (1) there could be

2. Action by owner in common of party wall—Against builder—Custom of the city of Dublin.]—In an action against a builder, for having taken away the lateral support of a house, & having shored up & braced a party wall in a negligent & unskilful manner, whereby pltf.'s house was destroyed, there was an averment of a custom of the city

of Dublin, & in the building trade thereof, that whenever a builder takes down a house for the purpose of erecting another house on the site thereof, it is his duty to use care & skill, & to take proper precautions as to protecting the party walls between the house taken down, & the next

adjoining house, so as to prevent the party wall from being injured. The jury found that such custom existed in the city of Dublin in the building trade:—*Held*: the custom was unreasonable.—*KEMPSTON v. BUTLER* (1861), 12 I. C. L. R. 516; 6 Ir. Jur. 410.—*IR.*

no question of custom, but only a question of contract; (2) as the whole of the wall of pltf.'s house appeared to be included within the abutments, his remedy was by an action of trespass.—*DEE v. CORNELL* (1850), 15 L. T. O. S. 523.

243. — Wall used by adjoining owner.]—A statement of claim in substance alleged that pltf. purchased a building site of H., & covenanted to erect thereon houses according to a certain specification. The specification, in providing for the erection of a party-wall, declared that the purchaser first building a party-wall was to be repaid by the purchaser of the adjoining site one-half of the cost of such party-wall, the value to be determined by the vendor's architect. The statement of claim further alleged that pltf. erected a party-wall, & that deft. afterwards became possessed of an adjoining site on the terms that he should build in accordance with a similar specification, & should observe, perform, & abide by all the terms of the specification relating to the party-wall; that deft. built a house on the adjoining site, & made use of a moiety of the party-wall erected by pltf., & promised to pay pltf. one-half of the value (which had been ascertained by the vendor's architect), & one-half of the architect's fee, but had not paid:—*Held*: the statement of claim was good, deft. having made use of the party-wall, knowing that money was to be paid to some one for the use thereof, & having afterwards promised to pay pltf.—*CHRISTIE v. MITCHISON* (1877), 36 L. T. 621.

244. — — —.]—Where an estate has been laid out in plots for building upon the condition (*inter alia*) that the purchaser of a plot first building a party-wall is to be repaid by the purchaser of the adjoining plot one-half of the value of the party-wall, & the original purchasers of plots sell their plots, either built upon or vacant, to other purchasers, an implied contract arises between these sub-purchasers of adjoining plots that, as between them, the sub-purchaser of a vacant plot, adjoining a plot on which a house has already been built by an original purchaser, when he builds his house up to the house already built & makes use of its gable-walls, he shall repay the then owner of the house, & not the original builder, the half cost of the party gable-wall.—*IRVING v. TURNBULL*, [1900] 2 Q. B. 129; 69 L. J. Q. B. 593, D. C.

245. Wall erected half on land of adjoining owner.]—Deft. was a builder & the owner of three contiguous building sites. He sold the middle one to pltf. & one of the end ones to another purchaser, retaining the third for himself. The

agreement for sale to pltf. contained a description of the property & a plan by which it appeared that the length of the pltf.'s frontage was 20 feet, on his plot a house was to be erected by deft. to whom he was to pay £770. About a year after the erection of this house & of a similar one on the other site which he had sold deft. built a house on his own site making use of the gable end wall of pltf.'s house. On account of this use pltf. obtained judgment for £21 7s. It was shown that pltf.'s frontage extended to the middle of the wall only, which being a 9-inch wall stood 4½ inches on his ground & 4½ inches on deft.'s ground:—*Held*: a good & reasonable custom had been proved that deft. should contribute to the expense of the wall which he used notwithstanding it was built half on his own land, there being nothing in the agreement to exclude the erection.—*ROBINSON v. THOMPSON* (1890), 89 L. T. Jo. 137, D. C.

246. — — —.]—The proprietor of two adjoining building plots erected a house upon one of them, building the whole gable half upon one plot & half upon the other plot. He afterwards conveyed the plot with the house upon it to A. The mutual gable, resting partly on the two plots, was described in the conveyance as a mutual gable. He subsequently sold the other plot, & the purchaser proceeded to erect a house upon it, making use of the mutual gable. In the letters of sale to A. the vendor said: "The unused half of the gable & boundary walls is not included in the offer." In an action by A.'s successor against the purchaser of the second plot for half the cost of the mutual gable wall, deft. relied upon the words of the letters as showing that A. had not acquired the claim for recompense for the unused half of the gable:—*Held*: A.'s successor was entitled to claim from the purchaser of the second plot one-half of the value of the mutual gable, & there was no inconsistency between the letters of sale & the words of the conveyance.—*BAIRD v. BELL*, [1898] A. C. 420, H. L.

(d) *Expense of Rebuilding Wall.*

See cases *infra*, & in Sect. 2, sub-sect. 3, B.,

D. Encroachment.

247. Action by reversioner.]—Pulling down an old party-wall, and building one longer & higher, the substituted wall encroaching but the breadth of half a brick, is yet, in point of law, an injury of such a permanent nature as to give a right of action to the reversioner.—*HARDING v. HARRISON* (1827), 5 L. J. O. S. K. B. 249.

PART III. SECT. 1, SUB-SECT. 3.—C (c).

243 i. Houses erected on building estate—Wall used by adjoining owner.]—Pltf., a tenant of P., the owner also of adjoining land, was instructed by P. to erect a party wall half on either land which he did; subsequently the adjoining land was leased by P. to deft. who built a house on it, making use of the party wall:—*Held*: pltf. could recover from deft. half the cost of erecting the wall.—*DEARIN v. COYELL* (1861), 4 Nfld. L. R. 556.—*NFLD.*

g. — Action of assumpsit.]—Pltf. built on his land in St. John's in the year 1892; deft., owner of the adjoining piece of land, built on his land in the year 1895. In an action to recover a moiety of the costs of building the party walls upon an implied promise to pay:—*Held*: in the circumstances an action of *assumpsit* would not lie.—*HEARN v. CLAPP* (1900), 8 Nfld. L. R. 358.—*NFLD.*

h. — When right of action for contribution arises.]—Pltf. sued to recover from deft. half the cost of a

party wall. Pltf. & deft. were lessees of adjoining pieces of land under agreements made with the same lessor. By these agreements pltf. & deft. respectively agreed to build houses upon the pieces of land; both agreements contained the following clauses: (1) "The buildings to be continuous with party walls common to both adjoining houses." (2) "All disputes regarding the cost of party walls to be decided by the Govt. surveyor, whose decision shall be binding on both parties." Pltf. caused the northern wall of his building to be built as a party wall, & it was used by deft. as the southern wall of the building erected by him. He did not use the rear portion of the wall. Pltf. demanded payment of half the cost of that portion which deft. refused to pay. Pltf. subsequently sued therefor:—*Held*: until the award of the Govt. surveyor was made, no cause of action for the moiety of the cost arose.—*COOVERJI LUDHA v. BHIMJI GIRDIHAR* (1882), 1 L. R. 6 Bom. 528.—*IND.*

245 i. Wall erected half on land of

*adjoining owner—Covenant to share cost—Whether running with land.]—*C. & deft. owned adjacent lots, & C. being about to build on his lot covenanted to erect a party wall on the dividing line & equally on both lots, deft. covenanting to pay for the rear portion thereof whenever he should require to use it. C. conveyed his lot to pltfs. with the usual statutory covenants, & pltfs. entered into possession. On deft. making use of the rear part of the party wall he paid what was due to C. In an action by pltfs. against deft. to recover the sum due in respect of the wall:—*Held*: the right to the sum stipulated to be paid for the wall under the covenant with C. had not passed under the conveyance by C. to pltfs.—*KENNY v. MACKENZIE* (1885), 12 A. R. 346.—*CAN.*

PART III. SECT. 1, SUB-SECT. 3.—D.

k. Wall raised—Pleading.]—Pltf.'s predecessor in title & deft. agreed that a wall should be built on the site of an old hedge, at the joint expense of the

Sect. 1.—Outside Metropolitan or London Building Acts: Sub-sect. 3, D., E., F. & G.; sub-sect. 4.]

248. ——The occupiers of a house & garden, No. 37, pulled down & rebuilt a wall which separated the garden from that of the adjoining house, No. 36, & in doing so they trespassed on the garden of No. 36 by placing in the soil of it foundations & footings of the new wall extending further into that garden than did those of the old wall. The house No. 36 was in the occupation of a tenant under a lease:—*Held*: the trespass being of a permanent nature, the owners of the reversion in fee in No. 36 could, although the tenant made no complaint, maintain an action in respect of the trespass.—*MAYFAIR PROPERTY Co. v. JOHNSTON*, [1894] 1 Ch. 508; 63 L. J. Ch. 399; 70 L. T. 485; 38 Sol. Jo. 253; 8 R. 781.

Annotations:—Mentd. *Shelfer v. City of London Electric Lighting Co.*, *Meux's Brewery Co. v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287; *Riley v. Halifax Corpn.* (1907), 71 J. P. 428.

E. Repair.

249. Prevention of nuisance.]—A declaration stated, that a certain messuage was in the occupation of S. as tenant to pltf., the reversion thereof belonging to pltf.; & that deft. was owner & proprietor of another messuage, & by reason thereof as such owner & proprietor of such messuage ought to have repaired & kept repaired in a substantial manner the said messuage secondly mentioned. Breach, non-repair by deft. Plea, that the said messuages were contiguous & abutting on each other, & were divided by a party-wall, whereof pltf. was seised of an undivided moiety; that the wall was in a ruinous state, & being parcel of the messuage in the declaration secondly mentioned, had fallen on the first-mentioned messuage. Replication, traversing that the wall was a party-wall, & that pltf. was seised thereof:—*Held*: the declaration was bad, there being no obligation towards a neighbour on the owner of a house, merely as owner, to repair or keep it in repair in a substantial manner, the whole of his obligation being to prevent it from becoming a nuisance.—*CHAUNTLER v. ROBINSON* (1849), 4 Exch. 163; 19 L. J. Ex. 170; 14 L. T. O. S. 107; 154 E. R. 1166.

Annotations:—Consd. *Todd v. Flight* (1860), 9 C. B. N. S. 377; *Ross v. Fedden* (1872), 26 L. T. 966. *Refd.* *Gandy v. Jubber* (1864), 5 B. & S. 78; *Hargroves, Aronson v. Hartop* (1905), 74 L. J. K. B. 233. *Mentd.* *Solomon v. Vintners' Co.* (1859), 4 H. & N. 585.

F. Support and Other Easements.

250. Adjoining premises extending over party wall.]—Defts. were owners of two houses in a street, numbered 38 & 40, & of a gateway under No. 40 & adjoining No. 38. In 1857 they demised No. 38 for a term of twenty-one years, the lease containing a covenant by the lessee to repair all walls & party-walls belonging to the premises. In 1865 they granted a lease to pltf. of No. 40 for a term of eleven years subject to a similar covenant to repair walls & party-walls. The wall on the side of the gateway separating it from No. 38 was a party-wall between the gateway & the house No. 38 to the height of the first floor. Pltf.'s house, No. 40, was built so as to extend in part over the top of the gateway & to rest upon this

party-wall between the gateway & No. 38, & to be supported by it. Pltf.'s covenant to repair did not extend to this wall, & there was no covenant by defts. to keep it in repair. In 1874, it was discovered that the walls of that part of No. 40 which was above the gateway were giving way. The damage was owing to the failure of support from the party walls, which had bulged in consequence of the pressure upon it from pltf.'s premises:—*Held*: there was no implied covenant on the part of defts. to support pltf.'s premises, although it might be an answer to an action upon pltf.'s covenant to repair, that the repair had been rendered impossible by the neglect of some precedent obligation on the part of defts.—*COLEBECK v. GIRDLEERS Co.* (1876), 1 Q. B. D. 234; 45 L. J. Q. B. 225; 34 L. T. 350; 40 J. P. 596; 24 W. R. 577.

251. Grant of moiety of wall—Defective flue.]

—Prior to 1886 pltf.'s predecessor in title built C. House on his own land with a wall to the west, in which were flues & fireplaces used only for C. House, & on the west side flues & fireplaces not so used, but which might be used for any adjoining house built on an adjoining & then vacant piece of land belonging to deft. In 1886 deft., being about to build a house on his land, agreed in writing with pltf.'s predecessor for the sale to deft. of the western half of the western wall of C. House, that wall being treated as divided from top to bottom, throughout its whole length, by a vertical plane in the centre thereof, which plane, if it had been a physical division, would have divided half of each of the flues, including those used for C. House, from the other half. Deft. then built on his land a house called G., adjoining C. House, & so connected with it that the fireplaces on the west side & the flues connected with them were used for the purposes of G., as had been intended. Pltf. purchased C. House in 1900, & subsequently the flue connected with deft.'s dining-room became defective, in the sense that by reason of cracks which developed in the surrounding masonry smoke found its way therefrom through pltf.'s half of the party-wall into his rooms & occasioned damage. The cracks were caused by a subsidence in deft.'s house, but the cause of the subsidence was undetermined, & there was no evidence of negligence by deft. in building his house or otherwise, or want of reasonable precaution:—*Held*: deft. was not liable for the damage.

Where a man grants a divided moiety of an outside wall of his house with intent to make it a party-wall between that house & a house to be built on his neighbour's adjoining land, the law implies the grant & reservation, in favour of the grantor & grantee respectively, of such easements as may be necessary to carry out the common intention as to the user of the wall, the nature of the easements varying with the particular circumstances of each case. Subject to such easements, the owner of each half may deal with it in such manner as he pleases, & if he uses it only for the contemplated purposes & without negligence or want of reasonable care & precaution he is not liable for any nuisance or inconvenience occasioned by such user.—*JONES v. PRITCHARD*,

parties, for the purpose of separating their premises, & that each party might at any time raise the wall at his own expense. In an action brought by pltf. against deft., for engrossing to himself the use of this wall by building upon it, pltf. stated in his declaration that he was possessed of one undivided

moiety of the wall, deft. of the other. The jury were directed that if they believed that the ground upon which this wall was built was the exclusive property of deft., they should find a verdict for deft.:—*Held*: this direction was proper.—*HUTCHINSON v. MAINS* (1832), Alc. & N. 155.—*IR.*

PART III. SECT. 1, SUB-SECT. 3.—E.

1. Necessity of notice.]—An adjoining owner wishing to repair a party wall must give the other adjoining owner notice before so doing.—*CROSSIN v. HUGLAND* (1897), 31 L. T. Jo. 418.—*IR.*

[1908] 1 Ch. 630 ; 77 L. J. Ch. 405 ; 98 L. T. 386 ; 24 T. L. R. 309.

Annotations :—**Distd.** Pwllbach Colliery Co. v. Woodman, [1915] A. C. 634. **Mentd.** Phelps v. City of London Corp., [1916] 2 Ch. 255.

See, also, Sub-sect. 3, C. (b), *ante*, & generally EASEMENTS & PROFITS À PRENDRE.

G. Partition.

252. Tenants in common—31 Hen. 8, c. 1 ; 32 Hen. 8, c. 32 ; Partition Act, 1868 (c. 40).]—Notwithstanding the abolition of the writ of partition, one of two tenants in common of a garden party-wall is, under stats. 31 Hen. 8, c. 1, & 32 Hen. 8, c. 32, entitled, as of right, against the wish of the other tenant in common, to compel the partition of the party-wall, subject to the provisions for sale contained in Partition Act, 1868.—**MAYFAIR PROPERTY CO. v. JOHNSTON**, [1894] 1 Ch. 508 ; 63 L. J. Ch. 399 ; 70 L. T. 485 ; 38 Sol. Jo. 253 ; 8 R. 781.

Annotations :—**Mentd.** Sheller v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co., [1895] 1 Ch. 287. **Riley v. Halifax Corp.** (1907), 71 J. P. 428.

See, generally, PARTITION.

SUB-SECT. 4.—RIGHTS AND REMEDIES OF OWNERS IN SEVERALTY.

253. Whether right to pull down wall.]—If one erects a wall upon his own land, & the land of his neighbour, & the neighbour pulls down the wall upon his land, & thereupon all the wall falleth down, this is lawful (*per* CUR.).—**WIGFORD v. GILL** (1591), Cro. Eliz. 269 ; 78 E. R. 524.

Annotation :—**Refd.** Wiltshire v. Sidford (1827), 6 L. J. O. S. K. B. 151.

254. May not erect half side wall on neighbour's land.]—The builder of a house on a new foundation may not erect half his flank or side wall on his neighbour's vacant ground.—**BARLOW v. NORMAN** (1774), 2 Wm. Bl. 959 ; 96 E. R. 566.

255. Pulling down adjoining building—Injury due to negligence—Failure to take precautions.]—In an action for an injury to pltf.'s premises, in consequence of the pulling down of deft.'s house adjoining, pltf. may recover damages for any injury actually caused by the negligence of deft., although he has not himself used those precautions which it was his duty to adopt against such injury.—**WALTERS v. PFEIL** (1829), Mood. & M. 362, N. P. *Annotation* :—**Distd.** Angus v. Dalton (1877), 3 Q. B. D. 85.

256. — Whether right to notice & shoring.]—In an action by a reversioner of a house in Cheapside against the owner of the adjoining house, for pulling it down without shoring up pltf.'s

house, in consequence whereof it was impaired, & in part fell down :—**Held** : (1) upon this declaration pltf. could not recover on the ground of deft.'s not having given notice that he was about to pull down his house, that not being alleged as a cause of the injury ; (2) as pltf. had not alleged or proved any right to have his house supported by deft.'s, he was bound to protect himself by shoring, & could not complain that deft. had neglected to do it.—**PEYTON v. LONDON CORPN.** (1829), 9 B. & C. 725 ; 109 E. R. 269.

Annotations :—**Distd.** Brown v. Windsor (1830), 1 Cr. & J. 20. **Consd.** Humphries v. Brogden (1850), 12 Q. B. 739 ; Rogers v. Taylor (1858), 2 H. & N. 828 ; Angus v. Dalton (1878), 4 Q. B. D. 162. **Refd.** Solomon v. Vintners' Co. (1859), 4 H. & N. 585. **Mentd.** Jeffries v. Williams (1850), 5 Exch. 792.

257. Pulling down adjoining wall—Duty to give notice.]—The mere circumstance of juxtaposition does not render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall ; nor, if he be ignorant of the existence of the adjoining wall, as where it is underground, is he bound to use extraordinary caution in pulling down his own.—**CHADWICK v. TROWER** (1839), 6 Bing. N. C. 1 ; 8 Scott, 1 ; 8 L. J. Ex. 286 ; 133 E. R. 1, Ex. Ch.

Annotations :—**Consd.** Bradbee v. Christ's Hospital (1842), 2 Dowl. N. S. 164. **Expld.** Humphries v. Brogden (1850), 12 Q. B. 739. **Consd.** Bonomi v. Backhouse (1858), E. B. & E. 622 ; Fairbrother v. Bury R. S. A. (1889), 37 W. R. 544. **Expld.** Southwark & Vauxhall Water Co. v. Wandsworth Board of Works, [1898] 2 Ch. 603. **Refd.** Bibbey v. Carter (1859), 7 W. R. 193 ; Sub-Marine Telegraph Co. v. Dickson (1864), 15 C. B. N. S. 759 ; Fletcher v. Rylands (1866), L. R. 1 Exch. 265 ; Dalton v. Angus (1881), 6 App. Cas. 740. **Mentd.** Metcalfe v. Hetherington (1855), 11 Exch. 257.

258. Wall broken into—Action of trespass.]—Where a wall, not being a party-wall, of the owner of a house is broken into, & made use of in the erection of an adjoining building, the remedy, in the absence of any contract between the parties, is by an action of trespass.—**DEE v. CORNELL** (1850), 15 L. T. O. S. 523.

259. Damage to vault.]—Damage having been done by the wrongful acts of a contractor or his workmen, employed under a contract & specification, to a neighbour's vault :—**Held** : in the circumstances, both the employer & contractor were liable for it, & pltf. was entitled to judgment, with costs against both defts.—**LEMAITRE v. DAVIS** (1881), 19 Ch. D. 281 ; 51 L. J. Ch. 173 ; 46 L. T. 407 ; 46 J. P. 324 ; 30 W. R. 360.

Annotations :—**Folld.** Selby v. Whitbread, [1917] 1 K. B. 736. **Mentd.** Tone v. Preston (1883), 24 Ch. D. 739 ; Simpson v. Godmanchester Corp., (1895), 64 L. J. Ch. 837.

260. Whether right to make openings in wall.]—Two houses belonged originally to one owner. The original owner, when one house was built &

PART III. SECT. 1, SUB-SECT. 4.

253 i. Whether right to pull down wall.]—**STERLING BANK v. ROSS** (1910), 17 O. W. R. 284.—**CAN.**

m. Substantial user of adjoining wall—Damages.]—Deft. built a house to the extreme extent of his boundary right up to pltf.'s house, of whose gable deft. availed himself :—**Held** : deft. had made substantial use of pltf.'s wall, & pltf. was entitled to damages.—**EAGAN v. BRENNAN** (1857), 4 Nfld. L. R. 165.—**NFLD.**

n. Erection on neighbour's land.]—Deft. built a wall between his land & that of pltf., of which a portion was on pltf.'s property. At the time the wall was erected pltf. said to deft.'s builder : " You're building on my land." He said further that he had no objection, but, " I caution you that in the case of my selling, the purchaser may put you to trouble " :—

Held : this was a qualified license justifying the erection of the wall, but going no further.—**PETERS v. FRECKER** (1872), 9 N. S. R. 67.—**CAN.**

o. Whether right to build into wall.]—**DE v. ALLAN** (1911), 18 O. W. R. 749 ; 2 O. W. N. 787.—**CAN.**

p. Buildings resting against neighbour's wall—Removal—Damages.]—Where deft. put up buildings on his property, but rested them against his neighbour's wall :—**Held** : he had committed a trespass for which he was liable ; but that, inasmuch as the buildings had stood for some years without objection, their removal would not be ordered, & pltf. must be restricted to damages.—**MYBURGH v. JAMISON** (1861), 4 S. S.—**S. AF.**

258 i. Wall broken into—& erections made thereon—Damages.]—Deft. had erected a wall upon the upper part of the wall of pltf.'s store, & pierced holes

therein. The predecessor in title of pltf.'s property granted by deed to deft. the privilege of piercing the wall, & erecting a wall above it to form the wall of deft.'s building ; this deed was void against pltf. for non-registration :—**Held** : the continuance of illegal burdens on pltf.'s property since the fee had been acquired by him were fresh & distinct trespasses against him for which he could recover damages.—**ROSS v. HUNTER** (1882), 7 S. C. R. 289.—**CAN.**

258 ii. Injunction.]—**BROOKE v. MCLEAN** (1884), 5 O. R. 209.—**CAN.**

260 i. Whether right to make openings in wall—Window—Injunction.]—Deft. raised the height of a party wall beyond that of pltf.'s building without his consent, & subsequently opened a window through the wall so raised overlooking pltf.'s premises :—**Held** :

Sect. 1.—Outside Metropolitan or London Building Acts: Sub-sect. 4. Sect. 2: Sub-sects. 1, 2 & 3, A. & B.]

the other was all but finished, the roof being in the course of being put on, sold the unfinished house to pltf. At that time a door led through the party wall, & a clause in the conveyance provided that this door should be blocked up. Deft. bought the other house, & then, owing to unpleasantness as to some windows, bored two holes about two inches square into pltf.'s dining-room. In an action for trespass brought by pltf.:—*Held*: such a right to bore holes could not exist, & the clause in the conveyance did not, on the principle *expressio unius exclusio alterius*, give deft. a right to open any other hole than the door in the wall.—*WELBANK v. WEATHERHEAD* (1892), 8 T. L. R. 243, D. C.

SECT. 2.—WITHIN METROPOLITAN OR LONDON BUILDING ACTS.

NOTE.—*The above Acts are Fires Prevention (Metropolis) Act, 1774 (c. 78), Metropolitan Building Act, 1855 (c. 122), & London Building Act, 1894 (c. cxxiii.), referred to in this sect. as 1774 Act, 1855 Act & 1894 Act respectively.*

See, generally, METROPOLIS.

SUB-SECT. 1.—DEFINITION OF PARTY-WALL.

261. Buildings against both sides of wall.]—Pltf. was the owner of a boundary wall built on his own land, against which he had built some closets, & deft., his adjoining neighbour, had recently built a substantial structure:—*Held*: so far as these buildings extended against both sides of the wall, it was a "party-wall" within 1855 Act, & deft. was entitled, on giving the proper notices under the Act, to take down such part as might be necessary for the purpose of necessary rebuilding.—*KNIGHT v. PURSELL* (1879), 11 Ch. D. 412; 48 L. J. Ch. 395; 40 L. T. 391; 43 J. P. 622; 27 W. R. 817.

262. Wall rebuilt to greater height than adjoining house.]—In 1884 pltf. served on deft. a notice under 1855 Act that he intended to pull down & rebuild the party-wall there existing between the houses of pltf. & deft. Pltf. then rebuilt the wall partly on his own & partly on deft.'s land to a greater height than deft.'s house. In 1885 deft. served on pltf. a party-wall notice & in pursuance of that notice pulled down his own house & erected a new house, carrying it to a greater height, & for that purpose he cut into & used the external wall which had been previously raised by pltf. The wall was built for half its thickness upon deft.'s land who contended that it was a party-wall. Pltf. contended it was an external wall & that deft. was not entitled to use it without paying for the portion of the wall so cut into & used by him:—*Held*: there were no grounds for the liability for which pltf. contended.—*WILLIAMS v. BULL* (1890), *Times*, Feb. 15th.

263. Projecting wall.]—Pltf. was the owner of the middle house of three terrace houses built symmetrically with reference to the middle house. Defts. held a building lease of one of the wing houses, which they had pulled down for the purpose of rebuilding. Pltf.'s front wall projected beyond the front of the wing houses. The edge

of the projection towards defts.' house was in a line with the face of the party-wall inside defts.' house. On a motion on the part of pltf., among other things, to restrain defts. interfering with the face of the projecting part of the front wall, which defts. contended was part of the party-wall:—*Held*: no part of the projecting front wall was a party-wall within 1855 Act.—*JOHNSTON v. MAYFAIR PROPERTY CO.*, [1893] W. N. 73; *subsequent proceedings, sub nom. MAYFAIR PROPERTY CO. v. JOHNSTON*, [1894] 1 Ch. 508.

264. Not necessarily for whole height—1894 Act, s. 75.]—A building, to which the above sect. would apply, was proposed to be erected, some portions of it being of a much greater height than others, & the walls which divided the higher from the lower portions were to be carried up above the roof of the lower so as to form the outside walls of the higher:—*Held*: the sect. only made a wall a party-wall in respect of its dividing one portion of the building from another; so that the walls in question would cease to be party-walls when carried up above the roof of the lower portions of the proposed building.—*DRURY v. ARMY & NAVY AUXILIARY CO-OPERATIVE SUPPLY*, [1896] 2 Q. B. 271; 65 L. J. M. C. 169; 74 L. T. 621; 60 J. P. 421; 44 W. R. 560; 12 T. L. R. 404; 40 Sol. Jo. 545, D. C.

Annotation:—*Reid. New v. Huggins* (1906), 50 Sol. Jo. 617.

265. — 1894 Act, ss. 5 (16), 58.]—*Held*: a wall may be a party-wall for such part of its height as is so used, & cease to be a party wall for the rest of its height.—*LONDON, GLOUCESTERSHIRE & NORTH HANTS DAIRY CO. v. MORLEY & LANCELEY*, [1911] 2 K. B. 257; 80 L. J. K. B. 908; 104 L. T. 773; 75 J. P. 437; 9 L. G. R. 738, D. C.; *subsequent proceedings*, [1911] 2 K. B. 1143, C. A.

266. Whether user makes wall a party-wall—Wall built entirely on demised land.]—Pltfs. were lessees from defts. of a plot of land which at the date of the lease was partially covered with buildings & was occupied by defts. together with the adjoining property as business premises, & the lease contained a covenant by pltfs. to build on the demised land a warehouse according to approved plans which showed that the back wall of the warehouse was to contain certain windows on the first floor overlooking defts.' premises. Defts., in pursuance of a collateral agreement to clear the demised land of buildings, demolished one end of a cart shed which stood partly on the demised land & partly on the land reserved by defts., but they left remaining certain stanchions & roof beams, which slightly projected over pltfs.' boundary & were eventually built into the back wall of the warehouse under a verbal agreement between pltfs.' architect & defts. The architect was employed to superintend the building of the warehouse in accordance with the approved plans, & the agreement was made without the express authority or knowledge of pltfs. The wall was built entirely on the demised land. Subsequently pltfs. were called upon by the local authority to block up the windows in the back wall on the ground that the building in of the stanchions & roof beams had converted it into a party-wall within 1894 Act. In an action for an injunction to restrain the defts. from using this wall as a party-wall:—*Held*: (1) the agreement was beyond the scope of the architect's

piercing the window was an unauthorised user of the party wall, & pltf. was entitled to an injunction to restrain further continuance of such window.—*SPROULE v. STRATFORD* (1882), 1 O. R. 335.—CAN.

260 II. S. P. BRENNAN v. ROSS (1910), 16 O. W. R. 583.—CAN.

t. Wall raised—Without consent—Custom of burgh.]—*Held*: a particular custom of a burgh, allowing proprietors of a mutual wall to increase

at will the height of their own half, without consent of the co-terminous proprietor is contrary to the general principles of law, & evidence thereof is inadmissible.—*SANDERS v. DUDGEON* (1832), 4 Sc. Jur. 234.—SCOT.

authority; (2) the user of the wall by defts. as a party-wall constituted a derogation from their grant & a trespass, & defts. must be ordered to disconnect their buildings from the wall.—**BETTS (FREDERICK) LTD. v. PICKFORDS LTD.**, [1906] 2 Ch. 87; 75 L. J. Ch. 483; 94 L. T. 363; 54 W. R. 476; 22 T. L. R. 315.

267. —Originally built for other purposes.]—Held: a wall which has become a party structure within 1894 Act, although originally built for other purposes & still sufficient for those purposes, may from dampness or other causes be as a party structure defective within s. 88.—**MINTURN v. BARRY**, [1911] 2 K. B. 265; 80 L. J. K. B. 802; 104 L. T. 635; 75 J. P. 330; 27 T. L. R. 352; 55 Sol. Jo. 385; 9 L. G. R. 611, D. C.; *subsequent proceedings*, [1912] 3 K. B. 510, C. A.; *sub nom.* **BARRY v. MINTURN**, [1913] A. C. 584, H. L.

SUB-SECT. 2.—HOW THICKNESS FOR NEW WALL DETERMINED.

268. According to height & width—"Topmost story."—Held: a "topmost story" within 1855 Act, Sched. I., rr. 5, 6 need not necessarily be contained within four vertical walls; floors or rooms inclosed on three sides by vertical walls & in front by the sloping roof of the house were stories within the schedule & rules.—**FOOT v. HODGSON** (1890), 25 Q. B. D. 160; 59 L. J. Q. B. 343; 55 J. P. 116, D. C.

SUB-SECT. 3.—RIGHTS AND LIABILITIES OF ADJOINING OWNERS.

A. Who is an Adjoining Owner.

269. Tenant in possession—Under agreement for lease.]—A tenant in possession, having an equitable interest only under an agreement for a lease for a term, is, in equity, an adjoining owner under 1855 Act, & three months' notice must be given to him before any alterations affecting his premises can be commenced by his neighbour, under that Act.—**COWEN v. PHILLIPS** (1863), 33 Beav. 18; 8 L. T. 622; 9 Jur. N. S. 657; 11 W. R. 706; 55 E. R. 272.

*Annotations:—***Consd.** **Hunt v. Harris** (1865), 19 C. B. N. S. 13. **Fold.** **Fillingham v. Wood**, [1891] 1 Ch. 51.

270. —.]—A tenant in possession of part of a house under an agreement for a greater interest than as tenant from year to year is an adjoining owner, under 1855 Act, & entitled to be served with three months' notice under s. 85 (1), before any alterations affecting his premises can be commenced by the building owner; in such a case service of a three months' notice on the person in receipt of the whole of the rents of the tenement is not sufficient.—**FILLINGHAM v. WOOD**, [1891] 1 Ch. 51; 60 L. J. Ch. 232; 64 L. T. 46; 39 W. R. 282; 7 T. L. R. 66.

271. —.]—"Owner" in 1894 Act, ss. 5 (20), (32), 90 as therein defined, includes a person who has entered upon land & erected buildings under an agreement for a lease, although no lease has been executed & although the agreement is expressed not to operate as a demise but to give only a right to enter upon the premises for the purpose of performing the agreement. A person in that position is entitled as an adjoining owner to receive from an adjacent building owner the notice & particulars of proposed works required by s. 90, & it is not sufficient to give notice to the intending lessor.—**LIST v. THARP**, [1897] 1 Ch. 260; 66 L. J. Ch. 175; 76 L. T. 45; 61 J. P. 248; 45 W. R. 243; 13 T. L. R. 149; 41 Sol. Jo. 188.

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*Annotations:—***Consd.** **Crosby v. Alhambra Co.**, [1907] 1 Ch. 295. **Reid.** **Spiers v. Troup** (1915), 84 L. J. K. B. 1986.

272. Leaseholder—Portions of premises sublet.]—A person who has a long lease of a house at a small ground rent, & sublets it in portions to different tenants at a rack-rent, either on lease or as tenants from year to year, is the owner of the house within the sects. of 1855 Act, which apply to the repair of dangerous party structures.—**HUNT v. HARRIS** (1865), 19 C. B. N. S. 13; 6 New Rep. 63; 34 L. J. C. P. 249; 12 L. T. 421; 11 Jur. N. S. 485; 13 W. R. 742; 144 E. R. 689.

*Annotations:—***Expld.** **Fillingham v. Wood**, [1891] 1 Ch. 51. **Consd.** **Wigg v. Lefevre** (1892), 8 T. L. R. 493. **Reid.** **Spiers v. Troup** (1915), 84 L. J. K. B. 1986.

273. —.]—The owners of a house in London made an addition to it which involved the raising of the party-wall between it & the adjoining house. They afterwards let the house to applt. for twenty-one years. Some time after, resp., the owner of the adjoining house, pulled it down & rebuilt it, thereby using the party-wall to a greater extent than before the alteration. Resp. having given notice to applt. of his intention to do the work under 1894 Act, s. 90, applt. not having consented thereto, a difference thereupon arose between resp., as building owner, & applt., as adjoining owner, within s. 90. Arbitrators having been appointed to settle that difference under s. 91, they by their award (*inter alia*) directed payment by resp. to applt. of a sum of money in respect of the extended use by resp. of the party-wall:—**Held:** applt. was not, as tenant of the first-mentioned house, entitled to any such payment.—**Re STONE & HASTIE**, [1903] 2 K. B. 463; 72 L. J. K. B. 846; 89 L. T. 353; 68 J. P. 44; 52 W. R. 130; 19 T. L. R. 654, C. A.

*Annotations:—***Consd.** **Adams v. Marylebone B. C.** (1906), 75 L. J. K. B. 995. **Distd.** **Mason v. Fulham Corpn.** (1910), 102 L. T. 188. **Reid.** **Leadbetter v. Marylebone Corpn.**, [1904] 2 K. B. 893; **Selby v. Whitbread**, [1917] 1 K. B. 736.

274. — Whole of premises sublet.]—Pltf. owned one of two adjoining houses, & deft. was lessee of the other for 35 years, but had sublet for 14 years to sub-tenants, who were in occupation. A party-wall having been pulled down & rebuilt by pltf., under a dangerous structure notice served on him by the London County Council, he brought an action against deft. to recover the moiety of the cost of rebuilding the party-wall:—**Held:** deft. was not rightly sued as owner under 1855 Act.—**WIGG v. LEFEVRE** (1892), 8 T. L. R. 493.

275. Tenant at will—Under agreement for lease.]—A person who has entered into an agreement for a lease under which he is to be a tenant at will until the granting of the lease, though with certain rights superadded, is not an owner within 1894 Act, s. 5 (29).—**ORF v. PAYTON** (1904), 69 J. P. 103; 21 T. L. R. 90; 3 L. G. R. 126. *Annotation:—***Reid.** **Spiers v. Troup** (1915), 84 L. J. K. B. 1986.

276. Persons having an interest—Other than tenants.]—"Adjoining owner" in 1894 Act, s. 90, as defined by s. 5 (20), (32), means every person holding an interest in the adjoining premises other than tenants from year to year or at will. A building owner must serve his statutory notice under s. 90 upon every such person; except that, where a class of persons, such as joint tenants or tenants in common, are entitled to a particular interest in the adjoining premises, notice on one of the class is sufficient.—CROSBY v. ALHAMBRA Co., LTD.**, [1907] 1 Ch. 295; 76 L. J. Ch. 176.**

B. Liability for Expenses.

277. To building owner—Whether rebuilt half on each side of boundary—Question for jury.]—

Sect. 2.—Within Metropolitan or London Building
l. 3, B.; Sub-sect. 4, A. & B.]

To a sufficient account of the expenses on rebuilding a party-wall, delivered in pursuance of 1774 Act, s. 41, & a sufficient demand of payment referring to that account, the defence relied on was that the party-wall was not built half on each side of the boundary, as required by s. 14 of the Act:—*Held*: the question for the jury was, whether it were fairly built so, without regarding any minute inaccuracy of measurement, or by unfairly & intentionally encroaching on deft.'s premises.—*READING v. BARNARD* (1827), *Mood. & M.* 71, N. P.

278. — Executor or administrator of party liable.]—Under 1774 Act, s. 41, where a party-wall has been rebuilt, the person who is owner of & entitled to the improved rent of the adjoining premises, is liable to contribution out of such rent, though he be no otherwise owner than as an exor. or administrator; & this, although there be a judgment outstanding, of a date prior to the pulling down of the wall, & no sufficient assets to meet it; for the portion of the rent claimable in respect of such contribution is not assets.—*THACKER v. WILSON* (1835), 3 *Ad. & El.* 142; 4 *Nev. & M. K. B.* 658; 1 *Har. & W.* 131; 4 *L. J. K. B.* 149; 111 *E. R.* 367.

Annotation:—*Mentd.* *Mason v. Fulham Corpn.* (1910), 102 *L. T.* 188.

279. — First paid by tenant.]—A tenant who has been compelled by the building owner to pay the proportion of the expenses of a party-wall or structure which was payable under 1855 Act, by his landlord, the adjoining owner, may maintain an action against the latter to recover the sum so paid, & is not bound, though entitled, to deduct it from rent due or accruing due.—*EARLE v. MAUGHAM* (1863), 14 *C. B. N. S.* 626; 2 *New Rep.* 327; 8 *L. T.* 637; 10 *Jur. N. S.* 208; 11 *W. R.* 911; 143 *E. R.* 590.

Annotation:—*Distd.* *Wigg v. Lefevre* (1892), 8 *T. L. R.* 493.

280. — Expenses incurred on requisition of adjoining owner.]—Under 1855 Act the whole measure of liability was that where any building owner had incurred any expenses on the requisition of the adjoining owner, the adjoining owner making the requisition should be liable for all such expenses.—*WILLIAMS v. BULL* (1890), *Times*, Feb. 15th.

281. — Where wall subsequently made use of.]—*Held*: where the building owner has after rebuilding the party-wall sold his house, the purchaser or sub-purchaser who is in possession of the house at the time when the adjoining owner makes use of the party-wall is the person who is entitled to receive the contribution.—*MASON v. FULHAM CORPN.*, [1910] 1 *K. B.* 631; 79 *L. J. K. B.* 385; 102 *L. T.* 188; 74 *J. P.* 170; 8 *L. G. R.* 415, *D. C.*

Annotation:—*Distd.* *Selby v. Whitbread*, [1917] 1 *K. B.* 736.

282. Other adjoining owners also liable—Work done after magistrate's order—Contribution.]—A structure within the metropolis having been surveyed by the Board of Works under 1855 Act ss. 69, 73, an order was made by a magistrate for the owner to take down or otherwise secure the party-walls. Upon his default the board themselves executed the works & took out a summons against the owner for the expenses incurred:—*Held*: (1) upon the hearing of such summons the owner could not object to his being made liable for expenses actually incurred, by merely showing that they included items which were in excess of the market price of labour and materials at the date of the execution of the works; (2) he could not require that the other owners of the party-

walls should be summoned in order that the expenses might be distributed among them.—*DEBENHAM v. METROPOLITAN BOARD OF WORKS* (1880), 6 *Q. B. D.* 112; 50 *L. J. M. C.* 29; 43 *L. T.* 596; 45 *J. P.* 190; 29 *W. R.* 353, *D. C.*

Annotation:—*Refd.* *Spiers v. Troup* (1915), 84 *L. J. K. B.* 1986.

283. — — — — —.]—In the course of rebuilding a house of which plffs. were the building owners within 1894 Act, they were served with a magistrate's order to pull down the party-wall as being a dangerous structure, which they did, & presumably under the powers of s. 88 (2), (6), or (7) contained in Part VIII. of the Act, rebuilt it, but higher & thicker than the old one, & without complying with the provisions of s. 91 contained in Part VIII. as to the settlement of any difference which might arise in the rebuilding thereof between plffs. & deft., the adjoining owner. In an action in which plffs. claimed contribution for a share of the expenses incurred in pulling down & rebuilding the party-wall:—*Held*: (1) as the building owner & adjoining owner were each liable under Part IX. of the Act for the expenses of pulling down the party-wall, plffs.' claim for contribution for such expenses succeeded; (2) inasmuch as plffs. had not complied with the above provisions of Part VIII., their claim for contribution for expenses in rebuilding the party-wall failed.—*SPIERS & SON, LTD. v. TROUP* (1915), 84 *L. J. K. B.* 1986; 112 *L. T.* 1135; 79 *J. P.* 341; 13 *L. G. R.* 633.

SUB-SECT. 4.—RIGHTS, DUTIES, AND LIABILITIES OF BUILDING OWNERS.

A. Who is a Building Owner.

284. Adjoining owner—Under previous award.]—Plffs. & defts. were the freeholders of adjoining houses in London. In 1902 the tenant of plffs.' house, being about to rebuild it in pursuance of a building agreement in a manner which involved the rebuilding of the party-wall between the houses, gave notice to defts. of his intention to do the work under 1894 Act, s. 90; & defts. as adjoining owners, served upon him a notice under s. 89 setting out the requisitions with which they required him to comply. A difference having arisen between the parties in respect of the execution of the works within the Act, it was referred under s. 91 to the arbn. of certain surveyors, who by their award, after deciding as to the dimensions & mode of erection of the party-wall, further awarded (*inter alia*) that the adjoining owners, defts., should have the right at any time to raise the wall as they might desire. The building operations were then carried out by plffs.' tenant. In 1904, defts. proceeded to raise the height of the party-wall & to build upon it without giving a building owner's notice to plffs. (who had in the meantime acquired the interest of their tenant), contending that they were entitled to do so under the terms of the award:—*Held*: defts., when they became desirous of building upon the party-wall, became building owners within the Act, & were under an obligation to serve a building owner's notice under s. 90 upon plffs. before commencing the work.—*LEADBETTER v. MARYLEBONE CORPN.*, [1904] 2 *K. B.* 893; 73 *L. J. K. B.* 1013; 91 *L. T.* 639; 68 *J. P.* 566; 53 *W. R.* 118; 20 *T. L. R.* 778, *C. A.*; *subsequent proceedings*, [1905] 1 *K. B.* 661, *C. A.*

Annotations:—*Refd.* *Selby v. Whitbread*, [1917] 1 *K. B.* 736. *Mentd.* *Adams v. Marylebone B. C.* (1906), 75 *L. J. K. B.* 995; *Mason v. Fulham B. C.* (1910), 79 *L. J. K. B.* 385.

285. Tenant at will—Under agreement for lease.]—A person who has entered into an agreement for a lease under which he is to be a tenant at will until the granting of the lease, though with certain rights superadded, is not an "owner" within 1894 Act, s. 5 (29), & has not the rights of a building owner under s. 87.—*ORF v. PAYTON* (1904), 69 J. P. 103; 21 T. L. R. 90; 3 L. G. R. 126.

*Annotation:—***Refd.** *Spiers v. Troup* (1915), 84 L. J. K. B.

286. Where no interference with party-wall—Adjoining property pulled down.]—By Charing Cross, Euston, & Hampstead Ry. Act, 1893 (c. cxxiv.), which incorporated Lands Clauses Acts, Cos. Clauses Acts, & Railways Clauses Consolidation Act, 1845 (c. 20), the co. was authorised, by s. 5, to make & maintain, in certain lines & according to certain levels, the railway & other works described in the Act, with all necessary & proper stations, works, & conveniences therewith. By s. 31 the co. were empowered to take by agreement for the extraordinary purposes mentioned in Railways Clauses Consolidation Act, 1845 (which included station purposes), any quantity of land not exceeding five acres; & it was provided that "any buildings erected on any land acquired under this sect. (except such buildings or parts of buildings as may be used for the purposes of a station) shall be subject to the Acts relating to buildings in the metropolis." Under s. 31 of the Act the co. acquired by agreement for the purposes of one of their stations a building which was situate outside their limits of deviation & not within their compulsory powers, & proceeded to pull it down without serving on the adjoining owner the party-structure notice required by 1894 Act:—*Held*: upon the facts, the co. were not building owners within 1894 Act, s. 5 (31), inasmuch as they had done nothing which in substance amounted to an interference with the party-structure.—*LEWIS & SOLOME v. CHARING CROSS, EUSTON & HAMPSTEAD RY.*, [1906] 1 Ch. 508; 75 L. J. Ch. 282; 94 L. T. 732; 70 J. P. 221; 54 W. R. 435; 22 T. L. R. 282; 50 Sol. Jo. 258; 4 L. G. R. 432.

*Annotation:—***Refd.** *Selby v. Whitbread*, [1917] 1 K. B. 736.

287. Whether assignees.]—*Held*: the words "the building owner at whose expense the same was built" 1894 Act, s. 99, mean the building owner or his assigns as the case may be.—*MASON v. FULHAM CORPN.*, [1910] 1 K. B. 631; 79 L. J. K. B. 385; 102 L. T. 188; 74 J. P. 170; 8 L. G. R. 415, D. C.

*Annotation:—***Distd.** *Selby v. Whitbread*, [1917] 1 K. B. 736.

288. — Notice given previous to transfer.]—Pltfs. & defts. were the owners of two adjoining houses in London. The houses were very old & had been built together so as to be mutually dependent upon one another for support. They were separated by a party-wall. Defts., having resolved to rebuild their house, served upon pltfs. a party-wall notice under 1894 Act, & the parties, in accordance with the provisions of s. 91, appointed their respective surveyors. The house was pulled down & rebuilt 13 feet further back from the street, & defts. conveyed the vacant 13 feet strip to the County Council, who dedicated it to the public. The effect of setting the house back was that the party-wall was left exposed to a depth of 13 feet & rendered unsafe by the withdrawal of the support of the defts.' house. Subsequently to the dedication the surveyors made an award ordering defts. to erect on the edge of the strip so dedicated a pier for the support of the

exposed portion of the party-wall. In an action brought to enforce the award, & also to recover damages at common law for the withdrawal of the support afforded by the building pulled down:—*Held*: defts., having once served a party-wall notice under the Act, could not by transferring the site to the County Council get rid of their obligations as building owners, but were bound, notwithstanding the transfer, to carry out the award which was subsequently made.—*SELBY v. WHITBREAD & CO.*, [1917] 1 K. B. 736; 86 L. J. K. B. 974; 116 L. T. 690; 81 J. P. 165; 33 T. L. R. 214; 15 L. G. R. 279.

289. Prospective leaseholder—Agreement for lease.]—Pltfs., in anticipation of being owners on the date of the expiry of the notice, served a party-wall notice on deft., the lessee of the adjoining premises, to the effect that after two months from the service thereof they intended "to pull down & rebuild a party-wall if on survey it be found so far defective or out of repair as to make such operation necessary or desirable & to perform all other necessary works incidental thereto." The party-wall was subsequently condemned by the district surveyor, who served the requisite notices on the parties concerned. Pltfs. thereupon pulled down the party-wall & served an account of the expense both of pulling down & rebuilding on the yearly tenant of deft. within one month of the completion of rebuilding, in accordance with 1894 Act, s. 96, but did not render such account to deft. until after the expiry of the month aforesaid:—*Held*: no owner is bound to accept or act on a notice from a person not an owner when the notice was given in anticipation that he may become an owner before the notice expires.—*SPIERS & SON, LTD. v. TROUP* (1915), 84 L. J. K. B. 1986; 112 L. T. 1135; 79 J. P. 341; 13 L. G. R. 633.

B. Right to Repair, Raise, Take Down, and Rebuild Wall.

290. To repair wall—Without notice—Where also adjoining owner.]—Where an owner of two houses within 1855 Act (c. 122), occupies one & lets the other to a tenant from year to year, he is justified in entering the house let to the tenant against the will of the latter, for the purpose of doing necessary repairs to the party-wall between the houses. It is not a condition precedent to the exercise of this right that notice should be given under s. 38, to the district surveyor.—*WHEELER v. GRAY* (1859), 6 C. B. N. S. 606; 28 L. J. C. P. 200; 23 J. P. 453; 5 Jur. N. S. 916; 7 W. R. 325; 141 E. R. 593, Ex. Ch.

*Annotation:—***Refd.** *Williams v. Golding* (1865), L. R. 1 C. P. 69.

291. — Where defective through dampness, etc.]—*Held*: a wall which has become a party-structure within 1894 Act, although originally built for other purposes & still sufficient for those purposes, may from dampness or other causes be as a party-structure defective within s. 88.—*MINTURN v. BARRY*, [1911] 2 K. B. 265; 80 L. J. K. B. 802; 104 L. T. 635; 75 J. P. 330; 27 T. L. R. 352; 55 Sol. Jo. 385; 9 L. G. R. 611, D. C.; *subsequent proceedings*, [1912] 3 K. B. 510, C. A.; *sub nom.* *BARRY v. MINTURN*, [1913] A. C. 584, H. L.

*Annotation:—***Mentd.** *Sanatorium v. Marshall*, [1916] 2 K. B. 57.

292. Wall raised—Damage to adjoining property.]—1855 Act, s. 83, par. 6, does not authorise the raising of a structure by a building owner so as to obstruct ancient lights in the adjoining premises.—*CROFTS v. HALDANE* (1867), L. R. 2

Sect. 2.—Within Metropolitan or London Building Acts: Sub-sect. 4, B., C., D.

Q. B. 194; 8 B. & S. 194; 36 L. J. Q. B. 85; 16 L. T. 116; 31 J. P. 358; 15 W. R. 444.

Annotation:—Mentd. Re Metropolitan Building Act, 1855, Ex p. McBryde (1876), 35 L. T. 543.

293. Wall pulled down & rebuilt—To be rebuilt with reasonable despatch.]—Pltf. was occupier of a house, as yearly tenant. Deft., the owner of the adjoining house, served a notice upon pltf. under 1855 Act, of his intention to pull down the party-wall between the two houses, & began to pull down the party-wall. Pltf. complained of the delay by deft. in rebuilding the party-wall. Deft. pleaded that he had employed a competent builder as contractor to rebuild the party-wall, & as the injury to pltf. had been caused by the delay of the contractor it was the contractor & not deft. who was liable to pltf.:—*Held*: the building owner had a right to pull down a party-wall for the purpose of rebuilding his own house, but it was a right coupled with a duty imposed on him both by common law & statute to rebuild the party-wall with all reasonable despatch.—*JOLLIFFE v. WOODHOUSE* (1894), 10 T. L. R. 553; *sub nom. JOLIFFE v. WOODHOUSE*, 38 Sol. Jo. 578, C. A.

C. Duty to give Notice.

294. Form of notice—Must be clear & definite.]—A party-wall notice, given by a building owner to an adjoining owner under 1894 Act, s. 90, ought to be so clear & intelligible as to enable the adjoining owner to see what counter-notice he should give under the Act.—*HOBBS, HART & Co. v. GROVER*, [1899] 1 Ch. 11; 68 L. J. Ch. 84; 79 L. T. 454; 15 T. L. R. 40; 43 Sol. Jo. 42, C. A.

Annotation:—Refd. Spiers v. Troup (1915), 84 L. J. K. B. 1986.

295. Necessity for notice—To adjoining owner—Adjoining owner also building owner.]—Where an owner of two houses within 1855 Act, occupies one & lets the other to a tenant from year to year, he is justified in entering the house let to the tenant against the will of the latter, for the purpose of doing necessary repairs to the party-wall between the houses. It is not a condition precedent to the exercise of this right that notice should be given under s. 38, to the district surveyor. Nor is it necessary that the landlord should give any notice, under s. 85, where he fills the two characters of building owner & adjoining owner.—*WHEELER v. GRAY* (1859), 6 C. B. N. S. 606; 28 L. J. C. P. 200; 23 J. P. 453; 5 Jur. N. S. 916; 7 W. R. 325; 141 E. R. 593, Ex. Ch.

Annotation:—Refd. Williams v. Golding (1865), L. R. 1 C. P. 69.

296. ——— Tenant under agreement for lease.]—A tenant in possession, having an equitable interest only under an agreement for a lease for a term, is, in equity, an "adjoining owner" under 1855 Act, & three months' notice must be given to him before any alterations affecting his premises can be commenced by his neighbour, under that Act.—*COWEN v. PHILLIPS* (1863), 33 Beav. 18; 8 L. T. 622; 9 Jur. N. S. 657; 11 W. R. 706; 55 E. R. 272.

Annotations:—Consd. Hunt v. Harris (1865), 19 C. B. N. S. 13. Follid. Fillingham v. Wood, [1891] 1 Ch. 51.

297. ———.]—A tenant in possession of part of a house under an agreement for a greater interest than as tenant from year to year, is an "adjoining owner," under 1855 Act, & entitled to be served with three months' notice under s. 85 (1), before any alterations affecting his premises can be commenced by the "building

owner"; in such a case service of a three months' notice on the person in receipt of the whole of the rents of the tenement is not sufficient.—*FILLINGHAM v. WOOD*, [1891] 1 Ch. 51; 60 L. J. Ch. 232; 64 L. T. 46; 39 W. R. 282; 7 T. L. R. 66.

298. ——— Other than tenants.]—The expression "adjoining owner" in 1894 Act, s. 90, as defined by s. 5 (29) (32) of the Act, means every person holding an interest in the adjoining premises other than tenants from year to year or at will. A building owner must serve his statutory notice under s. 90 upon every such person; except that, where a class of persons, such as joint tenants or tenants in common, are entitled to a particular interest in the adjoining premises, notice on one of the class will be sufficient.—*CROSBY v. ALHAMBRA Co., LTD.*, [1907] 1 Ch. 295; 76 L. J. Ch. 176.

299. ——— Party-wall not interfered with—Adjoining building removed.]—1855 Act, ss. 83, 85, do not apply to the case of the mere removal of a building from an adjoining building without disturbing the party-structure, & no previous notice under the Act need in such case be given. *Semble*: if the building sought to be removed be so constructed that its supports form part of the party-structure which separates the two buildings, such notice previous to removal would be necessary, although it were not the intention of the person removing the building to make use of the party-structure in the erection of new buildings.—*MAJOR v. PARK LANE Co.* (1866), L. R. 2 Eq. 453; 14 L. T. 543; 30 J. P. 743.

Annotation:—Refd. Spiers v. Troup (1915), 84 L. J. K. B. 1986.

300. ———.]—By Charing Cross, Euston, & Hampstead Ry. Act, 1893 (c. ccxiv.), which incorporated Lands Clauses Act, Cos. Clauses Acts, & Railways Clauses Consolidation Act, 1845 (c. 20), the co. was authorised, by s. 5, to make & maintain, in certain lines & according to certain levels, the railway & other works described in the Act, with all necessary & proper stations, works, & conveniences therewith. By s. 31 the co. were empowered to take by agreement for the extraordinary purposes mentioned in Railways Clauses Consolidation Act, 1845, which included station purposes, any quantity of land not exceeding five acres; & it was provided that "any buildings erected on any land acquired under this sect. (except such buildings or parts of buildings as may be used for the purposes of a station) shall be subject to the Acts relating to buildings in the metropolis." Under s. 31 of their Act the co. acquired by agreement for the purposes of one of their stations a building which was situate outside their limits of deviation & not within their compulsory powers, & proceeded to pull it down without serving on the adjoining owner the party-structure notice required by the 1894 Act:—*Held*: assuming the party-structure was affected by what the co. had done, the co. were not exempted by s. 31 of their Act from 1894 Act, Part VIII., & were bound to give to the owners of the adjoining premises the usual party-structure notice, & in default of their so doing the remedy of the adjoining owners was by injunction & not compensation under Lands Clauses Consolidation Act, 1845 (c. 18).—*LEWIS & SOLOME v. CHARING CROSS, EUSTON, & HAMPSTEAD Ry.*, [1906] 1 Ch. 508; 75 L. J. Ch. 282; 94 L. T. 732; 70 J. P. 221; 54 W. R. 435; 22 T. L. R. 282; 50 Sol. Jo. 258; 4 L. G. R. 432.

Annotation:—Refd. Selby v. Whitbread, [1917] 1 K. B. 736.

301. ——— Award embodying future work.]—Pltfs. & defts. were freeholders of adjoining houses in London. In 1902 the tenant of pltfs.

house, being about to rebuild it in pursuance of a building agreement in a manner which involved the rebuilding of the party-wall between the houses, gave notice to defts. of his intention to do the work under 1894 Act, s. 90, & defts., as adjoining owners, served upon him a notice under s. 89 setting out the requisitions with which they required him to comply. A difference having arisen between the parties in respect of the execution of the works within the Act, it was referred under s. 91 to the arbn. of certain surveyors, who by their award, after deciding as to the dimensions & mode of erection of the party-wall, further awarded (*inter alia*) that the adjoining owners, defts., should have the right at any time to raise the wall as they might desire. The building operations were then carried out by pltf.'s tenant. In 1904 defts. proceeded to raise the height of the wall & to build upon it without giving a building owner's notice to pltf's., who had in the meantime acquired the interest of their tenant, contending that they were entitled to do so under the terms of the award:—*Held*: defts. were under an obligation to serve a building owner's notice under s. 90 upon pltf's. before commencing the work.—*LEADBETTER v. MARYLEBONE CORPN.*, [1904] 2 K. B. 893; 73 L. J. K. B. 1013; 91 L. T. 639; 68 J. P. 566; 53 W. R. 118; 20 T. L. R. 778, C. A.; *subsequent proceedings*, [1905] 1 K. B. 661, C. A.

Annotations:—*Reid*. *Mason v. Fulham B. C.* (1910), 79 L. J. K. B. 385; *Selby v. Whitbread*, [1917] 1 K. B. 736. *Mentd.* *Adams v. Marylebone B. C.* (1906), 75 L. J. K. B. 995.

302. Availability of notice—Award not made within six months of notice.—1894 Act, s. 90 (4), does not apply to a case in which, a difference having arisen between the building owner & the adjoining owner with regard to the work to be done under the notice, there is a reference to surveyors under s. 91, & their award is not made within six months after the service of the party-wall notice.—*LEADBETTER v. MARYLEBONE CORPN.*, [1905] 1 K. B. 661; 74 L. J. K. B. 507; 92 L. T. 819; 69 J. P. 201; 53 W. R. 470; 21 T. L. R. 377, C. A.

Annotation:—*Mentd.* *Adams v. Marylebone B. C.* (1906), 75 L. J. K. B. 995.

D. Liability for Costs and Compensation.

303. For costs—Where notice invalid.—Defts. served a party-wall notice on pltf's., & stated by an indorsement on it that the time for consent & naming a surveyor were embodied in the notice, as thereby the requisite proceedings would be cleared & shortened. It was proved that the wall was not a party-wall, but defts. refused to withdraw the notice, saying it would expire in three months, & intimating that they did not intend to proceed, & that nothing would be done without further notice:—*Held*: pltf. was justified in filing a bill for injunction, & defts. were liable for costs.—*SIMS v. ESTATES CO.* (1866), 14 L. T. 55; 14 W. R. 419.

304. Compensation to adjoining owner for loss of trade—During raising of wall—Jurisdiction of surveyors.—Where a difference has arisen between a building owner & an adjoining owner under 1894 Act, s. 90, with respect to the raising of a party-wall under s. 88 (6), the surveyors appointed under s. 91 to settle that difference have no jurisdiction to entertain a claim for compensation by the adjoining owner against the building owner for damage caused to the trade of the former through the exercise by the latter of the rights given to him by the sub-sect.—*ADAMS v. MARYLEBONE BOROUGH COUNCIL*, [1907] 2 K. B. 822;

77 L. J. K. B. 1; 97 L. T. 593; 71 J. P. 465; 23 T. L. R. 702; 51 Sol. Jo. 672, C. A.

E. Liability for Negligence.

305. In papering & decoration—Remedy.—A party-wall had been pulled down & rebuilt under 1774 Act, but the paper & decorations had not been replaced by deft.:—*Held*: a *mandamus*, at the instance of the tenant of the adjoining house, would not lie to replace the paper & decorations, but the remedy must be by action.—*R. v. PONSFORD* (1843), 12 L. J. Q. B. 313; 1 L. T. O. S. 234; 7 J. P. 597; 7 Jur. 767.

306. Cumulative penalty.—The penalty imposed by 1855 Act, s. 94 on a building owner who fails to make good "any damage he may occasion to the property of an adjoining owner by any works authorised to be executed by him, or to do any other thing upon condition of doing which his right to execute such works is by s. 83 limited to arise," is cumulative.—*WILLIAMS v. GOLDING* (1865), L. R. 1 C. P. 69; Har. & Ruth. 18; 35 L. J. C. P. 1; 13 L. T. 291; 11 Jur. N. S. 952; 14 W. R. 60.

307. Protection of exposed rooms.—A building owner who pulls down a party-wall under 1855 Act, is not bound to protect by a hoarding or otherwise the rooms of the adjoining owner which are left exposed to the weather during the time that the wall is being pulled down & rebuilt.—*THOMPSON v. HILL* (1870), L. R. 5 C. P. 584; 39 L. J. C. P. 264; 22 L. T. 820; 18 W. R. 1070.

308. Damage to adjoining house.—A building owner who pulls down & rebuilds a party-structure under 1855 Act, is not bound to make good the damage to the adjoining owner's house, although such damage was the necessary consequence of the execution of the works he was authorised to complete.—*BRYER v. WILLIS* (1870), 23 L. T. 463; 35 J. P. 471; 19 W. R. 102.

309. Where contractor employed.—Pltf. & deft. were respective owners of two adjoining houses, pltf. being entitled to the support, for his house, of deft.'s soil. Deft. employed a contractor to pull down his house, excavate the foundations, & rebuild the house; the contractor undertook the risk of supporting pltf.'s house, as far as might be necessary, during the work, & to make good any damage & satisfy any claims arising therefrom. Pltf.'s house was injured, in the progress of the work, owing to the means taken by the contractor to support it being insufficient:—*Held*: deft. was liable, even if the undertaking as to risk, etc., had amounted to an express stipulation that the contractor should do, as part of the works contracted for, all that was necessary to support pltf.'s house.—*BOWER v. PEATE* (1876), 1 Q. B. D. 321; 45 L. J. Q. B. 446; 35 L. T. 321; 40 J. P. 789.

Annotations:—*Apprvd.* *Dalton v. Angus* (1881), 6 App. Cas. 740. *Foll.* *Lemaitre v. Davis* (1881), 51 L. J. Ch. 173. *Consd.* *Hughes v. Percival* (1883), 8 App. Cas. 443. *Reid.* *Jolliffe v. Woodhouse* (1894), 10 T. L. R. 553; *Hardaker v. Idle District Council*, [1896] 1 Q. B. 335; *Odell v. Cleveland House* (1910), 102 L. T. 602; *Selby v. Whitbread*, [1917] 1 K. B. 736. *Mentd.* *Birmingham Corpn. v. Allen* (1877), 6 Ch. D. 284; *Whiteley v. Pepper* (1877), 46 L. J. Q. B. 436; *Burt v. Victoria Graving Dock Co., London & St. Katherine's Dock Co.* (1882), 47 L. T. 378; *Barham v. Ipswich Dock Comrs.* (1885), 54 L. T. 23; *Crawford v. Consett L. B.* (1891), 55 J. P. Jo. 218; *Penny v. Wimbledon U. C.* (1899), 68 L. J. Q. B. 704; *Cribb v. Kynoch*, [1907] 2 K. B. 548; *Cox v. Coulson*, [1916] 2 K. B. 177.

310.—Applt. & resp. were owners of adjoining houses between which was a party-wall, the property of both. Applt.'s house also adjoined B.'s house & between them was a party-wall. Applt. employed a builder to pull down his house & rebuild it on a plan which involved the tying together of the new house & the party-wall

Sect. 2.—Within Metropolitan or London Building Acts: Sub-sect. 4, E.; Sub-sect. 5. Part IV.

between it & resp.'s house, so that if one fell, the other would be damaged. In the course of the rebuilding, the builder's workmen in fixing a staircase, negligently & without the knowledge of applt., cut into the party-wall between applt.'s house & B.'s house, in consequence of which applt.'s house fell, & the fall dragged over the party-wall between it & resp.'s house & injured resp.'s house. The cutting into the party-wall was not authorised by the contract between applt. & his builder:—*Held*: (1) the law cast a duty upon applt. to see that reasonable care & skill were exercised in those operations which involved a use of the party-wall belonging to himself & resp., exposing it to the risk above mentioned; (2) applt. could not get rid of responsibility by delegating the performance to a third person, & was liable to resp. for the injury to his house.—*HUGHES v. PERCIVAL* (1883), 8 App. Cas. 443; 52 L. J. Q. B. 719; 49 L. T. 189; 47 J. P. 772; 31 W. R. 725, H. L.; *affg.* S. C. *sub nom.* *PERCIVAL v. HUGHES* (1882), 9 Q. B. D. 441, C. A.

Annotations:—Refd. Jolliffe v. Woodhouse (1894), 10 T. L. R. 553; Newton v. Huggins (1906), 50 Sol. Jo. 617; Selby v. Whitbread, [1917] 1 K. B. 736. *Mentd.* Barham v. Ipswich Dock Conrs. (1885), 54 L. T. 23; Crawford v. Consett L. B. (1891), 55 J. P. Jo. 218; Black v. Christchurch Finance Co., [1894] A. C. 48; Hardaker v. Idle District Council, [1896] 1 Q. B. 335; Blake v. Woolf, [1898] 2 Q. B. 426; Holliday v. National Telephone Co., [1899] 2 Q. B. 392; Penny v. Wimbledon U. C. (1899), 68 L. J. Q. B. 704; Cribb v. Kynock, [1907] 2 K. B. 548; Newcombe v. Yewen & Croydon R. D. C. (1913), 29 T. L. R. 299; Cox v. Coulson, [1916] 2 K. B. 177.

311. —Pltf. an owner in fee simple of a house in London, brought an action against builders claiming damages on the ground that they, in the course of rebuilding an hotel, had caused injury to pltf.'s house by cracking & displacing the wall, & also asking for an injunction. On the motion for injunction an inquiry as to damage was directed to be taken before a special referee, & the referee assessed the structural damage at £40, without prejudice to any question of liability. Defts. alleged that the works were executed under 1855 Act, & the damage, if any, to pltf.'s premises was "a necessary consequence of carrying out the said works," & pltf.'s remedy, if any, was only against the building owner by whom defts. were employed:—*Held*: the Act did not exonerate a builder from liability for damage which had arisen from his negligence & want of care & skill.—*WHITE v. PETO BROTHERS* (1888), 58 L. T. 710; 4 T. L. R. 446.

312. —Delay in rebuilding.]—Pltf. was occupier of a house as yearly tenant. Deft., owner of the adjoining house, served a notice upon pltf. under 1855 Act of his intention to pull down the party-wall between the two houses. Pltf. complained of the delay by deft. in rebuilding the party-wall. Deft. pleaded that he had employed a competent builder as contractor to rebuild the party-wall & as the injury to pltf. had been caused by the delay of the contractor it was the contractor & not deft. who was liable to pltf.:—*Held*: deft. was liable for the negligence of the persons he employed & it was no answer for deft. to say that he had delegated that duty to his architect & builder.—*JOLLIFFE v. WOODHOUSE* (1894), 10 T. L. R. 553; *sub nom.* *JOLIFFE v. WOODHOUSE*, 38 Sol. Jo. 578, C. A.

SUB-SECT. 5.—APPOINTMENT OF ARBITRATOR OR UMPIRE.

313. Umpire appointed by court—On surveyors' refusal to appoint.]—Where surveyors had been

nominated under the 1855 Act, to settle differences in dispute between a building owner & an adjoining owner as to the erection of a party-wall, & such surveyors had refused to appoint an umpire, the ct. appointed an umpire, under C. L. P. Act, 1854, notwithstanding that an action was pending to settle the right of one of the parties to an ancient light in the party-wall.—*Re METROPOLITAN BUILDING ACT, Ex p. McBRYDE* (1876), 4 Ch. D. 200; 46 L. J. Ch. 153; 35 L. T. 543.

314. Necessity for—Where differences between building owner & adjoining owner.]—Although a co-owner of a party-wall could not at common law maintain an action against the other co-owner for temporarily undermining the foundation of the wall & replacing it with a new foundation when the work was unattended with danger to the security of the wall, yet, when within the area of 1855 Act, such a work, being a right in relation to a "party-structure" within s. 83, (7) (11), cannot be carried out when a difference arises between the building owner & the adjoining owner (unless they concur in the appointment of one surveyor) except by the award of two surveyors & a third selected by them, or of any two of such surveyors, as provided by s. 85 (7), of the Act.—*STANDARD BANK OF BRITISH SOUTH AMERICA (AFRICA) v. STOKES* (1878), 9 Ch. D. 68; 47 L. J. Ch. 554; 38 L. T. 672; 43 J. P. 91; 26 W. R. 492.

Annotations:—Refd. Lewis & Solome v. Charing Cross Euston & Hampstead Ry., [1906] 1 Ch. 508; Minturn v. Barry (1912), 76 J. P. 441. *Mentd.* Selby v. Whitbread, [1917] 1 K. B. 736.

315. Jurisdiction of arbitrators.]—Pltfs. & defts. were freeholders of adjoining houses in London. In 1902 the tenant of pltfs.' house, being about to rebuild it in pursuance of a building agreement in a manner which involved the rebuilding of the party wall between the houses, gave notice to defts. of his intention to do the work under 1894 Act, s. 90, & defts., as adjoining owners, served upon him a notice under s. 89 setting out the requisitions with which they required him to comply. A difference having arisen between the parties in respect of the execution of the works within the Act, it was referred under s. 91 to the arbn. of certain surveyors, who by their award, after deciding as to the dimensions & mode of erection of the party wall, further awarded (*inter alia*) that the adjoining owners, defts., should have the right at any time to raise the wall as they might desire. The building operations were then carried out by pltfs.' tenant. In 1904 defts. proceeded to raise the height of the wall & to build upon it without giving a building owner's notice to pltfs., who had in the meantime acquired the interest of their tenant, contending they were entitled to do so under the terms of the award:—*Held*: the jurisdiction of the arbitrators was limited by s. 91 to differences arising with reference to the work to which the original notice given to defts. under s. 90 related, & as the arbitrators had acted beyond their jurisdiction in awarding that defts. might in the future raise the wall as they desired, their award was *pro tanto* invalid.—*LEADBETTER v. MARYLEBONE CORPN.*, [1904] 2 K. B. 893; 73 L. J. K. B. 1013; 91 L. T. 639; 68 J. P. 566; 53 W. R. 118; 20 T. L. R. 778, C. A.; *subsequent proceedings*, [1905] 1 K. B. 661, C. A.

Annotations:—Consd. Adams v. Marylebone B. C. (1906), 75 L. J. K. B. 995. *Mentd.* Mason v. Fulham B. C. (1910), 79 L. J. K. B. 385; Selby v. Whitbread, [1917] 1 K. B. 736.

See, generally, ARBITRATION, Vol. II., pp. 399 *et seq.*

Part IV.—Evidence of Boundaries.

SECT. 1.—ADMISSIBILITY OF EVIDENCE.

316. As to contiguity of manors.]—In a cause where the question was, whether the *locus in quo* was parcel of the manors of Wakefield or Rochdale, it was shown that Wakefield & Rishworth were adjoining manors, & that the manor of Rochdale adjoined both Wakefield & Rishworth continuously:—*Held*: evidence of the continued boundary between Rochdale & Rishworth, was admissible to prove the boundary between Rochdale & Wakefield.—*BRISCO v. LOMAX* (1838), 8 Ad. & El. 198; 3 Nev. & P. K. B. 308; 1 Will. Woll. & H. 235; 7 L. J. Q. B. 148; 2 Jur. 682; 112 E. R. 812.

317. Declaration by landlord—Boundary of lands separated by lane held in common.]—Where in trespass *quare clausum fregit* it appeared that pltf. & deft. respectively occupied lands belonging to the same landlord & abutting on different sides of a lane & that deft. held under a lease not produced:—*Held*: the declaration of the landlord "that he had let the lane jointly to pltf. & deft. as much to one as to the other" was properly received in evidence, & being received, it proved pltf. & deft. to be tenants in common of the lane & neither of them could maintain trespass against the other in respect of the lane.—*NOYE v. REED* (1827), 1 Man. & Ry. K. B. 63; 6 L. J. O. S. K. B. 5.

Annotation:—*Reid*. *Collis v. Amphlett* (1918), 118 L. T. 466.

318. Declaration of former owner—Boundary of estate.]—Where the question was whether pltf. was owner of certain land adjoining to his estate or whether it belonged to deft. as lord of the manor:—*Held*: the declarations of a former owner of an estate were evidence against the present owner, on the principle of identity of interest, although the party who made the declarations

was alive & might have been called as a witness.—*WOOLWAY v. ROWE* (1831), 1 Ad. & El. 114; 3 Nev. & M. K. B. 819; 3 L. J. K. B. 121; 110 E. R. 1151.

Annotations:—*Expld.* *Doe d. Rowlandson v. Wainwright* (1838), 8 Ad. & El. 691; *Papendick v. Bridgwater* (1855), 5 E. & B. 166. *Refd.* *Doe d. Sheriff v. Coulthred* (1837), 2 Nev. & P. K. B. 165; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360. *Mentd.* *Phillips v. Cole* (1839), 10 Ad. & El. 106.

319. Declaration of tenant for life—Boundary of estate.]—The declarations of a tenant for life in possession as to the boundary of his estate are not evidence against the remainderman.—*HOWE v. MAIKIN* (1878), 40 L. T. 196; 27 W. R. 340, D. C.

Declarations of deceased persons.]—*See* Nos. 326, 335, 344, *post*; Sect. 3, sub-sect. 4, *post*.

320. Patent ambiguity in land certificate—Variance in area—Area described by boundaries.]—Where, in a land certificate issued by the Crown in 1899 there is a variance between the stated acreage & the area as described by physical boundaries, viz., one mile along a river to a width of a quarter of a mile therefrom, evidence can be given of user inconsistent with the area intended being that included in the boundaries, so as to establish that that description is a *falsa demonstratio*.—*WATCHAM v. EAST AFRICA PROTECTORATE*, [1919] A. C. 533; 87 L. J. P. C. 150; 120 L. T. 258; 34 T. L. R. 481, P. C.

321. Parol evidence—To determine situation of lands demised by testator.]—Where testator devises his lands situate in a particular parish or place, parol evidence is admissible to show what lands were then reputed to lie in such parish or place for the purpose of determining the sense of the description used by testator.

Where testator devised all his messuages & lands in the parish of D.:—*Held*: parol evidence was admissible to show that, although in point

PART IV. SECT. 1.

318 i. Declarations of former owner—Boundary of estate.]—T. sold part of his land to deft., & the remainder to pltf. A dispute arose between pltf. & deft. as to the boundary between them, & action was brought. On the trial deft. stated that T. pointed out what deft. claimed as the true boundary line. This was subsequent to pltf. taking possession:—*Held*: the evidence of T.'s declarations was improperly admitted.—*PHILPS v. TRUEMAN* (1876), 3 Pug. 391.—CAN.

a. Declarations by person in possession.]—Declarations respecting boundaries of land by a person in possession are evidence in an action in which the boundaries of the same land are in dispute.—*NILES v. BURKE* (1873), 1 Pug. 237.—CAN.

b. —.]—The declaration of a person as to the boundary of land is not evidence, unless made while in possession of the land, & is against interest, or, unless there is privity between him & the person against whom his declaration is offered.—*SARTELL v. SCOTT* (1864), 6 All. 166.—CAN.

c. Admissions by predecessor in title—Boundary of estate.]—Admissions by a predecessor in title of an adjoining owner as to an alleged conventional line constitute an element for consideration unless the true line has been satisfactorily proved.—*LEWIS MILLER & Co., Ltd. v. CLOW* (1918), 52 N. S. R. 1.—CAN.

d. Surveyor's affidavit—As to other property.]—The question in dispute at the trial being the boundary line

between certain lots, affidavits were offered in evidence as to the line between other lots in the same concession, taken by the surveyor employed by defts. to run this line:—*Held*: such affidavits were properly rejected.—*MANARY v. DASH* (1864), 23 U. C. R. 580.—CAN.

e. Parol evidence—To determine situation of land granted by Crown.]—Parol evidence is admissible to show the actual position & surveys of lands included in grants of wilderness & woodlands.—*DAVISON v. BENJAMIN* (1874), 9 N. S. R. 474.—CAN.

f. — As to Boundary Line Commissioners.]—The point in dispute being the boundaries of a lot pltf. offered to prove that a requisition had been made to the Boundary Line Commrs., to settle the line, & that they did so & planted monuments; but as no award had been filed, & no record of the proceedings could be found, he relied upon oral testimony only:—*Held*: inadmissible.—*BARR v. CANADA LIFE INSURANCE CO.* (1867), 26 U. C. R. 614.—CAN.

g. — Expert testimony.]—A person not a licensed surveyor is a competent witness on a question of boundary.—*POTTER v. CAMPBELL* (1858), 16 U. C. R. 109.—CAN.

h. — Instructions to surveyors.]—In an action for a declaration as to the width of a street, the expert testimony of surveyors to show that there was no boundary to the street on the river side except the river itself, & testimony to show the instructions given to the surveyors who laid out the street, were inadmissible.—

SASKATOON v. TEMPERANCE COLONIZATION SOCIETY (1912), 22 W. L. R. 897; 8 D. L. R. 875.—CAN.

k. Hearsay evidence—Of surveyors—Notes by clerks.]—In an action to determine a boundary line, two surveyors were called as witnesses, but neither of them had personally made a survey; they spoke from notes & from the survey made by their clerks, who ran the lines:—*Held*: the evidence was not admissible.—*ANTICKNAP v. SCOTT* (1914), 26 W. L. R. 952; 16 D. L. R. 20; 19 B. C. R. 81.—CAN.

l. Res gesta.]—The declarations of a party accompanying the act of showing the point of beginning on the boundary of a grant, are admissible in evidence as part of the *res gesta*.—*DOE d. LONCHESTER v. MURRAY* (1847), 3 Kerr. 335.—CAN.

m. Copy of field notes.]—An admitted copy of the field notes from the Crown lands office may be received in evidence.—*DOE d. STRONG v. JONES* (1850), 7 U. C. R. 385.—CAN.

n. Surveyor's notes.]—To determine a disputed boundary line the field notes of a land surveyor were offered in evidence, but objected to on the ground that they were not made by him in the execution of his duty as such surveyor:—*Held*: the objection was good.—*MCGREGOR v. KEILLER* (1883), 9 O. R. 677.—CAN.

o. —.]—Notes of a survey made by a deceased surveyor in a book in which he kept a diary of matters, private & professional, were tendered in evidence to prove the boundary between lots 3 & 4. The entry of the

Sect. 1.—Admissibility of evidence. Sects. 2 & 3:
Sub-sects. 1 & 2.]

of fact some part of his land was situate in the parish of W., yet that, at the date of his will & death, that part was generally reputed to lie in D.—**ANSTEE v. NELMS** (1856), 1 H. & N. 225; 26 L. J. Ex. 5; 27 L. T. O. S. 190; 4 W. R. 612; 156 E. R. 1186.

Annotations:—Mentd. Board v. Board (1873), L. R. 9 Q. B. 48; Paine v. Jones (1874), L. R. 18 Eq. 320; Dalton v. Fitzgerald, [1897] 2 Ch. 86.

See, generally, DEEDS & OTHER INSTRUMENTS.

SECT. 2.—JUDICIAL NOTICE.

322. City of London.]—A judge is not bound to take judicial notice of the boundaries of the city of London, & affidavits are inadmissible, to show that the Tower of London is, in point of fact, within the city.—**BRUNE v. THOMPSON** (1842), 2 Q. B. 780; 2 Gal. & Dav. 110; 11 L. J. Q. B. 131; 6 Jur. 581; 114 E. R. 306.

323. Foreign State—Procedure.]—In dealing with questions involving the sovereignty & extent of territory of a foreign State, the ct. should act in unison with H. M. Govt.

Where a dispute has arisen concerning the status & boundaries of a foreign State, the ct. will, by inquiring of the Foreign Office, obtain judicial knowledge not only of such status, but also of the fact whether the dispute is within the territory of that State. Information relating to the boundaries of a foreign State should be acquired by such a method, rather than by evidence adduced by the litigants, which might lead to a result inconsistent with the practice of H. M. Govt.—**FOSTER v. GLOBE VENTURE SYNDICATE LTD.**, [1900] 1 Ch. 811; 69 L. J. Ch. 375; 82 L. T. 253; 44 Sol. Jo. 314.

Annotation:—Mentd. *Re Suarez*, *Suarez v. Suarez*, [1918] 1 Ch. 176.

See, generally, EVIDENCE.

SECT. 3.—REPUTATION.

SUB-SECT. 1.—NATURE OF.

324. Must be within knowledge of party.]—Upon the trial of an issue in prohibition, whether the usurpation of office in a *quo warranto* information mentioned was committed out of the jurisdiction of the County Palatine, & within that of the City, of Chester; a document from the remembrancer's office of the Exch. Ct. was produced, purporting to be a decree made, after hearing of a complaint against the citizens of Chester, & their answer, by the Lord High Treasurer of England, the Chancellor of the Exchequer, the Under Treasurer, & the Chief Baron, with the advice & assent of a Queen's Serjeant, & the Queen's Attorney & Solicitor-General, & others of the same ct.:—**Held**: this document was not

survey was as follows: "June 6, 1827. —Got A. to show the stake between Nos. 3 & 4." It was not proved that the entry was made contemporaneously with the transaction:—**Held**: the entry was not admissible as one made in the course of business, or in the performance of a *quasi* public duty.—**O'CONNOR v. DUNN** (1877), 2 A. R. 247.—**CAN.**

p. Copy of fence viewer's award.]—Fence viewers made an award respecting division lines, & at a trial, the township clerk produced a copy which he swore was a true copy of such award,

the original being in his custody:—**Held**: such copy was admissible, these awards being made by a statutory public officer acting in a judicial capacity.—**WARREN v. DESLIPIES** (1872), 33 U. C. R. 59.—**CAN.**

q. Maps or plans prepared by deceased persons.]—Maps or plans prepared by deceased persons cannot be looked at for the purpose of defining the boundaries between privately owned estates. They are, however, evidence of the physical features shown on them &, to the extent to which such physical features assist in

admissible as evidence of reputation, because the parties making the decree had no knowledge of the subject, except that which they derived in the course of the proceeding.—**ROGERS v. WOOD** (1831), 2 B. & Ad. 245; 109 E. R. 1134.

Annotations:—Reid. Crease v. Barrett (1835), 1 Cr. M. & R. 919; Evans v. Rees (1839), 10 Ad. & El. 151.

325. Statement in lease.]—A lease for years, of tin mines & toll-tin, determinable on lives, was granted in 1797, & was surrendered in 1810. Another was then granted on paying a fine, part of which was paid for the surrender of the former lease. In 1798 the lessor executed a lease of the surface:—**Held**: a recital in that lease was admissible in evidence against the lessee of the mines & toll in 1810, for he could not claim by any title prior to that date.—**CREASE v. BARRETT** (1835), 1 Cr. M. & R. 919; 5 Tyr. 458; 4 L. J. Ex. 297; 149 E. R. 1353; *subsequent proceedings*, 2 Cr. M. & R. 738.

Annotations:—Reid. Evans v. Taylor (1838), 7 Ad. & El. 617; Trimblestown v. Kemmis (1843), 9 Cl. & Fin. 749; Beaufort v. Smith (1849), 4 Exch. 450; Hammond v. Bradstreet (1854), 2 C. L. R. 1195; Hardcastle v. Dennison (1861), 10 C. B. N. S. 606; Evans v. Morthyr Tydvil U. D. C. (1898), 79 L. T. 578; R. v. Norfolk County Council (1910), 26 T. L. R. 269. **Mentd.** De Rutzen v. Farr (1835), 4 Ad. & El. 53; Doe d. Tatham v. Wright (1836), 1 Har. & W. 729; Ward v. Suffield (1839), 5 Bing. N. C. 381; Mortimer v. McCallan (1840), 6 M. & W. 58; Gerish v. Chartier (1845), 1 C. B. 13; Hughes v. Hughes (1846), 15 M. & W. 701; Doe d. Welsh v. Langfield (1847), 16 M. & W. 497; Quilter v. Jorss (1863), 14 C. B. N. S. 747; Carmarthen & Cardigan Ry. Co. v. Manchester & Milford Ry. Co. (1873), L. R. 8 C. P. 685; Mors-le-Blanch v. Wilson (1873), L. R. 8 C. P. 227.

326. Declaration of deceased person.]—The question in a cause being, whether a particular road, admitted to exist, was public or private, evidence was offered that a person, since deceased, had planted a willow on a spot adjoining the road, on ground of which he was a tenant, saying, at the same time, that he planted it to show where the boundary of the road was when he was a boy:—**Held**: such a declaration was not evidence, as showing reputation.—**R. v. BLISS** (1837), 7 Ad. & El. 550; 2 Nev. & P. K. B. 464; Will. Woll. & Dav. 624; 7 L. J. Q. B. 4; 1 Jur. 959; 112 E. R. 577.

Annotations:—Consd. Papendick v. Bridgwater (1855), 5 E. & B. 166; Mercer v. Denne, [1905] 2 Ch. 538. **Reid.** R. v. Berger, [1894] 1 Q. B. 823.

See, also, Nos. 334, 335, 344, post; Sub-sect. 4, post.

327. Verdict of commission.]—Pltf. produced in evidence a commission to ascertain the boundaries between the manors of R. & W. issued out of the Duchy Ct. of Lancaster which recited that the boundaries were uncertain, & that as disputes were likely to arise, the respective lords of those manors had prayed that a commission might issue to prevent them. Upon this commission, there was an inquisition, & a verdict which set out the boundaries, & was returned to the ct., but no decree thereon was produced:—**Held**: it was admissible as a verdict upon the matter decided by it, *viz.*, the boundaries of R. & W., but not as reputation simply.—**BRISCO v. LOMAX**

determining boundaries, they afford evidence of boundaries.—**EVERINGHAM v. PENRITH MUNICIPALITY** (1916), 16 S. R. N. S. W. 238.—**AUS.**

r. Statistical accounts.]—**MEACHER v. BLAIR-OLIPHANT**, [1913 S. C. 417.—**SCOT.**

PART IV. SECT. 2.

s. Divisions of province.]—A judge must take notice of territorial divisions of a Province.—**MCDONALD v. DICAIRE** (1859), 1 Ch. Ch. 34.—**CAN.**

(1838), 8 Ad. & El. 198; 3 Nev. & P. K. B. 308; 1 Will. Woll. & H. 235; 7 L. J. Q. B. 148; 2 Jur. 682; 112 E. R. 812.

328. Duchy survey.]—On a question as to the boundary of a manor, formerly, but no longer, part of the Duchy of Lancaster, a document of the time of Elizabeth, when the manor belonged to the duchy, was offered in evidence. It was produced from the Duchy Office, & purported to be a survey of the manor, taken by J. W. deputy of the Surveyor-General of the Duchy, by authority of letters of deputation to J. W. by the oaths & presentment of such of the tenants of the manor whose names were subscribed. The names of twenty persons followed, described as “jurors at the ct. of survey” & it was added, that they, being examined, did present, etc. Then came a statement of the boundaries, a list of tenants & rents, & a presentment of the demesnes, of customs, of injuries suggested, & other particulars. No authority for taking the survey was proved, except as above-mentioned:—*Held*: the document was not admissible, as evidence of reputation.—*EVANS v. TAYLOR* (1838), 7 Ad. & El. 617; 3 Nev. & P. Q. B. 174; 7 L. J. Q. B. 73; 112 E. R. 602.

Annotations:—*Consd.* Beaufort v. Smith (1849), 4 Exch. 450. *Distd.* Daniel v. Wilkin (1852), 7 Exch. 429. *Consd.* Mercer v. Denne, [1905] 2 Ch. 538.

329. Entry in manor book.]—In an action of ejectment to recover twenty-two acres of land claimed as parcel of a certain manor, the lessor of pltf., who sought to prove that the land in question was parcel of the manor, offered in evidence an old book found in the muniment room of the family to whom the manor belonged. This book, amongst other entries & receipts in the handwriting of the then steward, contained an entry of the lease, & a minute to the effect that “H.’s widow has assigned to Sir E., who claims ten years to come.” An ineffectual search for the originals had been made, & notice had been given to deft. to produce them:—*Held*: the book, if admissible as evidence of reputation, merely went to show the extent of the manor.—*DOE d. PADWICK v. SKINNER* (1848), 3 Exch. 84; 18 L. J. Ex. 107; 12 L. T. O. S. 131; 13 J. P. 200; 154 E. R. 766; *subsequent proceedings, sub nom.* *DOE d. PADWICK v. WITCOMB* (1851), 6 Exch. 601, Ex. Ch.; (1853), 4 H. L. Cas. 425, II. L.

330. Presentment of jury of survey.]—*Semble*: a presentment of a jury of survey, being a private one, is not admissible as evidence of reputation.—*DANIEL v. WILKIN* (1852), 7 Exch. 429; 21 L. J. Ex. 236; 155 E. R. 1016; *subsequent proceedings*, 8 Exch. 156.

331. Arbitrator’s award.]—Pltf. sued deft. for a consequential injury to her reversionary interest in a several fishery in an arm of the sea, alleging her right to the soil between high & low water mark, into which she charged deft. with cutting, & stating that such soil & fishery were in the possession of F. as her tenant. Deft. was tenant of a neighbouring property under G. In support of pltf.’s title, evidence was offered of the proceedings in a former action, brought by F. while tenant to pltf., against G., complaining of a similar injury to the same fishery. The declaration in the former action alleged that the present pltf. was owner of the soil between high & low water

mark, & charged G. with cutting the soil, & thereby injuring F.’s fishery. Not guilty being pleaded, the cause was referred to arbn., & an award made in favour of F.:—*Held*: these proceedings were not admissible as evidence of reputation of pltf.’s ownership of the fishery.—*WENMAN (LADY) v. MACKENZIE* (1855), 5 E. & B. 447; 25 L. J. Q. B. 44; 25 L. T. O. S. 267; 1 Jur. N. S. 1015, 1049, n.; 3 W. R. 626; 3 C. L. R. 1307; 119 E. R. 547.

332. Deposition for perpetuation of testimony.]—On an issue as to whether a certain piece of land was common land or subject to any commonable rights either of the commoners of the parish of C., or of the commoners of the parish of L.: a deposition made in the year 1815, in a suit to perpetuate testimony by a witness examined on commission on behalf of a predecessor in title of defts., was admitted in evidence as being a statement made by a person vouched by the party on whose behalf the deponent was examined, & an admission by conduct of a predecessor in title of defts. This deposition had been sealed up by the examiners, but was now found unsealed:—*Held*: the mere fact that the deposition was now found to be unsealed was not evidence of user or adoption by the party on whose behalf the deponent was examined, & in the absence of evidence of such user or adoption, the deposition was inadmissible on the ground on which it was admitted.—*EVANS v. MERTHYR TYDFIL URBAN COUNCIL*, [1899] 1 Ch. 241; 68 L. J. Ch. 175; 79 L. T. 578; 43 Sol. Jo. 151, C. A.

Annotations:—*Refd.* Mercer v. Denne, [1905] 2 Ch. 538. *Mentd.* Heath v. Deane, [1905] 2 Ch. 86.

SUB-SECT. 2.—WHEN ADMISSIBLE.

333. In general.]—Reputation is admissible in evidence though unsupported by usage.—*CREASE v. BARRETT* (1835), 1 Cr. M. & R. 919; 5 Tyr. 458; 4 L. J. Ex. 297; 149 E. R. 1353; *subsequent proceedings*, 2 Cr. M. & R. 738.

Annotations:—*Refd.* Evans v. Taylor (1838), 7 Ad. & El. 617; Beaufort v. Smith (1849), 4 Exch. 450; Hammond v. Bradstreet (1854), 2 C. L. R. 1195; Harcastle v. Dennison (1861), 10 C. B. N. S. 606; Evans v. Merthyr Tydvil U. D. C. (1898), 79 L. T. 578; R. v. Norfolk County Council (1910), 26 T. L. R. 269. *Mentd.* Rutzen v. Farr (1835), 5 Nev. & M. K. B. 617; Doe d. Tatham v. Wright (1836), 1 Har. & W. 729; Ward v. Suffield (1839), 5 Bing. N. C. 381; Mortimer v. McCallan (1840), 6 M. & W. 58; Trimblestown v. Kemmis (1843), 9 Cl. & Fin. 749; Gerish v. Chartier (1845), 1 C. B. 13; Hughes v. Hughes (1846), 15 M. & W. 701; Doe d. Welsh v. Langfield (1847), 16 M. & W. 497; Quilter v. Jorss (1863), 14 C. B. N. S. 747; Carmarthen & Cardigan Ry. Co. v. Manchester & Milford Ry. Co. (1873), L. R. 8 C. P. 685; Mors-le-Blanch v. Wilson (1873), L. R. 8 C. P. 227.

334. Matters of general or public interest—Boundary of town.]—The question being whether a turnpike stood within the limits of a town:—*Held*: evidence of reputation that the town extended to a certain point & evidence that old people since dead had declared that to be the boundary, was admissible.—*IRELAND v. POWELL* (1802), cited in 7 Ad. & El. at p. 555; 112 E. R. 579, N. P.

Annotations:—*Consd.* R. v. Antrobus (1835), 2 Ad. & El. 788; R. v. Bliss (1837), 7 Ad. & El. 550; Mercer v. Denne, [1904] 2 Ch. 534. *Refd.* Chatfield v. Fryer (1815), 1 Price, 253.

See, also, No. 326, ante, Nos. 335 & 344, post; & Sub-sect. 4, post.

PART IV. SECT. 3, SUB-SECT. 2.

334 i. Matters of general or public interest—Popular understanding—Boundary of town.]—Where no limits had been assigned to a town the ct. looked to the popular understanding of

what constituted the town.—*DOUGALL v. SANDWICH & WINDSOR PLANK & GRAVEL ROAD CO.* (1854), 12 U. C. R. 59.—*CAN.*

334 ii. — Boundary of town.]—Boundaries of a municipality are of

public interest & may be proved by evidence of public repute, even though founded originally upon hearsay.—*DU TORT v. LYDENBURG MUNICIPALITY* (1909), T. S. 527.—*S. AF.*

Sect. 3.—Reputation: Sub-sects. 2, 3 & 4. Sect. 4.]

335. — Boundary between parishes & manors.]

—Upon a question of boundary between two parishes & manors, a certain common was within the parish & manor of H., or within the parish of B. & manor of M.:—*Held*: evidence of what old persons, now dead, had said concerning the boundaries of the parishes & manors was admissible, even though these old persons were parishioners, & claimed rights of common on the wastes, which would be enlarged by their several declarations, there not appearing to be any dispute at the time respecting the right of the old persons making the declarations, at least no litigations pending; for the boundary had been long in dispute between the respective parishes & manors, & intersecting perambulations had been made both before & after such declarations by the respective parties; so that those persons could not be considered as having it in view to make evidence for themselves at the time.—*NICHOLLS v. PARKER* (1805), 14 East, 331, n.; 104 E. R. 629.

Annotations:—Consd. *Davies v. Morgan* (1831), 1 Cr. & J. 587; *Barraclough v. Johnson* (1838), 8 Ad. & El. 99.

336. — Whether old or new land of manor.]

—Upon a question whether the lord of a manor was entitled to the coals under a freehold tenement within the manor, it is competent to him to show by parol evidence that there was a known distinction within the manor between old & new land, & that in fact plff.'s lands lay within the boundary of the new land.—*BARNES v. MAWSON* (1813), 1 M. & S. 77; 105 E. R. 30.

337. — Whether place within town or hundred.]—The mention in Domesday Book of the town of A. previously to the enumeration of the hundreds in the country, inquisitions taken by jurors of the town of A. upon deaths in the Castle of A., & a charter erecting the town of A. into a county of itself, with a special exception of the Castle of A., do not necessarily lead to the conclusion that the Castle of A. is not within one of the hundreds in the county: & a judge is authorised to direct a jury to give great weight to evidence of reputation tending to negative such a conclusion.—*NEWCASTLE (DUKE) v. BROXTOWE (HUNDRED)* (1832), 4 B. & Ad. 273; 1 Nev. & M. K. B. 598; 1 Nev. & M. M. C. 507; 2 L. J. M. C. 47; 110 E. R. 458.

Annotations:—Consd. *Mercer v. Denne*, [1905] 2 Ch. 538. *Refd.* *Crease v. Barrett* (1835), 1 Cr. M. & R. 919; *Dunraven v. Llewellyn* (1850), 15 Q. B. 791; *Evan v. Merthyr Tydvil U. D. C.* (1898), 79 L. T. 578. *Mentd.* *Hadley v. Baxendale* (1854), 23 L. T. (O. S.) 69; *Yates v. Dunster* (1855), 11 Exch. 15; *Shedden v. Patrick* (1860), 2 Sw. & Tr. 170; *Joyner v. Weeks*, [1891] 2 Q. B. 31; *Wednesbury Corpn. v. Lodge Holes Colliery Co.*, [1907] 1 K. B. 78.

338. — Parish boundary.]—A map of a parish provided from the parish chest, which was made under a private inclosure Act not printed is not receivable in evidence to show the boundaries of the parish without proof of the inclosure Act; but it being proved by the surveyor who made the map 34 years before the trial that he laid down the boundaries of the parish from the information of an old man then about 60, who went round & showed them to him:—*Held*: on this proof the map would have been receivable as evidence of reputation if it had been also proved that the old man was dead at the time of trial but that it was not receivable at all without proof of his death.—*R. v. MILTON (INHABITANTS)* (1843), 1 Car. & Kir. 58, N. P.

339. — Parish rights of common.]—In an action in the Ch. Div. by a statutory committee of commoners for specific performance of an

agreement to purchase commonable rights, an order was made directing the trial before a jury in the Q. B. Div. of an issue of fact, whether a certain piece of land was common land or subject to any commonable rights either of the commoners of the parish of C., or of the commoners of the parish of L.:—*Held*: evidence of reputation was admissible on the trial of such an issue.—*EVANS v. MERTHYR TYDFIL URBAN COUNCIL*, [1899] 1 Ch. 241; 68 L. J. Ch. 175; 79 L. T. 578; 43 Sol. Jo. 151, C. A.

Annotations:—Refd. *Heath v. Deane*, [1905] 2 Ch. 86; *Mercer v. Denne*, [1905] 2 Ch. 538.

340. Matters of private interest—Sheep walk.]

—In a question as to private rights, whether or not a place is parcel of a sheep walk, evidence of reputation is admissible.—*DAVIES v. LEWIS* (1787), 2 Chit. 535.

341. — Waste of farm.]—In an action in replevin, on a question whether S. Hill, a waste, was parcel of I. Farm, & the soil & freehold of R., or not, evidence was offered of declarations of old persons deceased, as to the ancient boundary of the waste belonging to I. Farm, that it extended to the inclosures on the north side of the hill:—*Held*: the question being not as to the boundary of a parish or manor, but between one person's private property & another, the evidence was not admissible.—*CLOTHIER v. CHAPMAN* (1805), 14 East, 331, n.; 104 E. R. 629.

342. — Division between estates.]—On a question of boundary between two estates, if evidence has been given that the boundary of the estates is the same as that between two hamlets, evidence of reputation as to the boundary of the hamlets may be adduced for the purpose of proving that of the estates; & the jury may be desired to take into consideration the latter evidence if they are satisfied with the first.—*THOMAS v. JENKINS* (1837), 6 Ad. & El. 525; 1 Nev. & P. K. B. 587; *Will. Woll. & Dav.* 265; 6 L. J. K. B. 163; 1 J. P. 211; 1 Jur. 261; 112 E. R. 201.

Annotations:—Consd. *Briscoe v. Lomax* (1838), 7 L. J. Q. B. 148; *Mercer v. Denne*, [1905] 2 Ch. 538.

343. — Waste of manor or freehold.]—On a question between the lord of the manor of O. & the owner of a freehold estate within the manor, whether a certain close was part of the lord's waste or part of the adjoining estate of deft., after proof having been given that there were very many lands & tenements held of the manor, the tenants whereof in respect of those lands had always exercised rights of common for all their commonable cattle on the waste of the manor, evidence was offered, on the part of the lord, of declarations *ante litem motam* of deceased persons who had been such tenants & had exercised such rights, that the close was parcel of the waste. Similar declarations made by deceased residents within the manor not being tenants were also tendered. No evidence was given of any exercise of any rights of common on the close:—*Held*: (1) the want of evidence of acts of enjoyment would not affect the admissibility of evidence of reputation; (2) declarations by residents within a manor were as receivable as declarations by tenants of the manor; (3) these declarations were not admissible in evidence, since there is no common law right for all tenants of a manor to have common on the waste of the manor, but each tenant who has the right of common appendant, has it as an incident by law attached to his particular grant, & the numerous private rights of common of the several tenants do not compose one public right so as to render evidence of reputation as to the boundary of the waste admissible.—*DUNRAVEN (LORD) v. LLEWELLYN* (1850), 15 Q. B.

791; 19 L. J. Q. B. 388; 15 L. T. O. S. 543; 14 Jur. 1089; 117 E. R. 657, Ex. Ch.

Annotations:—**Consd.** Warrick v. Queen's College, Oxford (1871), 6 Ch. App. 716; Evans v. Merthyr Tydfil U. C. (1898), 68 L. J. Ch. 175. **Refd.** R. v. Bedfordshire (1855), 4 E. & B. 535; Dendy v. Simpson (1856), 18 C. B. 831; Broome v. Wenham (1893), 68 L. T. 651; Heath v. Deane, [1905] 2 Ch. 86.

SUB-SECT. 3.—PARTICULAR FACTS.

344. Whether admissible.]—On a question whether a turnpike stood within the limits of a town:—*Held*: evidence that old people, since dead, had said that there formerly were houses where none any longer stood was inadmissible, being evidence of a particular fact, & not of reputation.—IRELAND v. POWELL (1802), cited in 7 Ad. & El. at p. 555; 112 E. R. 579, N. P.

Annotations:—**Consd.** R. v. Antrobus (1835), 2 Ad. & El. 788; R. v. Bliss (1837), 7 Ad. & El. 550. **Refd.** Chatfield v. Fryer (1815), 1 Price, 253; Mercer v. Denne, [1904] 2 Ch. 534.

See, also, Nos. 326, 334, 335, *ante*; Sub-sect. 4, *post*.

SUB-SECT. 4.—DECLARATIONS OF DECEASED PERSONS.

345. Boundary of town.]—IRELAND v. POWELL, No. 334, *ante*.

346. Waste of farm.]—CLOTHIER v. CHAPMAN, No. 341, *ante*.

347. Lord of manor—Extent of wastes of manor.]—Declarations of a deceased lord of a manor, as to the extent of his rights over the wastes of a manor, are not admissible in evidence; *aliter*, if spoken of the extent of the wastes only.—CREASE v. BARRETT (1835), 1 Cr. M. & R. 919; 5 Tyr. 458; 4 L. J. Ex. 297; 149 E. R. 1353; *subsequent proceedings*, 2 Cr. M. & R. 738.

Annotations:—**Mentd.** De Rutzen v. Farr (1835), 4 Ad. & El. 53; Doe d. Tatham v. Wright (1836), 1 Har. & W. 729; Evans v. Taylor (1838), 7 Ad. & El. 617; Ward v. Suffolk (1839), 5 Bing. N. C. 381; Mortimer v. McCullan (1840), 6 M. & W. 58; Gerish v. Chartier (1845), 1 C. B. 13; Hughes v. Hughes (1846), 15 M. & W. 701; Doe d. Welsh v. Langfield (1847), 16 M. & W. 497; Beaufort v. Smith (1849), 4 Exch. 450; Hammond v. Bradstreet (1851), 2 C. L. R. 1195; Hardcastle v. Dennison (1861), 10 C. B. N. S. 606; Quilter v. Jorss (1863), 14 C. B. N. S. 747; Carmarthen & Cardigan Ry. Co. v. Manchester & Milford Ry. Co. (1873), L. R. 8 C. P. 685; Mors-le-Blanch v. Wilson (1873), L. R. 8 C. P. 227; Evans v. Merthyr Tydfil U. C. (1898), 79 L. T. 578; R. v. Norfolk County Council (1910), 26 T. L. R. 269.

348. Boundary of manor.]—Where a legal manor has once existed, declarations of persons deceased as to its boundary are still admissible in evidence, though the manor has ceased to exist otherwise than by reputation.—DOE d. MOLESWORTH v. SLEEMAN (1846), 9 Q. B. 298; 1 New Pract. Cas. 434; 15 L. J. Q. B. 338; 7 L. T. O. S. 252; 10 Jur. 568; 115 E. R. 1287.

Annotation:—**Mentd.** Doe d. Jenkins v. Davies (1847), 10 Q. B. 314.

349. Boundary of parish—Recital in agreement.]—On Apr. 1, 1858, P., the owner of a large estate in the parish of T., found, among the title deeds of that estate in his possession, an agreement dated Jan. 12, 1698, purporting to be made between the then owner of the parish of N. of the one part, & six persons named & described as of T., of the other. This agreement recited that N. was in the parish of T., & provided that, notwithstanding, N. should thenceforth be in no way liable to maintain or keep, or be at any charges or expenses in maintaining & keeping any poor in the other part of that parish, but only such poor as should come from N.; & that the other part of the parish should be at the cost of maintaining its own poor, but not

the poor from N. The agreement further contained covenants between the parties for carrying out this arrangement. It purported to be executed by the owner of N., & to be agreed to under hand by two inhabitants of T., other than the parties to it of the second part:—*Held*: this agreement was evidence of reputation as to the extent of the parish, being a declaration by the deceased owner of N. & the other inhabitants of T. to that effect.—R. v. MYTTON (1860), 2 E. & E. 557; 121 E. R. 209; *sub nom.* MYTTON v. THORNBURY (CHURCHWARDENS & OVERSEERS), 29 L. J. M. C. 109; 2 L. T. 12; 24 J. P. 180; 6 Jur. N. S. 341; 8 W. R. 275.

350. Tenants of manor—Waste of manor of freehold.]—DUNRAVEN (LORD) v. LLEWELLYN, No. 343, *ante*.

351. Former incumbent—Parochial chapelry.]—Where the question was, whether the chapelry of St. H. was a legal parochial chapelry:—*Held*: a case stated by a deceased incumbent of St. H. for the opinion of a proctor, with his opinion thereon, was admissible.—CARR v. MOSTYN (1850), 5 Exch. 69; 19 L. J. Ex. 249; 14 L. T. O. S. 506; 14 J. P. 576; 155 E. R. 30.

Annotation:—**Refd.** Fowke v. Berington, [1914] 2 Ch. 308.

See, also, Nos. 326, 334, 335, 344, *ante*.

SECT. 4.—PUBLIC DOCUMENTS, MAPS, ORDERS, ETC.

352. Domesday Book.]—NEWCASTLE (DUKE) v. BROXTOWE (HUNDRED), No. 337, *ante*.

353. Crown survey—Manor—Commission lost under which survey made.]—An ancient extent of Crown lands found in the proper office, & purporting to have been taken by a steward of the King's lands, & following in its construction the directions of 4 Edw. 1, will be presumed to have been taken under competent authority, although the commission cannot be found.—ROWE v. BRENTON (1828), 8 B. & C. 737; 3 Man. & Ry. K. B. 133; 2 State Tr. N. S. 251; Concanen's Rep. 113-128; 108 E. R. 1217.

Annotations:—**Consd.** Evans v. Taylor (1838), 7 Ad. & El. 617; Mercer v. Denne, [1905] 2 Ch. 538. **Refd.** R. v. Richmond (1841), 5 Jur. 605; Doe d. William IV. v. Roberts (1844), 13 M. & W. 520. **Mentd.** Doe d. Carthew v. Brenton (1830), 4 Moo. & P. 186; Whittingham v. Bloxham (1831), 4 C. & P. 597; Anglesey v. Hatherton (1842), 10 M. & W. 218; Doe d. Dund v. Thompson (1845) 7 Q. B. 897; Rogers v. Brenton (1817), 10 Q. B. 26; *Ex p.* Exeter, Gorham v. Exeter (1850), 10 C. B. 102; Shaw v. Beck (1853), 8 Exch. 392; Jessop v. Jessop (1861), 30 L. J. P. M. & A. 193; A.-G. to Prince of Wales v. Crossman (1866), L. R. 1 Exch. 381; Dixon v. Farrer (1886), 18 Q. B. D. 43; Sutton Harbour Improvement Co. v. Plymouth Town Grdms. (1890), 63 L. T. 772.

354. ———.]—A survey taken by commission from the Crown, when seised of a manor, is admissible to show what were the demesne lands of the manor at that time.—DIMES v. ARDEN (1836), 6 Nev. & M. K. B. 494; 5 L. J. K. B. 158.

Annotation:—**Mentd.** Delacherois v. Delacherois (1864), 4 New Rep. 501.

355. ——— Rights of common.]—A survey & report made by a surveyor in 1816, in discharge of a duty imposed upon him by 34 Geo. 3, c. 75, s. 8, upon the occasion of a sale of Crown lands, & produced out of the proper custody:—*Held*: admissible in evidence as a public document.—EVANS v. MERTHYR TYDFIL URBAN COUNCIL, [1899] 1 Ch. 241; 68 L. J. Ch. 175; 79 L. T. 578; 43 Sol. Jo. 151, C. A.

Annotations:—**Refd.** Mercer v. Denne, [1905] 2 Ch. 538. **Mentd.** Heath v. Deane, [1905] 2 Ch. 86.

356. Duchy survey—Manor.]—On a question as to the boundary of a manor, formerly, but no

Sect. 4.—Public documents, maps, orders, etc.]

longer, part of the Duchy of Lancaster, a document of the time of Elizabeth, when the manor belonged to the duchy, was offered in evidence. It was produced from the Duchy Office, & purported to be a survey of the manor, taken by J. W., deputy of the Surveyor-General of the Duchy, by authority of letters of deputation to J. W. by the oaths & presentment of such of the tenants of the manor whose names were subscribed. The names of twenty persons followed, described as "jurors at the ct. of survey"; & it was added, that they, being examined, did present, etc. Then came a statement of the boundaries, a list of tenants & rents, & a presentment of the demesnes, of customs, of injuries suggested, & of some other particulars. No authority for taking the survey was proved, except as above-mentioned:—*Held*: the document was not admissible, as a survey appearing to be taken by the proper officer, agreeably to 4 Edw. 1, Stat. Extenta Manerii.—*EVANS v. TAYLOR* (1838), 7 Ad. & El. 617; 3 Nev. & P. Q. B. 174; 7 L. J. Q. B. 73; 112 E. R. 602.

Annotations:—*Consd.* Beaufort v. Smith (1849), 4 Exch. 450. *Distd.* Daniel v. Wilkin (1852), 7 Exch. 429. *Consd.* Mercer v. Denne, [1905] 2 Ch. 538.

357. ———.]—A document purporting to be a survey of a manor made while it was part of the possessions of the Duchy of Cornwall, & coming out of the proper custody:—*Held*: admissible as evidence of the boundaries of the manor.—*SMITH v. BROWNLOW (EARL)* (1870), L. R. 9 Eq. 241; 21 L. T. 739; 34 J. P. 293; 18 W. R. 271.

Annotations:—*Refd.* Evans v. Merthyr Tydfil U. C., [1899] 1 Ch. 241. *Mentd.* Betts v. Thompson (1870), 23 L. T. 427; Warrick v. Queen's College, Oxford (1870), L. R. 10 Eq. 105; London Sewers Comrs. v. Glasco (1871), 25 L. T. 614; De La Warr v. Miles (1881), 17 Ch. D. 535.

358. Parliamentary survey—Tything.—In an action against the surveyor of highways of the parish of S. for distraining on the goods of pltf. for arrears of a highway rate, it appeared that pltf. was occupier of one of two farms in the tything of W., in that parish. The occupiers in W. had never paid highway rate for the parish of S. until 1857, though they had been rated to the poor rates of the parish, & they had always done the necessary repairs to the roads in W. Among other documents to prove that W. was a distinct tything, a parliamentary survey made in the time of the Commonwealth was admitted in evidence. In 1857 a highway rate, in which pltf. was assessed, was made for the parish, & affirmed by the ct., on a case stated by the quarter sessions. In July, 1861, the rate in question was made, & pltf. was summoned before justices, who issued their warrant of distress in obedience to a rule of ct.:—*Held*: (1) the parliamentary survey was admissible; (2) there was sufficient evidence of a legal exemption of the tything of W. from liability to contribute to the repair of the highways in the parish of S.—*FREEMAN v. READ* (1863), 4 B. & S. 174; 32 L. J. M. C. 226; 10 Jur. N. S. 149; 122 E. R. 425.

PART IV. SECT. 4.**a. Map made under School Act.**

Upon a question as to the boundaries of a school section:—*Held*: the map prepared by the township clerk, under the above Act, showing the division of the township into sections, was admissible as evidence.—*Re SHORREY & THRASHER* (1870), 30 U. C. R. 504.—*CAN.*

b. S. P. BURFORD SCHOOL TRUSTEES v. BURFORD TOWNSHIP (1889), 18 O. R. 546.—*CAN.*

c. Map made by city surveyors—Boundaries of square.—Maps of a city made by city surveyors showing thereon a square marked "B," were offered in evidence to show its boundaries:—*Held*: not admissible.—*VANKOUGHNET v. DENISON* (1885), 11 A. R. 699.—*CAN.*

363 i. Ordnance map.—*GIBSON v. BONNINGTON SUGAR REFINING CO.* (1869), 7 Macph. (Ct. of Sess.) 394.—*SCOT.*

363 ii. S. P. MEACHER v. BLAIR-OLI-

Annotations:—*Refd.* R. v. Rollett (1875), L. R. 10 Q. B. 469; R. v. Berger, [1894] 1 Q. B. 823. *Mentd.* Dawson v. Willoughby (1864), 5 B. & S. 920; Quartermaine v. Selby (1889), 5 T. L. R. 223; Heath v. Weaverham Overseers, [1894] 2 Q. B. 108; Ferrand v. Bingley U. C., [1903] 2 K. B. 445.

359. Tithe map.—*Held*: under Tithe Act, 1836 (c. 71), s. 64, a tithe commutation map was not admissible in evidence, as showing the boundary of land in case of disputed title.—*WILBERFORCE v. HEARFIELD* (1877), 5 Ch. D. 709; 46 L. J. Ch. 584; 25 W. R. 861.

Annotations:—*Distd.* Smith v. Lister (1895), 64 L. J. Q. B. 154. *Refd.* Coleman v. Kirkaldy, [1882] W. N. 103; Bidder v. Bridges (1886), 54 L. T. 529.

360. ———.]—Tithe maps though not evidence of the boundary between parties may nevertheless be used to show a particular position.—*PALMER v. ANDREWS* (1902), cited in Moore's History & Law of Fisheries, at p. 147.

361. ——— **Private owners.**—A tithe map is not admissible as evidence in a case of disputed boundaries between private owners.—*FROST v. RICHARDSON* (1910), 103 L. T. 22; *affd.* 103 L. T. 416, C. A.

362. ——— **Waste of manor.**—Where a question of general right to the waste of the manor had arisen in which a class of the community, viz. the inhabitants of a township & tenants of the manor, had a common interest:—*Held*: a tithe map made in 1843 was admissible in evidence.—*SMITH v. LISTER* (1895), 64 L. J. Q. B. 154; 72 L. T. 20; 15 R. 226.

363. Ordnance map—Adjoining premises.—*Held*: an Ordnance map was not admissible to show boundary of premises.—*COLEMAN v. KIRKALDY*, [1882] W. N. 103.

364. ——— **Maps from British Museum—Land in parish.**—In an action in which pltf. sought to prove that certain land was in the parish & vill of M., maps were tendered in evidence on either side, which included the Ordnance map & several other maps, some of which came from the British Museum:—*Held*: the maps were not admissible as evidence in such an action as this.—*BIDDER v. BRIDGES* (1885), 54 L. T. 529; 34 W. R. 514.

365. ——— **Private lands.**—Although an Ordnance survey map is not evidence of title, it may be given in evidence when the question of boundary is in dispute, to show the boundary line as represented on the map when the survey was made.—*CATON v. HAMILTON* (1889), 53 J. P. 504.

366. ——— **Position of hedge.**—Ordnance maps are admissible in evidence to show the position of a hedge at a certain date.—*A.-G. & CROYDON RURAL DISTRICT COUNCIL v. MOORSOM-ROBERTS* (1908), 72 J. P. 123; 6 L. G. R. 470.

367. Map with inclosure award—Parish boundary.—*R. v. MILTON (INHABITANTS)*, No. 338, ante.

368. ——— **Highway.**—A map of an inclosure award is inadmissible to prove the boundaries of a highway against deft., on an indictment for obstructing a highway, whose property is adjacent to the highway, & who was not subject to the jurisdiction of the Inclosure Comrs., in making their award.—*R. v. BERGER*, [1894] 1 Q. B. 823;

PHANT (1913), 50 Sc. L. R. 373.—*SCOT.*

d. Plan—Whether a public document.—A plan does not become a public document & admissible as such in evidence merely because it has been lodged with the Registrar-General in connection with an application to bring land under Real Property Acts.—*EVERINGHAM v. PENRITH MUNICIPALITY* (1916), 16 S. R. N. S. W. 238.—*AUS.*

e. Plan attached to Crown grant.]

63 L. J. Q. B. 529; 70 L. T. 807; 58 J. P. 416; 42 W. R. 541; 10 T. L. R. 380; 17 Cox, C. C. 761; 10 R. 245, D. C.

Annotation:—*Consd. A.-G. v. Horner*, [1913] 2 Ch. 140.

369. — Inclosed land.—*Semble*: in a case of disputed boundaries, an inclosure map may be evidence against the owner of the land comprised in the award.—*Frost v. Richardson* (1910), 103 L. T. 22; *affd.* 103 L. T. 416, C. A.

370. ——The conservators of a common regulated under Commons Act, 1876 (c. 56), in whom the general management of the common was vested, brought an action to restrain the owner of enclosures abutting on the common from encroaching by means of fences erected on the common side of the hedges forming the boundary of the common as delineated upon a map annexed to the award. Deft. was a party to the application for regulation of the common, which was limited to "improvement," & did not extend to the "adjustment of rights." He contended that the award map was not conclusive & did not in fact show the real boundaries of the common. His enclosures were physically separated from the common by old quickset hedges, & the map showed as the boundary the centre line of these hedges. *YOUNGER, J.*, & on appeal, *SCRUTTON, L.J.*, dissenting from the rest of the ct., having decided that the award map was conclusive as to boundaries & deft. was estopped from disputing its accuracy:—*Semble* (*LORDS CAVE & SUMNER*): the award map formed as against deft. very cogent, if not conclusive, evidence of the boundary between his land & the common.—*Collis v. Amphlett* (1910), 89 L. J. Ch. 101; 122 L. T. 433; 18 L. G. R. 1, H. L.; *revsq.*, [1918] 1 Ch. 232, C. A.

371. Map made under royal commission—Rating area.—A map, made under the authority of the King's commission in 1832, setting out the metes & bounds of the level of New Romney, authenticated by the presentment of a jury, who made it part of their return to an inquisition held under the same commission, & practically acquiesced in for nearly sixty years:—*Held*: to be evidence of the local limits within which the Comrs. of Sewers of the level were entitled to exercise their jurisdiction of levying scots or rates.—*NEW ROMNEY CORPN. v. NEW ROMNEY SEWERS COMRS.*, [1892] 1 Q. B. 840; 61 L. J. Q. B. 558; 56 J. P. 756, C. A.

372. Manor map—Waste of manor.—A manor map, produced from the custody of the lord of the manor, made in 1817 by a surveyor, since deceased, who was proved by a living witness to have been competent & conversant with the district, & used by the parish authorities for rating purposes:—*Held*: to be admissible in evidence where a question of general right to the waste of the manor had arisen in which a class of the community, *viz.*, the inhabitants of a township & tenants of the manor, had a common interest.—*Smith v. Lister* (1895), 64 L. J. Q. B. 154; 72 L. T. 20; 15 R. 226.

373. Order of court—On information between tenants—Not binding on landlords.—An information between tenants for the determination of boundaries & the decision on it:—*Held*: not to

bind the inheritances of their respective landlords & not admissible in evidence, except against persons claiming under the actual parties.—*IVY'S (LADY) TRIAL, MOSSAM v. IVY* (1684), 10 State Tr. 555.

Annotation:—*Mentd. Darby v. Ouseley* (1856), 2 Jur. N. S. 497.

374. By judges & officers of the Court of Exchequer—Jurisdiction of county or city.—Upon the trial of an issue in prohibition, whether the usurpation of office in a *quo warranto* information mentioned was committed out of the jurisdiction of the County Palatine, & within that of the City of Chester, a document from the remembrancer's office of the Exch. Ct. was produced, purporting to be a decree made, after hearing of a complaint against the citizens of Chester, & their answer, by the Lord High Treasurer of England, the Chancellor of the Exchequer, the Under Treasurer, & the Chief Baron, with the advice & assent of a Queen's Serjeant, & the Queen's Attorney & Solicitor-General, & others of the same ct.:—*Held*: the document was not admissible in evidence as a decree, because it was not a decree of the Exch. Ct. nor of any ct. known to the law at the time when it purported to have been made, nor as an award, because there appeared no voluntary submission of parties.—*ROGERS v. WOOD* (1831), 2 B. & Ad. 245; 109 E. R. 1134.

Annotations:—*Refd. Crease v. Barrett* (1835), 1 Cr. M. & R. 919; *Evans v. Rees* (1839), 10 Ad. & El. 151.

375. — Order of sessions—District within jurisdiction.—Upon a question of boundaries, ancient orders of sessions, containing statements respecting the extent of a district within the jurisdiction of the ct. of quarter sessions, made when no dispute as to the boundary existed:—*Held*: admissible in evidence.—*NEWCASTLE (DUKE) v. BROXTOWE (HUNDRED)* (1832), 4 B. & Ad. 273; 1 Nev. & M. K. B. 598; 1 Nev. & M. M. C. 507; 2 L. J. M. C. 47; 110 E. R. 458.

Annotations:—*Refd. Crease v. Barrett* (1835), 1 Cr. M. & R. 919; *Mercer v. Denne*, [1905] 2 Ch. 538. *Mentd. Dunraven v. Llewellyn* (1850), 15 Q. B. 791; *Hadley v. Baxendale* (1854), 23 L. T. O. S. 69; *Yates v. Dunster* (1855), 11 Exch. 15; *Shedden v. Patrick* (1860), 2 Sw. & Tr. 170; *Joyner v. Weeks*, [1891] 2 Q. B. 31; *Evan v. Morthyr Tydvil U. D. C.* (1898), 79 L. T. 578; *Wednesbury Corpn. v. Lodge Holes Colliery Co.*, [1907] 1 K. B. 78.

376. — Verdict of commission—But no decree—Manor boundaries.—*BRISCO v. LOMAX*, No. 327, *ante*.

377. Ecclesiastical documents—Estate book of Dean & Chapter.—An estates book of the Dean & Chapter of St. Pauls, over one hundred years old, was admitted in evidence on a question of title but commented on in respect of alterations made therein in another handwriting from that of the book.—*IVY'S (LADY) TRIAL, MOSSAM v. IVY* (1684), 10 State Tr. 555.

Annotation:—*Mentd. Darby v. Ouseley* (1856), 2 Jur. N. S. 497.

378. ——A book kept in the chapter-house of the Dean & Chapter of Sarum, purporting to contain copies of leases granted by the Dean & Chapter, is, as a public book, evidence of those leases for the purpose of reputation, without proof of possession under the leases.—*COOMBS v. COETHER & WHEELER* (1829), Mood. & M. 398, N. P.

—A plan, attached to a Crown grant & referred to in it, is admissible for the purpose of locating a boundary line.—*LEWIS MILLER & CO., LTD. v. CLOW* (1918), 52 N. S. R. 1.—*CAN.*

1. Plan under statute.—A plan approved under Special Surveys Act, 1902, should be treated simply as evidence of the location of a boundary line.—*PETERSON v. BITULITHIC & CONTRACTING CO.* (1913), 24 W. L. R.

19; 4 W. W. R. 223; 12 D. L. R. 444.—*CAN.*

g. Reports on local investigations.—Unless there be very good grounds for dissenting & differing from reports made upon local investigations, the cts. in dealing with boundary questions ought to be guided by them.—*RAM GOPAL ROY v. GORDON STUART & CO.* (1872), 14 Moo. Ind. App. 453; 17 W. R. 285.—*IND.*

h. Survey map.—In a boundary dispute, a survey map, if not conclusive evidence, is evidence of an important character, which should be considered.—*GUDADIUR BANERJEE v. TARA CHAND BANERJEE* (1871), 15 W. R. 3.—*IND.*

k. Schedule under Scigniorial Act, 1854.—*LABRADOR CO. v. R.*, [1893] A. C. 104; 62 L. J. P. C. 33; 67 L. T. 730, P. C.—*CAN.*

Sect. 4.—Public documents, maps, orders, etc.
Sect. 5.]

379. — Terrier—Parish.]—A terrier cannot be received in evidence, unless it comes from the proper repository, the registry of the diocese, or a copy from the parish registry, if the original cannot be found.—*ATKINS v. HATTON* (1794), 2 Anst. 386; 2 Eag. & Y. 403; 145 E. R. 911.

*Annotations:—*Refd. *Miller v. Foster* (1794), 2 Anst. 387, n. *Mentd.* *Jesus College v. Gibbs* (1835), 1 Y. & C. Ex. 145.

380. — — — — —.]—A terrier or map of the parish, not signed by any of the parishioners, or parish officers:—*Held*: not to be admissible evidence of the boundary of the parish.—*EARL v. LEWIS* (1801), 4 Esp. 1, N. P.

381. — Parish papers—In custody of incumbent.]—Under an issue to try the boundaries of a parish, papers handed over to the present incumbent by the representative of his predecessor, as papers belonging to the parish, found in the late incumbent's possession are:—*Held*: to be admissible evidence.—*EARL v. LEWIS* (1801), 4 Esp. 1, N. P.

382. — Survey.]—*Held*: an ecclesiastical survey, stating the vicar to be entitled to tithe-hay in the parish generally, did not supply the absence of proof of perception from the particular lands.—*ARMSTRONG v. HEWITT* (1817), 4 Price, 216; Wils. Ex. 119; 146 E. R. 444, Ex. Ch.

*Annotations:—*Refd. *Hall v. Godson* (1836), 2 Y. & C. Ex. 153; *Bidder v. Bridges* (1885), 34 W. R. 514.

383. — Entries in churchwarden's book—Parish.]—On the question whether a place is parcel of a certain parish, old entries made by a churchwarden in a book, by which he did not charge himself, but in which he merely made statements relative to repairs, etc., done to a chapel in the parish church, alleged to belong to the place in question:—*Held*: not to be evidence.—*COOKE v. BANKS* (1826), 2 C. & P. 478, N. P.

*Annotation:—*Refd. *Fowke v. Berington*, [1914] 2 Ch. 308.

384. — Assessment to church rate.]—Old assessments to church rate:—*Held*: to be evidence upon a question of boundary, though the parish officers did not charge themselves with the receipt of the rate, otherwise than by crosses set against the names of the parties rated.—*PLAXTON v. DARE* (1829), 10 B. & C. 17; 5 Man. & Ry. K. B. 1; 8 L. J. O. S. K. B. 98; 109 E. R. 357.

*Annotations:—*Refd. *Mercer v. Denne* (1905), 74 L. J. Ch. 723. *Mentd.* *Hall v. Ball* (1841), 3 Man. & G. 242; *Doc d.* *Shrewsbury v. Keeling* (1848), 11 Q. B. 881.

385. — Answers to bishop's inquisition.]—Where the question was whether the chapelry of St. H. was a legal parochial chapelry:—*Held*: the answer of the incumbent of St. H., & other clergymen, to questions sent by the Bishop of C., the diocesan, for the information of the Governors of Queen Anne's Bounty, at the time an augmentation was made, was admissible, as being in the nature of an inquisition on a public matter.—*CARR v. MOSTYN* (1850), 5 Exch. 69; 19 L. J. Ex. 249; 14 L. T. O. S. 506; 14 J. P. 576; 155 E. R. 30.

*Annotation:—*Refd. *Fowke v. Berington*, [1914] 2 Ch. 308.

See, generally, ECCLESIASTICAL LAW.

386. Award of inclosure commissioners—Whether conclusive as to antecedent parish boundaries.]—The determination of comrs. under an inclosure Act, as to the boundaries of a parish to be inclosed:—*Held*: not conclusive of the fact as to what were the boundaries antecedently to such determination.—*R. v. ST. MARY, BURY ST.*

*1. Award.]—*The question of a disputed boundary between occupants of Crown lands was referred in 1841 to the Comr. of Crown lands; he fixed

the boundary. In 1863, the same boundary was disputed by the same parties:—*Held*: evidence of reference

EDMUNDS (INHABITANTS) (1821), 4 B. & Ald. 402; 106 E. R. 1006.

*Annotation:—*Refd. *R. v. Madeley* (1850), 15 Q. B. 43.

387. — Waste of manor.]—In 1818 R. inclosed a piece of land of 11 perches, lying by the side of a lane which was a highway, in the manor of W. At that time G. was the owner in fee of the adjoining freehold land. In 1820 G. died, having devised his estate to H. for life, with remainders over. In 1836 a private Act was passed, by which comrs. were empowered to inclose & allot the wastes of the manor, including encroachments made within twenty years of the passing of the Act, & pieces of waste land lying by the sides of any public roads or lanes. In 1837 R. died, & F., his heir, took possession of the 11 perches. In 1838 the comrs. made & published their award, by which they awarded to H. two allotments, one of 24 perches, which included the 11 perches, & another of 29 perches similarly situate. H. took possession of the second allotment; but F. remained in possession of the piece of 11 perches, till he sold it, in 1859, to deft. In 1874 H. died, & pltf. succeeded to the estate under the will of G. He then brought ejectment against deft. to recover the 11 perches:—*Held*: the admission of H. against his interest, by accepting the allotment under the award, was strong evidence that the land was waste of the manor, & rebutted the presumption arising from the situation of the slips of land, that they belonged to him as owner of the adjoining land.—*GERY v. REDMAN* (1875), 1 Q. B. D. 161; 45 L. J. Q. B. 267; *sub nom.* *REDMAN v. GERY*, 24 W. R. 270.

388. Arbitrator's award—Private lands.]—Where a question of boundary was referred by a submission between A. & his tenant B. on the one side & C., a neighbouring landowner, on the other:—*Held*: the award was admissible evidence for C. in a subsequent action by him against B. although B. had in the meantime become tenant of the same land to another landlord under whom he now justified & who was not shown to be in privity with A.—*BRETON v. KNIGHT* (1837), cited in *Roscoe's Evidence at N. P.*, 18th ed., Vol. I., at p. 220.

389. — Parish & county.]—On an issue respecting the boundary of a parish & county, an award in a suit (*inter alios*) in which the arbitrator set out the boundary as proved before him, & a verdict entered according to his direction:—*Held*: not admissible as evidence of such boundary.

Although verdicts are, upon authority, admitted as proof of reputation, the rule does not extend to awards.—*EVANS v. REES* (1839), 10 Ad. & El. 151; 2 Per. & Dav. 626; 113 E. R. 58.

*Annotations:—*Refd. *Wenman v. Mackenzie* (1855), 5 E. & B. 447. *Mentd.* *Andrew v. Motley* (1862) 12 C. B. N. S. 514.

390. Presentation by homage of manor—Mutilated document.]—An ancient presentment by the homage of a manor, in the form of a book, set out the boundaries of the manor, & then gave in alphabetical order the names of the several parishes within it, & of the tenants resident in each parish, but this part of the presentment contained nothing as to boundaries. Two or three sheets at the concluding part of it, where the parish of Y. should have followed in order, had been cut off, but it did not appear under what circumstances. In an action involving a question as to the boundary of the manor, where it was admitted that the manor & Y. were conterminous in the direction of the

& the result was rightly received.—*ROBERTSON v. BLOXSOME* (1865), 4 N. S. W. S. C. R. 260.—*AUS.*

locus in quo:—*Held*: the presentment was admissible as evidence of the reputed boundary, for the document, although mutilated, was perfect in that part of it which related to the subject of the boundary.—*EVANS v. REES* (1839), 10 Ad. & El. 151; 2 Per. & Dav. 626; 113 E. R. 58.

Annotations:—*Mentd.* *Wenman v. Mackenzie* (1855), 5 E. & B. 447; *Andrew v. Motley* (1862), 12 C. B. N. S. 514.

SECT. 5.—PRIVATE DOCUMENTS.

391. Survey—Public sale of lands.]—In 1649, church lands were exposed for sale, & a survey taken. The lands were found to be the inheritance of the church of St. Paul's & as such sold for £9,500 & enjoyed by the purchasers till the restoration. On the survey being offered in evidence in proceedings in 1684, the reading of it was opposed because it had not any authority to warrant it:—*Held*: it was admissible in evidence.—*IVY'S (LADY) TRIAL, MOSSAM v. IVY* (1684), 10 State Tr. 555.

Annotation:—*Mentd.* *Darby v. Ouseley* (1856), 2 Jur. N. S.

392. Private lands.]—The question in ejectment being parcel or not parcel, a survey was offered in evidence on pltf.'s side, which was taken by one under whom the lessor claimed, wherein the lands in question were included:—*Held*: being an act to which the defts. were not privy, & consequently not bound, & being dangerous, & tending to encourage people to take more than their own into a survey, it should be rejected.—*ANON.* (1718), 1 Stra. 95; 93 E. R. 407, N. P.

393. — Manor.]—An old survey of two manors is good evidence of the boundaries of each *inter se*, if both manors belonged, at the time when the survey was taken, to the person who took it, otherwise it is not.—*BRIDGMAN v. JENNINGS* (1699), 1 Ld. Raym. 734; 91 E. R. 1390.

394. — —.]—An ancient survey of a manor made before comrs. appointed by the lord of the manor, & a jury of the tenants of the manor:—*Held*: admissible as evidence to show the boundaries of the manor.—*TALBOT v. LEWIS* (1831), 6 C. & P. 603, N. P.; *subsequent proceedings*, 1 Cr. M. & R. 495.

Annotation:—*Refd.* *Cresce v. Barrett* (1835), 5 Tyr. 458.

395. — —.]—A survey of a manor is admissible though not conclusive evidence as to the rights of persons having an interest therein.—*BLANDY-JENKINS v. DUNRAVEN (EARL)* (1898), 62 J. P. 661; *subsequent proceedings*, [1899] 2 Ch. 121, C. A.

Annotation:—*Refd.* *Evans v. Merthyr Tydvil U. D. C.* (1898), 79 L. T. 578.

396. — Lordship.]—Defts. for the purpose of proving that the Plas Bach was parcel of the lordship of D., tendered in evidence a survey, which ran thus: "Lordship of D. Survey taken in the reign of Queen Elizabeth, 11th. The presentment of the jury of survey for town lands within the Comot of K." Then followed a statement that David ap John ap David occupied

certain parcels of land in K., & amongst them "Place Baghe," & in the margin were the words "Examined with demise. Acres 112. £1 3s. 4d." Defts. also put in evidence certain ministers' accounts taken in 39 Eliz. relating to a messuage in the tenure of David ap John ap David, situate in K. In the margin were the words, "Note, this is 6s. 6d. rent in the old survey in my Lord L.'s time":—*Held*: the survey being a private one was not admissible for the purpose of proving that the lands in question were parcel of the lordship of D.—*DANIEL v. WILKIN* (1852), 7 Exch. 429; 21 L. J. Ex. 236; 155 E. R. 1016; *subsequent proceedings*, 8 Exch. 156.

397. — Notes of surveyor.]—Field-book entries made by a deceased surveyor for the purpose of a survey on which he was professionally employed:—*Held*: admissible in evidence as being made in the discharge of professional duty.—*MEILOR v. WALMESLEY*, [1905] 2 Ch. 164; 74 L. J. Ch. 475; 93 L. T. 574; 53 W. R. 581; 21 T. L. R. 591; 49 Sol. Jo. 565, C. A.

Annotations:—*Expld.* *Assheton-Smith v. Owen* (1905), 75 L. J. Ch. 181. *Distd.* *Mercer v. Donnc.* [1905] 2 Ch. 538. *Consd.* *Re Djambi (Sumatra) Rubber Estates* (1912), 107 L. T. 631. *Mentd.* *Eastwood v. Ashton* (1913), 83 L. J. Ch. 263; *Nesbit v. Mablethorpe, U. D. C.*, [1918] 2 K. B. 1; *Watcham v. East Africa Protectorate*, [1919] A. C. 533.

398. Private map—Agreeing with ancient purchase.]—An old map of lands along with the writings & agreeing with the boundaries adjusted in an ancient purchase:—*Held*: admissible in evidence.—*YATES v. HARRIS* (1702), cited in 1 Stra. at p. 95, n.; 93 E. R. 407.

399. — Parish boundaries.]—Appl. admitted to have in his custody, a map or plan of the consolidated parishes, which appeared, from the date thereof, to have been made in 1648, & was entitled, "An exact description of the parishes of B. W. & B. N., in the county of N., setting forth their joint & several lines of perambulation, with all the parcels of land as they are now divided within the parish of B. W., & part of the parcels of land lying within the parish of B. N., & also some parcels of land lying in the adjoining parishes, measured, surveyed, & delineated, at the appointment of T. S., Esq., lord of the lordships & manor of R. alias L., alias B. L. & P. Hall, lying within the said parishes, per J. K., philomathemat.":—*Held*: the map was admissible in evidence.—*WILKINSON v. ALLOTT* (1777), 3 Bro. Parl. Cas. 684; 1 E. R. 1575, II. L.

Annotations:—*Consd.* *A.-G. to Prince of Wales v. St. Aubyn* (1811), Wight, 167. *Mentd.* *Atkins v. Hatton* (1791), 2 Anst. 386; *Wynn v. Smythies* (1815), 1 Marsh. 547; *Godfrey v. Little* (1829), 1 Russ. & M. 59.

400. — Made when owner's title to whole undisputed.]—In ejectment, a map of property is receivable in evidence, only when it is undisputed that, at the time the map was made, the property belonged to the person from whom both parties claim.—*DOE d. HUGHES v. LAKIN* (1836), 7 C. & P. 481, N. P.

401. — From bishop's registry.]—In an action for breaking flood-gates, deft. justified as the lessee of a mill, which he held of the Bishop

PART IV. SECT. 5.

398 l. Private map.]—A map produced from the custody of the son of the original owner of property & sworn to be the map upon which the land was originally sold was held admissible.—*VAN EVERY v. DRAKE* (1860), 9 C. P. 478.—*CAN.*

m. Private plan.]—In a dispute as to marches between two landowners, whose lands had at one time formed parts of the same barony, pursuer tendered as evidence an old plan.

It had been found in the possession of a third person, owner of another part of the original barony. It was not known on whose instructions or for what purpose the plan had been made. It had at one time passed with the titles of defenders' predecessors:—*Held*: competent evidence.—*REID v. HALDANE'S TRUSTEE* (1891), 18 R. (Ct. of Sess.) 744; 28 Sc. L. R. 511.—*SCOT.*

n. — Preserved for long time in charter chest.]—In a question of dis-

puted boundaries, pursuer tendered in evidence an old plan of his estate which had been preserved in his charter chest for many years, but the origin of which was unknown:—*Held*: without deciding whether the plan should have been excluded or not, it did not, in the circumstances, furnish evidence of any kind; such anonymous plan or plans produced *ex p.* are *prima facie* not evidence.—*PLACE v. BREADALBANE (EARL)* (1874), 1 R. (Ct. of Sess.) 1202.—*SCOT.*

Sect. 5.—Private documents. 6.]

of W. Deft. proposed to put in an old map of the place in question brought from the Bishop of W.'s registry:—*Held*: the map was not admissible in evidence.—*WAKEMAN v. WEST* (1836), 7 C. & P. 479, N. P.

402. Map of county—Republished.]—In order to show that a house was situated in the county of N. plff. tendered in evidence a map printed on paper from an engraved copper plate, having on the face of it these words: "A new map of the county of S., taken from the original map published by J. K. in 1736, who took an accurate survey of the whole county, now republished, with corrections & additions by J. & W. K., sons of the author, 1766, & engraved by J. R." The map was produced by a witness, who was a magistrate of the two counties, N. & S. He had bought it twelve years before the trial:—*Held*: the map was not admissible in evidence.—*HAMMOND v. BRADSTREET* (1854), 10 Exch. 390; 23 L. J. Ex. 332; 23 L. T. O. S. 271; 2 W. R. 625; 2 C. L. R. 1195, Ex. Ch.

Annotations:—*Consd.* Coleman v. Kirkaldy, [1882] W. N. 103. *Expld.* It. v. Berger, [1894] 1 Q. B. 823. *Consd.* A.-G. v. Horner, [1913] 2 Ch. 140. *Refd.* Fowke v. Berington, [1914] 2 Ch. 308.

403. County history—Boundary of manor.]—The manors of R. & S, the parishes of C. & Y., & the counties of B. & G., were coterminous:—*Held*: in an action in which the boundaries of the two manors came in question, a county history of the county of B., which stated the boundaries of the counties at this spot, was not receivable in evidence.—*EVANS v. GETTING* (1831), 6 C. & P. 586, N. P. *Annotation*:—*Refd.* Fowke v. Berington, [1914] 2 Ch. 308.

404. — Boundary of parish.]—*Qu.*: whether Morant's History of Essex is admissible evidence to prove that Great & Little Coggeshall are one parish.—*WHITE & JACKSON v. BEARD* (1840), 2 Curt. 480.

Annotations:—*Mentd.* Ramsbottom v. Duckworth (1847), 1 Exch. 506; R. v. Byrom (1848), 12 Q. B. 321; R. v. Wilkinson (1848), 12 J. P. 360; R. v. Crook (1857), 21 J. P. 627; Asterley v. Adams (1871), L. R. 3 A. & E. 361.

405. Bill & answer in Chancery.]—A grant of a several fishery had been made by the Crown to a corpn. There was a dispute as to the limits of the fishery. In an action against alleged trespassers, plff., the lessee of the corpn., tendered in evidence the bill & answer in Ch. in a suit instituted a great many years before, by another grantee of the Crown against the corpn., & in which the limits of the alleged fishery were described:—*Held*: as part of the history of the fishery & of the claims made to it, the bill & answer were admissible in evidence.—*MALCOLMSON v. O'DEA* (1863), 10 H. L. Cas. 593; 9 L. T. 93; 27 J. P. 820; 9 Jur. N. S. 1135; 12 W. R. 178; 11 E. R. 1155, H. L.

Annotations:—*Consd.* Bristow v. Cornican (1878), 3 App. Cas. 641. *Appld.* Blandy-Jenkins v. Dunraven, [1899] 2 Ch. 121. *Refd.* Haigh & Baxter v. West (1893), 68 L. T. 531. *Mentd.* Mills v. Colchester Corpn. (1867), 36 L. J. C. P. 210; Rawstorne v. Backhouse (1867), 17 L. T. 441; Murphy v. Ryan (1868), 16 W. R. 678; Carlisle Corpn. v. Graham (1869), L. R. 4 Exch. 361; Edgar v. English Fisheries (1870), 23 L. T. 732; Johnson v. Barnes (1872), L. R. 7 C. P. 592; *Re* Walton-cum-Trimley Manor, *Ex p.* Tomline (1873), 28 L. T. 12; Goodman v. Saltash Corpn. (1882), 7 App. Cas. 633; Neill v. Devonshire (1882), 8 App. Cas. 135; Smith v. Andrews, [1891] 2 Ch. 678; Fitzgerald v. Firbank, [1897] 2 Ch. 96; Hanbury v. Jenkins, [1901] 2 Ch. 401; A.-G. for British Columbia v. A.-G. for Canada, [1914] A. C. 153.

o. Recital in mortgage—Description of boundary.]—Plff. sued in 1893 to recover possession of land. Defts. denied plff.'s title. Plff. tendered in evidence a mtge. of adjacent land

executed in 1877, which set forth the boundaries of the land comprised in the mtge., & as one of such boundaries referred to the land in question as then

406. Corporation "Assembly book."]—Plff. tendered in evidence an "Assembly Book," belonging to a corpn., dated 1676, & containing entries of the rents due to the corpn. from its various tenants, among which were entries of rents paid in respect of a fishery:—*Held*: the book was admissible as an ancient document showing the exercise of acts of ownership.—*MALCOLMSON v. O'DEA* (1863), 10 H. L. Cas. 593; 9 L. T. 93; 27 J. P. 820; 9 Jur. N. S. 1135; 12 W. R. 178; 11 E. R. 1155, H. L.

Annotations:—*Foll.* Blandy-Jenkins v. Dunraven, [1899] 2 Ch. 121. *Refd.* Haigh & Baxter v. West (1893), 68 L. T. 531. *Mentd.* Mills v. Colchester Corpn. (1867), 36 L. J. C. P. 210; Rawstorne v. Backhouse (1867), 17 L. T. 441; Murphy v. Ryan (1868), 16 W. R. 678; Carlisle Corpn. v. Graham (1869), L. R. 4 Exch. 361; Edgar v. English Fisheries (1870), 23 L. T. 732; Johnson v. Barnes (1872), L. R. 7 C. P. 592; *Re* Walton-cum-Trimley Manor, *Ex p.* Tomline (1873), 28 L. T. 12; Bristow v. Cornican (1878), 3 App. Cas. 641; Goodman v. Saltash Corpn. (1882), 52 L. J. Q. B. 193; Neill v. Devonshire (1882), 8 App. Cas. 135; Smith v. Andrews, [1891] 2 Ch. 678; Fitzgerald v. Firbank, [1897] 2 Ch. 96; Hanbury v. Jenkins, [1901] 2 Ch. 401; A.-G. for British Columbia v. A.-G. for Canada, [1914] A. C. 153.

407. Expired lease & counterpart.]—Expired leases & counterparts of expired leases, though cancelled, are admissible in evidence upon a question of boundary.—*PLAXTON v. DARE* (1820), 10 B. & C. 17; 5 Man. & Ry. K. B. 1; 8 L. J. O. S. K. B. 98; 109 E. R. 357.

Annotations:—*Refd.* Hall v. Ball (1841), 3 Man. & G. 242. *Mentd.* Doe d. Shrewsbury v. Keeling (1848), 11 Q. B. 884; Mercer v. Denne (1905), 74 L. J. Ch. 723.

408. Agreement for lease—Private lands.]—By a memorandum between A. & B., it was agreed that a question of boundary should be referred to some indifferent surveyor residing at a distance. By a further memorandum written on the same paper, at a subsequent day, it was agreed that the question should be settled by C. The lessees of A. & B. were not parties to the agreement:—*Held*: the agreement was evidence for the lessee of A. against the lessee of B., after proof that the lessee of B. had applied to A. for a lease of the spot in dispute, in case the decision should be against B., & that he was present when the boundary was staked out by the referee.—*TAYLOR v. PARRY* (1840), 1 Man. & G. 604; 1 Scott, N. R. 576; 9 L. J. C. P. 298; 4 Jur. 967; 133 E. R. 474.

Annotations:—*Distd.* Humphrey v. Nowland (1862), 15 Moo. P. C. C. 343. *Mentd.* Fishmongers Co. v. Dimsdale (1852), 22 L. J. C. P. 44; Holmes v. Powell (1856), 8 De G. M. & G. 572.

409. Recital in agreement—Parish boundary.]—By a rate for the relief of the poor of the parish of T. applt. was rated as the occupier of the N. estate. From the year 1698, up to the time the rate was made, N. had maintained its own poor, & had never been charged with the support of the poor of any other place. On Apr. 1, 1858, an agreement relating to the N. estate was found by P. among the title-deeds of a large estate in the parish of T. of which he was owner. The agreement purported to have been made in 1698, between a former owner of the N. estate & certain parishioners & owners of land in T. parish, & it was thereby agreed that, notwithstanding the N. estate was lying & being in T. parish, it should be in no way liable to maintain & keep, or be at any charges for maintaining any poor that should at any time be in any other part of T. parish, but only such as should come from the N. estate. It was sealed by the owner of the estate:—*Held*: this was an instrument which might reasonably be expected

belonging to plff.:—*Held*: the statement in the deed was admissible.—*NINGAWA v. BHARMAPPA* (1897), L. L. R. 23 Bom. 63.—*IND.*

to be found among the title deeds of a large estate in the parish, & was admissible in evidence to show that the N. estate was part of T. parish.—*R. v. MYTTON* (1860), 2 E. & E. 557; 121 E. R. 209; *sub nom. MYTTON v. THORNBURY* (CHURCHWARDENS & OVERSEERS), 29 L. J. M. C. 109; 2 L. T. 12; 24 J. P. 180; 6 Jur. N. S. 341; 8 W. R. 275.

410. Inscription on boundary wall.]—Where there is on the face of a boundary wall of a house an inscription, stating that it is the property of another person, the vendor of the house cannot, in the absence for more than twenty years of any acts of ownership by the person so stated to be the owner of the wall, rely upon adverse possession as giving him a title to the wall.—*PHILLIPSON v. GIBBON* (1871), 6 Ch. App. 428; 40 L. J. Ch. 406; 24 L. T. 602; 35 J. P. 676; 19 W. R. 661, L. J. J. *Annotation*:—*Mentd. Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557.

411. Particulars of sale at auction.]—A conveyance of a right of several fishery by the owner to a purchaser did not in express terms include the bed of the river. The particulars of sale at the auction at which the purchaser bought, stated, that the sale did not include the ownership of the bed of the river:—*Held*: these particulars were admissible evidence to rebut the presumption that the bed of the river was intended to pass with the grant of the fishery.—*ECROYD v. COULTHARD*, [1897] 2 Ch. 554; 66 L. J. Ch. 751; 77 L. T. 357; 61 J. P. 791; 46 W. R. 119; *affd.*, [1898] 2 Ch. 358, C. A.

Annotations:—*Mentd. Hanbury v. Jenkins*, [1901] 2 Ch. 401; *Hough v. Clark & Hall* (1907), 23 T. L. R. 682.

412. Agreement to stay proceedings for trespass on land in dispute—Whether private land or common.]—In an action brought to determine the title to certain land, plff. tendered in evidence an ancient document coming from the proper custody which purported to be signed by M., a tenant of a predecessor in title of deft., & which stated that J., a predecessor in title of plff., had been persuaded to stop all proceedings at law that he then had against M. for wilfully & without leave bringing his sheep & cattle on to J.'s freehold land therein specified, which was assumed to be part of the land in dispute, for which wilful trespass M. bound himself to pay costs, & that he would for the future keep his own & other people's sheep & cattle from trespassing on the land to the utmost of his power:—*Held*: the document was admissible in evidence, not as an admission by the tenant as to title, in which case it would not be evidence against the landlord, but as evidence of an act of ownership by a predecessor in title of plff.—*BLANDY-JENKINS v. DUNRAVEN* (EARL), [1899] 2 Ch. 121; 68 L. J. Ch. 589; 81 L. T. 209; 43 Sol. Jo. 656, C. A.

Annotation:—*Mentd. Evans v. Merthyr Tydvil U. D. C.* (1898), 79 L. T. 578.

See, generally, DEEDS & OTHER INSTRUMENTS.

SECT. 6.—PERAMBULATIONS.

413. Right of perambulation—Removal of obstructions.]—Parishioners cannot allege a right by prescription to abate nuisances & obstructions to their perambulation in Rogation-Week.—*GOODDAY v. MICHELL* (1595), Cro. Eliz. 441; Owen, 71; 78 E. R. 681.

Annotations:—*Expld. Taylor v. Devey* (1837), 7 Ad. & El. 409. In *Goodday v. Michell* the justification failed, but the defect was in the mode of pleading, for deft.'s right was thought to be placed on prescription, & not on custom, &, besides, the bar did not embrace all the trespasses laid in the declaration (LORD DENMAN, C.J.).

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Mentd. George d. Thornbury v. — (1764), Amb. 627; *Brocklebank v. Thompson*, [1903] 2 Ch. 344.

414. — Evidence of.]—Evidence of a custom to perambulate the boundaries of a parish is not sufficient to support the allegation in the pleas of a right to perambulate the boundaries of the liberty.—*GRANT v. KEARNEY* (1823), 12 Price, 773; 147 E. R. 798.

415. When admissible—Notice to other party—Boundaries of parishes.]—There was a common on which the inhabitants of the parishes of A. & B. had, from time immemorial, intercommoned; those of B. had always repaired part of a road across it. Under an Act of Parliament to inclose the lands in A., F., a part of the common, was set off for the inhabitants of B. which under an Act to inclose the lands in B. was allotted amongst them. The church-rates, poor-rates, & land tax for F. after the inclosure were paid by the inhabitants of B. A question arose, whether F. was not within the parish of A., because by reputation the whole of the common had been considered as being in A., & its inhabitants had in their perambulations, taken it in as belonging to them. The jury having found that F. was in the parish of B.:—*Held*: a new trial must be refused, perambulations being no evidence, unless the adjoining parish had notice of them.—*WARREN v. SHUTTLEWORTH* (1823), 1 L. J. O. S. K. B. 214.

416. — — — Boundaries of waste of manor.]—On the question whether certain land be part of plff.'s estate, or waste of the manor, a perambulation of such manor, by the lord, including the land in question, is evidence, as showing an assertion of ownership by the lord, though it be not proved that any person on behalf of plff. was present at the perambulation, or knew of it.—*WOOLWAY v. ROWE* (1834), 1 Ad. & El. 114; 3 Nev. & M. K. B. 849; 3 L. J. K. B. 121; 110 E. R. 1151.

Annotations:—*Mentd. Doe d. Daniel v. Coulthred* (1837), 7 Ad. & El. 235; *Doe d. Rowlandson v. Wainwright* (1838), 8 Ad. & El. 691; *Phillips v. Cole* (1839), 10 Ad. & El. 106; *Trimblestown v. Kenmis* (1843), 9 Cl. & Fin. 749; *Papendick v. Bridgwater* (1855), 5 E. & B. 166; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360.

417. — — — Boundaries of hundred or manor.]—A perambulation of a hundred is not usual; but there is no reason why a hundred, as well as a parish or a manor, should not thus have its bounds ascertained (COZENS-HARDY, M.R.).—*CHESTERFIELD (LORD) v. HARRIS*, [1908] 2 Ch. 397; 77 L. J. Ch. 688; 99 L. T. 558; 24 T. L. R. 763; 52 Sol. Jo. 639, C. A.; *affd. sub nom. HARRIS v. CHESTERFIELD* (EARL), [1911] A. C. 623, H. L.

Annotations:—*Mentd. Malvern Hills Conservators v. Whitmore* (1909), 100 L. T. 841; *Staffordshire & Worcestershire Canal Navigation v. Bradley*, [1912] 1 Ch. 91; *A.-G. v. Horner*, [1913] 2 Ch. 140.

418. Proof of course of perambulation—Entries in parish books.]—Plea, to trespass for breaking & entering plff.'s dwelling-house, that the house was in the parish of B. in which there was an immemorial custom for all the parishioners to go through the house, upon their perambulations of the parish boundaries, on the Thursday in Rogation-Week, every third year; & justification under the custom. Issue being joined on a traverse of the custom, & a verdict found for defts.:—*Held*: (1) it could not be assumed, on this plea, that the house stood on the boundary, & the custom was bad, as pleaded; (2) entries in the parish books, recording the fact that the perambulations had taken a particular line, would not be evidence upon such an issue.—*TAYLOR v. DEVEY* (1837), 7 Ad. & El. 409; 2 Nev. & P. K. B. 469; Will. Woll. & Dav. 646; 7 L. J. M. C. 11; 1 J. P. 343; 1 Jur. 892; 112 E. R. 524.

BOUNDARIES, FENCES AND PARTY-WALLS.

SECT. 7.—OTHER ACTS OF OWNERSHIP.

419. Admissibility of evidence—Land within same manor—Strip of land by highway.]—Where the question was, whether a slip of land between some old enclosures & the highway, vested in the lord of the manor or the owner of the adjoining freehold:—*Held*: evidence might be received of acts of ownership by the lord of the manor on similar slips of land not adjoining his own freehold, in various parts of the manor.—*DOE d. BARRETT v. KEMP* (1831), 7 Bing. 332; 5 Moo. & P. 173; 9 L. J. O. S. C. P. 102; 131 E. R. 128; *subsequent proceedings* (1835), 2 Bing. N. C. 102, Ex. Ch.

Annotations:—*Consd.* Jones v. Williams (1837), 2 M. & W. 326; Leeke v. Portsmouth Corpn. (1912), 107 L. T. 260. *Refd.* Brisco v. Lomax (1838), 3 Nev. & P. K. B. 308; Tutill v. West Ham L. B. of Health (1873), L. R. 8 C. P. 447; University College, Oxford v. Oxford Corpn. (1904), 20 T. L. R. 637. *Mentd.* Hardcastle v. Dennison (1861), 10 C. B. N. S. 606; Leeke v. Portsmouth Corpn. (1912), 106 L. T. 627.

420. —.].—A conveyance by the lord of part of the desmesne of the manor described the land as "All that piece or parcel of meadow ground commonly called or known by the name or description of Chamberlain's Field, containing by estimation 3 a. 3 r. 35 p., be the same more or less, & abutting towards the west on H. Lane." The deed also contained the general words,—"Together with all ways, etc., & appurtenances to the said messuage, etc., lands, etc., belonging, or therewith used, possessed, occupied or enjoyed, or accepted, reputed, taken, or known as part, parcel, or member thereof, or as appurtenant or belonging thereto."—Upon a special case, in which it was provided that the ct. should be at liberty to draw inferences as a jury, it appeared that the grantee of Chamberlain's Field & those claiming under him had for sixty years used a small strip of land lying between the field & H. Lane as a place of deposit for manure. that about the year 1841, the present owner cut & converted to his own use a tree which grew thereon, & that in 1843 he inclosed the strip. There was evidence that the lord of the manor had both before & since the date of the conveyance exercised various acts of ownership over other similar strips of land by the roadside, in other parts of the manor, the nearest of which was about three quarters of a mile distant from the spot in question:—*Held*: assuming the language of the deed to be doubtful or ambiguous, the evidence of user by the grantee and those claiming under him was sufficient to outweigh the presumption in favour of the lord arising from the acts of ownership by him on other parts of the waste of the manor similarly situated.—*SIMPSON v. DENDY* (1860), 8 C. B. N. S. 433; 6 Jur. N. S. 1197; 141 E. R. 1233; *affd.* (1861), 9 W. R. 743, Ex. Ch.

Annotations:—*Refd.* Berridge v. Ward (1861), 10 C. B. N. S. 400. *Mentd.* Tidswell v. Whitworth (1867), L. R. 2 C. P. 326; C. L. Ry. Co. v. City of London Land Tax Comrs., [1911] 2 Ch. 467.

421. —. —. —.].—The lords of the manor of C. claimed as waste of their manor two strips alongside a public highway as against defts., adjoining owners. The land in dispute with other adjoining strips on the south was bounded on the side away from the road by a ditch & hedge. Pltfs. proved customary grants & admissions by the lords over a strip of land on the same side of the road & to the north of that in dispute as part of their manor, & enfranchisement of land separated by one field from the other side of the road to the

east of the land in dispute; also that a strip of land contiguous to that land on the south & bordering the road had been waste of the manor. They further tendered evidence of persons who stated that they had been told that the strips in dispute were waste within the manor, & also a map publicly used which they alleged tended to prove the manor boundaries:—*Held*: (1) although pltfs. had proved physical similarity in character between the land in dispute & the strips to the north & south of it, acts of ownership over such strips were not admissible as evidence of ownership of the land in dispute as referring to one close or parcel of land; (2) in order to make such evidence applicable it was also necessary for pltfs. to prove that the land in dispute was within the manor of C; (3) the evidence tendered for that purpose was not evidence of reputation at all, but only the expression of opinion, & the action must be dismissed.—*LEEKE v. PORTSMOUTH CORPN.* (1912), 107 L. T. 260; 56 Sol. Jo. 705; 76 J. P. Jo. 340.

422. —. —. —. Strip of land by river.]—W. was lord of a manor abutting on a river, & bounded by the *medium filum*. V. was owner of a freehold orchard within the manor, having a fence parallel to the river, & between the fence & the river was a strip of land. W. brought an action of trespass against V. for acts done on the strip, & gave in evidence acts of ownership. V. also gave in evidence acts of ownership, & tendered evidence that a similar strip, being a continuation of V.'s strip, belonged to the owner of the freehold next to V.'s, & further down the river, both being also within the same manor:—*Held*: the evidence was admissible, though of little weight.—*VAUGHAN v. DE WYNTON* (1867), 17 L. T. 30; 32 J. P. 38; 15 W. R. 1145.

Annotation:—*Refd.* Leeke v. Portsmouth Corpn. (1912), 106 L. T. 627.

423. —. —. —. Acts outside boundary.]—Although acts done upon parts of a district of land may be evidence of possession of the whole, yet as regards lands within a disputed boundary acts of ownership by either party outside the boundary are no evidence of title to the lands within it.—*CLARK v. ELPHINSTONE* (1880), 6 App. Cas. 164; 50 L. J. P. C. 22, P. C.

424. Effect of acts of ownership—Unascertained boundary.]—To prove a right to the soil, acts of ownership exercised by one party, are conclusive evidence against a supposed title, from boundaries which have never been ascertained.—*CURZON v. LOMAX* (1803), 5 Esp. 60, N. P.

Annotation:—*Refd.* Doe d. Molesworth v. Sleeman (1846), 9 Q. B. 298

425. —. —. —. Unenclosed adjacent commons.]—Where pltf. being possessed of house & land in E. had for 60 years exercised rights of common in W., but it appeared that this was done near the boundary of the two commons of W. & E., which lay open & uninclosed adjacent to each other; & it also appeared that the parties did not, at the time, know the exact boundary, & pltf. had on a previous inclosure of the E. common obtained an allotment there in respect of his estate:—*Held*: it was for the jury to say, whether the evidence was referable to an exercise of the right in E. & a mistake of the boundary, or to an exercise of the right in W.—*HETHERINGTON v. VANE* (1821), 4 B. & Ald. 428; 106 E. R. 993.

Annotation:—*Consd.* Lester v. Kemp (1824), 9 Moore, C. P. 85.

426. —. —. —. Doubtful boundary—Occupation for more than 20 years.]—In ejectment between the

PART IV. SECT. 7.

426 i. Effect of acts of ownership—Disputed boundary—Planting of sur-

veyor's posts.—Where the boundary is disputed the planting of surveyor's posts in land does not constitute possession.—*LEDYARD v. YOUNG* (1914),

7 O. W. N. 146.—*CAN.*

426 ii. —. —. —. *Presumption of ownership.*—When a man is found

purchasers of copyhold & leasehold properties adjoining, the question being as to the limits of the garden ground of each, a portion of the garden of one having been thrown into the garden of the other forty years ago by the then common proprietor, & the boundary line being left doubtful on the plans:—*Held*: the fact that the piece in question had actually been occupied with the leasehold property for more than twenty years, was conclusive.—*TEAR v. TAYLOR* (1859), 1 F. & F. 480, N. P.

See, further, LIMITATION OF ACTIONS.

SECT. 8.—DISCOVERY, INSPECTION, AND INTERROGATORIES.

427. General rule—By defendant—Lease—Contiguous lands.]—Pltf.'s grandfather being seised of a moiety of certain lands, made a lease thereof to deft.'s father for 3 lives, under a certain rent. The lands being contiguous, & adjoining to other lands of deft., could not be known, for the fences had been thrown down, & the boundaries destroyed. Pltf. exhibited a bill to have a discovery thereof. Deft. demurred, because pltf. had not sworn that the counterpart of the lease was lost:—*Held*: deft. must answer as to the boundaries.—*GLYNN v. SCAWEN* (1675), Cas. temp. Finch, 239; 23 E. R. 131.

428. ——— Mining rights.]—This was an action to restrain defts. from getting any coals or other materials in the mines under a farm comprised in a lease granted by the Marquis of Bute to four persons, named, now represented by pltf.s., the co., & two trustees. The above farm was bounded by another farm, the property of Mrs. G. Both were mountain farms, consisting partly of uninclosed lands. The boundary between the latter portions of the farms was indicated by boundary stones. The complaint of pltf.s. was that in the course of their workings they discovered that deft. co. had extended their workings beyond their boundary into the coal under pltf.s.' farm. Pltf.s. had endeavoured to obtain production of deft. co.'s lease, so that they might discover what the parcels were & see the plans therein, but the applications were resisted on the ground that the action was one in respect of trespass, which defts. denied, but which, if established, there would be accounts & inquiries as to the coal alleged to have been got by defts. under pltf.s.' land:—*Held*: pltf.s. were entitled to production & inspection of the lease so far as the parcels, whether in the recitals or the operative part, & the plans were concerned, but the other parts of the lease would be sealed up.—*WAYNE'S MERTHYR CO. v. POWELL'S DYFFRYN STEAM COAL CO.*, [1880] W. N. 141.

429. ——— Deeds—Contiguous lands.]—A. having lands contiguous to B. brought his bill, that B. may discover the boundaries of his estate, as they appeared by his deeds:—*Held*: B. was not obliged to make this discovery.—*HUNGERFORD v. GOREING* (1687), 2 Vern. 38; 23 E. R. 635.

430. ——— Lands of which Crown co-owner.]—Title-deeds referred to & partially set out in an answer, without deft. by such answer objecting to the production of them, & which relate to a manor, in which the Crown is jointly interested with the party granting will be ordered to be produced. The same rule applies to title-deeds relating to the boundaries of estates belonging to

the Crown & deft.—*A.-G. v. LAMBE* (1838), 3 Y. & C. Ex. 162; 8 L. J. Ex. Eq. 23; 2 Jur. 698; 160 E. R. 656.

Annotation:—*Mentd.* *Smith v. Beaufort* (1842), 1 Hare, 507.

431. ——— Manor lands.]—Where the issue was whether certain lands formed part of a manor, pltf. alleging the negative & deft. the affirmative, deft. admitted the possession of deeds relating to the matters in the bill, but denied they showed pltf.'s title:—*Held*: as the parcels & boundaries might establish pltf.'s case, he was entitled to production, sealing up the other parts.—*JENKINS v. BUSHBY* (1866), 35 L. J. Ch. 400.

Annotation:—*Refd.* *Bewicke v. Graham* (1881), 7 Q. B. D. 400.

432. ——— Parish rate & minute books—Parish boundary.]—Upon a bill of discovery in aid of an action to try whether pltf.'s house was within the limits of a certain parish, & liable to the parochial rates, the ct. ordered defts., the parish officers, to produce for his inspection the rate-books, account-books, minute-books, orders, & other documents which related to the matter in question, & were admitted by their answer to be in their possession.—*BURRELL v. NICHOLSON* (1833), 1 My. & K. 680; 39 E. R. 838.

Annotations:—*Consd.* *Combe v. City of London* (1840), 4 Y. & C. Ex. 139; *Earp v. Lloyd* (1857), 3 K. & J. 549.

Mentd. *Smith v. Beaufort* (1842), 1 Hare, 507.

433. ——— Documents—Nature of document misconceived.]—Although deft. to an action swears that certain documents, which are in his possession & are material to the matter in issue, form & support his own title, & do not contain anything which could form or support pltf.'s case or impeach the defence, the ct. will not act on such oath, at least in proceedings excepted by Ord. 62 from the rules under Jud. Act, 1875 (c. 77), but will order such documents to be produced, if, from the whole of deft.'s answer or from the description of the documents given by deft., the ct. is reasonably certain that deft. has erroneously represented or misconceived the nature of such documents.—*A.-G. v. EMERSON* (1882), 10 Q. B. D. 191; 52 L. J. Q. B. 67; 48 L. T. 18; 31 W. R. 191, C. A., *subsequent proceedings* (1887), 3 T. L. R. 851; (1888), 5 T. L. R. 109, C. A.; [1891] A. C. 649, H. L. *Annotations*:—*Consd.* *Bulman & Dixon v. Young, Ehlers, & Commercial S.S. Co.* (1883), 49 L. T. 736; *Roberts v. Oppenheim* (1884), 26 Ch. D. 724; *Morris v. Edwards* (1890), 15 App. Cas. 309; *Frankenstein v. Gavin's Cycle Cleaning & Insee. Co.*, [1897] 2 Q. B. 62. *Appld.* *A.-G. v. Newcastle-upon-Tyne Corpn.*, [1897] 2 Q. B. 384. *Refd.* *Budden v. Wilkinson*, [1893] 2 Q. B. 432; *Milbank v. Milbank*, [1900] 1 Ch. 376; *British Asscn. of Glass Bottle Manufacturers v. Nettlefold*, [1912] A. C. 709. *Mentd.* *Yorkshire Provident Life Assce. v. Gilbert & Rivington* (1895), 14 R. 411; *A.-G. v. Newcastle-upon-Tyne Corpn.*, [1899] 2 Q. B. 478.

434. ——— By plaintiff—Deeds—Compulsory purchase.]—Where lands had been taken by a co. under the compulsory clauses, & the owners by their bill sought the completion of the purchase by the co., for which they had given the notice, or the redelivery of the land, & defts. denied pltf.'s title to the land:—*Held*: defts. were entitled to see the parcels with a view to an ascertainment of the boundaries, but not the operative parts of the deeds.—*LIND v. ISLE OF WIGHT FERRY CO.* (1860), 2 L. T. 503; 8 W. R. 540.

435. ——— By both parties—Note of boundaries.]—On a bill to settle the boundaries of a manor:—*Held*: each party should give to the other a note of their boundaries, & it should be tried in a feigned issue.—*METCALFE v. BECKWITH* (1726), 2

exercising, on both sides of a boundary line, without objection, rights of ownership or incorporeal rights, & when it is not shown that there is any

other owner of the soil, or that any objection to the exercise of such rights was made during a long course of years, his acts cannot be treated as the

encroachments of a wrong-doer.—*GOVERNMENT v. RAJ KISHEN SINGH* (1868), 9 W. R. 426.—*IND.*

, *Inspection, and Interrogatories.*

P. Wms. 376; 2 Eq. Cas. Abr. 240, pl. 19; 24 E. R. 773.

Annotation :—*Reid*. Godfrey v. Littel (1829), 1 Russ. & M. 59.

436. ————.]—On a bill in equity to have a trial at law for the bounds of a manor, each side must give notes of the bounds they claim; & if the jury find bounds different from the notes given by either side, those different boundaries must be indorsed on the *habeas corpus*. —*LETHIEULLIER v. CASTLEMAIN* (LORD) (1726), Dick. 46; Cas. temp. King 60; 2 Eq. Cas. Abr. 161, pl. 12; 12 Vin. Abr. 267, pl. 29; 21 E. R. 184, L. C.

Annotation :—*Folld*. Hughes v. Grames (1726), cited in Cas. temp. King at p. 61.

437. ———— **By mortgagee—Unsettled part of estate.**]—Where a mtge. has been made by the owner of an estate partly settled, partly unsettled, & during the possession of that owner the boundaries have been confounded; & if a person entitled under the settlement has filed a bill to compel the mtgee. to set out, not the title by which he claims, but the metes & bounds of the estate, subject to his mtge., such mtgee. cannot plead in bar to the discovery. —*STRODE v. BLACKBURNE* (1796), 3 Ves. 222; 30 E. R. 979, L. C.

Annotation :—*Mentd*. Ogilvie v. Jeaffreson (1860), 2 Giff. 353.

438. Where defendant has caused confusion of boundaries.]—A bill charging, that defts. had got the title deeds, & mixed the boundaries, prayed a discovery, possession, & an account. A demurrer was allowed. —*LOKER v. ROLLE* (1795), 3 Ves. 4; 30 E. R. 863, L. C.

Annotations :—*Consd*. A.-G. to Prince of Wales v. St. Aubyn (1811), Wight. 167. *Distd*. Caton v. Coles (1866), L. R. 1 Eq. 581.

439. ———— **Forfeiture involved.**]—A bill, by a lord of a manor, praying a discovery of the boundaries of copyholds, against a copyholder, & charging him with having confounded the boundaries, ought to waive the forfeiture. Even though the forfeiture be not waived, the copyholder cannot, by demurrer, protect himself from answering those parts of the bill, which do not allege acts or circumstances tending to produce a forfeiture. —*DURHAM (BP.) v. RIPPON* (1825), 2 Coop. temp. Cott. 215; 4 L. J. O. S. Ch. 32; 47 E. R. 1133.

440. ———— **Gradual encroachment.**]—A bill filed against a canal co. alleged that the co. had for several years been gradually encroaching upon the land of pltf. whose property adjoined the canal, & prayed for a commission to ascertain the boundaries :—*Held* : the co. were bound to produce maps of the canal, & also leases of the adjoining lands, which pltf. alleged to comprise part of his property, notwithstanding that the co. insisted by their answer that they related to their own title & not to the title of pltf. —*BUTE (MARQUIS) v. GLAMORGANSHIRE CANAL CO.* (1845), 1 Ph. 681; 15 L. J. Ch. 60; 6 L. T. O. S. 253; 9 Jur. 1063; 41 E. R. 791, L. C.

Annotation :—*Mentd*. Lloyd v. Purves (1858), 6 W. R. 421.

441. ———— **Tenant.**]—If a tenant hold lands of his own together with demised lands, it is his duty to keep the boundaries distinct, & if he allow them to become confused, he is bound, if necessary, to produce his own title deeds to elucidate the matter. —*SOUTHWELL (CHAPTER) v. THOMPSON* (1837), 6 L. J. Ch. 196.

442. ———— **Lessee.**]—Deft. had a freehold interest in certain premises & was also assignee of the lease of other adjoining premises, the reversion of which was in the lessor of pltf. Deft. for some time previous to, & until the end of the

term, occupied the freehold & leasehold premises together, & as the lessor of pltf. stated, had obliterated the boundaries between them. On the expiration of the lease, the lessor of pltf. brought ejectment to recover a portion of the land which he claimed as parcel of the leasehold, & alleged that deft. claimed as his freehold; & he prayed to be permitted to inspect the lease, the assignment of the lease to deft., & the conveyance of the freehold to the latter, alleging that he believed that the parcels in the lease & in the conveyance of the freehold would help to make out his case :—*Held* : he was entitled to inspect the lease, if he had no counter-part, & also the assignment but not the conveyance of the freehold, as that deed did not prove any part of pltf.'s title to the land he sought to recover. —*DORR d. AVERY v. LANGFORD* (1852), Bail Ct. Cas. 37; 21 L. J. Q. B. 217.

Annotation :—*Mentd*. Price v. Harrison (1860), 6 Jur. N. S. 1345.

443. ————.]—At the expiration of a lease the reversioner found difficulty in identifying certain part of the property which had been generally described in the original lease as "seven & a half acres of pasture or meadow land lying dispersedly in the common fields at Walworth, commonly called Lock's Fields." The property had during the lease been underlet & dealt with by instruments, some of which contained particular descriptions, which, as the reversioner contended would help him to identify the houses & lands now in deft.'s occupation as his property, & he filed this bill for discovery of such under-leases & instruments :—*Held* : pltf. was entitled to the discovery. —*BROWN v. WALES* (1872), L. R. 15 Eq. 142; 42 L. J. Ch. 45; 27 L. T. 410; 21 W. R. 157. *Annotation* :—*Consd*. Lyell v. Kennedy (1883), 8 App. Cas. 217.

444. Inspection—Removal of obstruction—Common Law Procedure Act, 1854 (c. 125), s. 58.]—In an action by pltf. against defts., owners of an adjoining mine, pltf. having been allowed inspection of deft.'s workings for the purpose of seeing whether defts. had worked across their boundary & removed his coal, found, at the boundary between pltf.'s & defts.' minerals, a newly erected wall, which prevented him from seeing whether there was any encroachment behind it. An application for leave to take down part of this wall having been refused, pltf. obtained an order of a judge that he should be at liberty, so far as was necessary for the purpose of inspecting defts.' mine at & behind the wall, to make a drift-way through the wall, upon certain terms therein stated. Upon application to set aside the order :—*Held* : the cts. of common law had, as ancillary to the power of inspection given by C. L. P. Act, 1854, s. 58, the same power to remove obstructions, with a view to inspection, which was exercised by the cts. of equity, & the judge had jurisdiction to make the order. —*BENNETT v. GRIFFITHS* (1861), 3 E. & E. 467; 30 L. J. Q. B. 98; 3 L. T. 745; 7 Jur. N. S. 284; 9 W. R. 332; 121 E. R. 517.

Annotation :—*Refd*. Perkins v. L. & N. W. Ry. Co. (1874), 1 Ry. & Can. Tr. Cas. 327.

445. Interrogatories—Commonable rights.]—B. & N., two landowners in the parish of M., brought an action for a declaration that a piece of land formed part of M. Common, & to establish commonable rights thereover. N. sued as owner in fee of a beerhouse & three cottages, & pltf. pleaded the exercise of the rights claimed from time immemorial. Deft. was the lord of an adjacent manor, & his defence was that the piece of land never formed part of M. Common, but was common land forming part of his own manor

that if pltfs. ever had any rights of common thereon such rights had been extinguished; that some of the rights claimed could only be used in respect of ancient tenements, & that the beerhouse & three cottages in respect of which N. sued had no land held therewith. After the defence had been delivered deft. administered interrogatories to pltfs., asking in effect:—(1) how long pltfs. had been owners or occupiers of their properties, & for what estates, what was the tenure thereof, & whether those lands were within the limits of any & what actual & reputed manors, & whether any such premises were ancient messuages, & whether the beerhouse & three cottages had any & what lands appurtenant thereto or held therewith; (2) whether pltfs. or their predecessors in title, as proprietors or occupiers of any lands in M., or under any other alleged title, had exercised the rights claimed upon any & what parts of M. Common, or upon any & what part of the piece of land in question; (3) asking pltfs. to set forth particulars of their exercise of such rights, & whether they did so by any license or in consideration of any & what payment. Pltfs. objected to answer these interrogatories on the ground that they related exclusively to their own title & to the evidence they should adduce at the hearing:—*Held*: (1) pltf. N. must answer so much of the first interrogatory as asked whether the beerhouse & cottages had any lands appurtenant thereto or held therewith, because he had not pleaded that

they had, & deft. had pleaded that they had not, but the rest of the interrogatories need not be answered, because they were in effect directed to the discovery of the evidence by which pltfs. intended to prove their case at the hearing; (2) on appeal, the question being left to the Ct. of Appeal as arbitrators to settle what parts of the interrogatories should be answered, pltfs. must answer further parts of them.—*BIDDER v. BRIDGES* (1885), 29 Ch. D. 29; 54 L. J. Ch. 798; 52 L. T. 455; 33 W. R. 792, C. A.; *subsequent proceedings* 54 L. T. 529.

446. — Contiguous strips of land by highway.]
—In an action to recover possession of two strips of land forming part of one continuous strip lying on one side of a road & alleged to be waste within pltfs.' manor, pltfs. intimated that at the trial they intended to show acts of ownership by them over parts of the strip contiguous to & at greater distance from the parts of the strip in dispute in the action. They proposed to interrogate defts. as to facts concerning defts.' acquisition of other parts of the strip not in dispute lying between inclosures of defts. & the road:—*Held*: the interrogatories ought to be allowed, the answers to be admissible when pltfs. had established that they were the owners of the manor, & that the whole strip lay within the manor, & was of one continuous character.—*LEEKE v. PORTSMOUTH CORPN.* (1912), 106 L. T. 627; 76 J. P. Jo. 159; *subsequent proceedings* 107 L. T. 260.

BRANDY.

See FOOD AND DRUGS ; REVENUE.

BRAWLING.

See CRIMINAL LAW AND PROCEDURE ; ECCLESIASTICAL LAW.

BREACH OF COVENANT.

See INJUNCTION ; LANDLORD AND TENANT.

BREACH OF PROMISE OF MARRIAGE.

See HUSBAND AND WIFE

BREACH OF THE PEACE.

See CRIMINAL LAW AND PROCEDURE.

BREACH OF TRUST.

See CHARITIES ; INJUNCTION ; LIMITATION OF ACTIONS ; TRUSTS AND TRUSTEES

BREACH OF WARRANTY.

See AGENCY ; ANIMALS ; SALE OF GOODS.

BREAD.

AND DRUGS.

BREWER.

See INTOXICATING LIQUORS ; REVENUE.

BRIBERY.

See AGENCY ; CRIMINAL LAW AND PROCEDURE ; ELECTIONS.

BRIDGES.

See HIGHWAYS, STREETS, AND BRIDGES ; RAILWAYS AND CANALS ; STREET AND AERIAL TRAFFIC.

BRIEF.

See BARRISTERS.

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See COURTS.

BRITISH NATIONALITY.

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BRITISH POSSESSIONS.

See DEPENDENCIES, COLONIES, AND BRITISH POSSESSIONS ; EXTRADITION AND FUGITIVE OFFENDERS.

BROKERS.

See AGENCY ; CUSTOM AND USAGES ; INSURANCE ; SALE OF GOODS ; SHIPPING AND NAVIGATION ; STOCK EXCHANGE.

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SALE OF LAND.

London Building Acts . „

BOUNDARIES, FENCES, & PARTY - WALLS; METROPOLIS.

Building Leases „ LANDLORD TENANT.

Part I.—Application of Terms.

1. Who is a "builder"—Person building for profit.]—A builder is a person who builds either on his own or another's land for profit.—*Re NEIRINCKS, Ex p. NEIRINCKS* (1835), 1 Deac. 78; 2 Mont. & A. 384; 4 L. J. Bcy. 73, Ct. of R.

Annotations:—*Consd. Re Edwards, Ex p. Edwards* (1840), 9 L. J. Bcy. 11; *Stuart v. Sloper* (1849), 3 Exch. 700, *Reid. Re Stewart, Ex p. Stewart* (1849), 3 De G. & Sm. 557. *Mentd. Re Wright, Ex p. Brundrett* (1837), 6 L. J. Bcy. 29.

2. — Bankruptcy law—Isolated transaction.]—A party, by profession a barrister, took a lease of three pieces of building ground, & at his own expense erected thereon upwards of two hundred houses, which he let as opportunity offered. Upon a trial at law, the jury found that he did not buy & sell building materials for profit, was not a builder, in the sense of being ready to build a house for any one who would give him an order, & meant to confine himself to the above-mentioned speculations, & did not intend generally to embark in other building speculations:—*Held*: he was not a builder within the bkpcy. law.—*Re STEWART, Ex p. STEWART* (1849), 3 De G. & Sm. 557; 18 L. J. Bcy. 14; 13 L. T. O. S. 306; 13 Jur. 581; 64 E. R. 604.

3. *S. P. STUART v. SLOPER* (1849), 3 Exch. 700;

18 L. J. Ex. 321; 154 E. R. 1027; *sub nom. STEWART v. SLOPER*, 13 L. T. O. S. 100.

Annotations:—*Consd. Re Fowler* (1851), Fonbl. 201. *Mentd. R. v. Amos* (1851), 2 Den. 65.

4. — — — — — Intention to repeat.]—

When a ct. of bkpcy. is considering whether bkpt. has "omitted to keep such books of account as are usual & proper in the business carried on by him" within Bkpcy. Act, 1883 (c. 52), s. 28 (3) (a), proof that he engaged in one or two building transactions is sufficient proof that he carried on the business of a builder, if it be shown that he intended the one or two transactions to be followed by similar transactions.—*Re GRIFFIN, Ex p. BOARD OF TRADE* (1890), 60 L. J. Q. B. 235; 39 W. R. 156; 7 T. L. R. 146; 8 Morr. 1, C. A.

Annotation:—*Mentd. A.-G. v. Plymouth Corpn.* (1908), 99 L. T. 793.

See further, BANKRUPTCY & INSOLVENCY, Vol. IV., pp. 18, 19, Nos. 84, 97, 101, 104–107.

What is a "building"—Covenant against building—In lease.]—See LANDLORD & TENANT.

— — — — — On sale of land.]—See SALE OF LAND.

What is a "building contract"—Locomotives Act, 1898 (c. 29), s. 12 (1).]—See HIGHWAYS, STREETS, & BRIDGES.

Part II.—The Contract.

SECT. 1.—FORMATION.

5. Contract by agent.]—M. being called abroad, requested G. to act for him in relation to the building of a house at W. Under this authority G., by an instrument under hand, appointed V.

surveyor of the intended buildings with power to make contracts for work & materials. V. in pursuance of this power on behalf of M. contracted with workmen for the mason work, & on this work these workmen duly entered:—*Held*: the

PART I.

a. Architect—Who may be registered as—*New Zealand Institute of Architects Act*, 1913, s. 8 (1) (b).]—An appet. who has the qualifications prescribed by the above Act has a legal right to be registered as a member of the institute, & the council has no power to require as a condition of registration that he shall sign a declaration that he will not be interested or concerned in the profits of any building operations, or in the acceptance of any trade discounts from any builder, merchant, or tradesman dealing with materials for building. A regulation made by the institute which seeks to impose the signing of such a declaration as a condition of membership, or which empowers the council to expel or suspend any member becoming so interested or concerned, is *ultra vires*, since such a regulation is inconsistent with the rights & privileges which the Act confers.—*HAMILTON v. CUMMING*,

[1919] N. Z. L. R. 131.—N.Z.

b. — — — — — Person bona fide engaged as principal in practice of architecture.]—*LEAPER v. NEW ZEALAND INSTITUTE OF ARCHITECTS* (1915), 34 N. Z. L. R. 643.—N.Z.

c. — — — — — Foreign architect not registered—Right to prepare & charge for plans—*Alberta Architects' Act*, 1906, s. 13.]—*COUCHON & VAN TYLE v. MACCASHAM* (1914), 28 W. L. R. 500.—CAN.

d. — — — — — Necessity for registration—Quebec.]—*QUEBEC ASSOCN. OF ARCHITECTS v. PARADIS* (1915), Q. R. 48 S. C. 220.—CAN.

e. Engineer—Who may qualify as—Compliance with the statute.]—The statute incorporating the Canadian Society of Civil Engineers gives the right to become a member to every one who practised as a civil engineer in Quebec at the time of the passing of the Act. Pltf., claiming to have

satisfied this requirement, presented a request for admission containing allegations of fact to satisfy the law, verified by his own deposition under oath. On the refusal of the society to comply with his request, he prayed a peremptory writ of *mandamus* be issued to effect his purpose:—*Held*: it was not for the ct. to decide whether pltf. was qualified as a civil engineer, or whether he had pursued the studies & possessed the knowledge requisite for a civil engineer, but only whether he had practised as a civil engineer at the time of the passing of the Act.—*TACHE v. SOCIETY OF CANADIAN CIVIL ENGINEERS* (1904), Q. R. 26 S. C. 215.—CAN.

PART II. SECT. 1.

f. Whether building owner acting as principal or agent—Undisclosed principal—Personal liability.]—*ORSINI v. BOTT* (1917), 12 O. W. N. 290.—CAN.

contract was binding on M.—**MARLBOROUGH (DUKE) v. STRONG** (1721), 1 Bro. Parl. Cas. 175; 1 E. R. 496.

Annotations:—**Mentd.** *M'Intosh v. G. W. Ry. Co.* (1855), 3 Eq. Rep. 628; *Dabbs v. Nugent* (1865), 13 L. T. 396.

6. Tender—Oral acceptance—Terms embodied.]

—A., a railway contractor, met B., & several others, in order to receive tenders with reference to certain work. A. then read a specification with reference to the work in question, after which B. & the others handed in their tenders. B.'s tender was signed with his name, but there was no evidence that it was in his handwriting:—

Held: notwithstanding, such tender, taken with the specification, sufficiently proved the contract.

—**ALLEN v. YOXALL** (1844), 1 Car. & Kir. 315, N. P.

7. — Acceptance of lowest—Custom.]—Where pltf. sent in to N., the agent of defts., a tender for the execution of certain buildings:—**Held**: the judge was right, on the evidence before him, in concluding that according to the custom in the trade, pltf.'s tender being the lowest, had been accepted, although N. had no absolute authority to accept the lowest.—**PAULING v. PONTIFEX** (1852), 2 Saund. & M. 59; 20 L. T. O. S. 126; 16 J. P. 792; 1 W. R. 64.

8. — Whether acceptance conditional—Additional words.]—A tender having been made by deft. to do work for a certain price, pltf. accepted, but added the words: "We will have to complete same in twelve months. We will begin work on Monday":—**Held**: those words amounted only to a direction, & not to a condition.—**TYSON v. CROWTHER** (1863), 2 New Rep. 168.

9. — Quantity indefinite.]—In May, 1895, the Admty. were engaged in erecting a breakwater, & required large quantities of rough stone. They entered into communication with resps., stone merchants, who filled up the following form of tender, of which the outlines were printed:—"We, the undersigned, do hereby agree to de-

6 i. Tender—Oral acceptance.]—Where the conditions under which a tender to erect a building is made, provide for a written acceptance, a verbal acceptance is not sufficient.—**FRIPP v. UPTON** (1884), 3 N. Z. L. R. 237.—N.Z.

g. — Time for acceptance.]—In an action for implement of an offer to execute the mason work required for the erection of a house in A. made by deft. to pltf.'s architect on June 10, & accepted by pltf. on June 21, deft. maintained there was no concluded contract, for his offer had not been accepted within seven days as provided by one of a number of conditions of tendering agreed to by the architects & builders of A., & in any view there had been undue delay in accepting his offer:—**Held**: (1) the conditions were not to be regarded as implied conditions in building contracts in A., but rather as rules for the guidance of architects; (2) even if regarded as conditions, the condition in question contemplated cases where the whole tenders fell to be received by a definite date, & fixed seven days for the architect considering them, & did not apply to deft.'s offer; (3) the offer had been accepted without undue delay, & was binding.—**MURRAY v. RENNIE** (1897), 24 R. (Ct. of Sess.) 965.—SCOT.

h. — Conditional acceptance—Conditions not performed.]—H. tendered for the construction of a line of railway pursuant to an advertisement for tenders, & his offer was conditionally accepted. At the same time H. executed a bond reciting the fact of

the tender & conditioned, within four days, to provide two acceptable sureties & deposit 5 per cent. of the amount of his tender in the Bank of M., & also to execute all necessary arrangements for the commencement & completion of the work by specified dates, & the prosecution thereof until completed. These conditions were not performed & the contract was eventually given to other persons:—**Held**: (1) the agreement made by the bond was unilateral; (2) the railway co. was under no obligation to accept the sureties offered or to give H. the contract; (3) the bond & agreement for the construction of the work were to be contemporaneous acts, & as no such agreement was entered into H. was not liable on the bond.—**BRANTFORD, WATERLOO, & LAKE ERIE RY. CO. v. HUFFMAN** (1891), 19 S. C. R. 336.—CAN.

k. — Effect of acceptance—Written unsigned tender.]—A written tender by a builder offering to erect a building at a stated price, though not signed by the builder or by his authority, becomes a binding & enforceable contract on its acceptance, such a contract not being within Sale of Goods Act or Stat. Frauds.—**WEBB & SONS v. WILLIAMS** (1907), 27 N. Z. L. R. 456.—N.Z.

l. — Deposit as guarantee of good faith.]—Pltfs. sent to defts. a tender in writing for the erection of a school-house for \$45,000, & with it a cheque for \$2,000 "as a guarantee of good faith." The tender was accepted by defts., but, after negotiations, pltfs. declined to do the work

liver (see plan annexed) cap & roach stone (rough) approximate amount 2,000,000 tons, in accordance with specification for 4d. per ton. It is believed that a considerably larger amount is obtainable, but as the amount required is not stated we have not verified this. Dated Sept. 7, 1895." On Oct. 2, the Admty. sent to resps. the following letter:—"Your tender dated Sept. 7, 1895, is accepted for the supply for the new breakwater of about 2,000,000 tons, or such quantity as may be required, of cap & roach stone (rough), in accordance with specification at the rate of 4d. per ton, on the understanding that the stone be taken in such quantities & from such position as may be considered by the Admty. superintending officer the most desirable for the Admty. works. Your claim should be made out on the attached form, & forwarded with the goods to the officer in charge of works for his certificate." In accordance with the above tender & acceptance of tender, resps. supplied cap & roach stone to the Admty. for the purposes of the breakwater, & the Admty. accepted the stone so supplied & paid for same, until Jan. 15, 1898, when the Admty. ceased to draw stone from resps.' stone heaps, & refused to receive any further supply of cap & roach stone from them. Resps. having presented a petition of right for damage for breach of contract:—**Held**: in the tender & acceptance of tender there was no contractual obligation to take 2,000,000 tons but only to take stone in such quantities & at such times as the Admty. might require, i.e., the contractors were to supply the stone in the quantities specified from time to time when the Admty. demanded it, & there was at no time an undertaking to take a definite quantity, & resps.' petition of right failed.—**A.-G. v. STEWARDS & CO., LTD.** (1901), 18 T. L. R. 131, H. L.

Annotations:—**Reid.** *Berk v. International Explosives Co.* (1901), 7 Com. Cas. 20; *Kensington & Knightsbridge Electric Lighting Co. v. Notting Hill Electric Lighting Co.* (1918), 87 L. J. K. B. 565.

10. — Misrepresentation as to conditions—

unless paid a larger price than \$45,000. The tender was not under pltfs.' corporate seal, but was signed by the managing director with the name of the co. & his own designation. It was admitted by pltfs. that the managing director had authority to send in the tender:—**Held**: (1) defts. were justified in assuming the \$2,000 was deposited with them in response to their call for tenders; (2) "guarantee of good faith" meant the tender was made in good faith, & pltfs., if the tender should be accepted, would enter into the necessary contract.—**BRANDON CONSTRUCTION CO. v. SASKATOON SCHOOL BOARD** (1912), 21 W. L. R. 949; 2 W. W. R. 870; *reversd.* 6 Sask. L. R. 273.—CAN.

m. — Mistake in offer.]—A., a contractor, by letter offered to execute for B. carpentry work according to specifications for a lump sum, & the offer was accepted. A. having refused to implement the contract, B. raised an action of damages against him. Deft. stated & proved that his son, who made the offer for him, had in his private calculation gone over the schedule of measurements & quantities, & marked down the prices of each item, but in making the summation of the whole items, he had accidentally omitted a number of items, with the result that the offer was less than it should have been, in consequence of which error, deft. pleaded he was entitled to resile:—**Held**: deft. was not entitled to resile, & was liable in damages for breach of contract.—**SEATON BRICK & TILE CO., LTD. v. MITCHELL** (1900), 2 F. (Ct. of Sess.) 550.—SCOT.

Right to rescind.]—Defts. advertised for tenders for the construction of reservoirs. Pltfs., a firm of contractors, sent in a tender, which was accepted. Upon their attending to examine the drawings, specifications & general conditions, the assistant engineer of defts., in answer to a question, said the conditions were the ordinary conditions. Pltfs., upon subsequently reading the conditions, found that they were unusual, refused to go on with the contract, & sought to recover £101 1s., which they had paid as a deposit:—*Held*: pltfs. were entitled to recover.—*MOSS & CO., LTD. v. SWANSEA CORPN.* (1910), 74 J. P. 351.

11. — Letter after acceptance—Whether binding.]—A firm of contractors tendered for the execution of certain work for the Comrs. of Works. The tender having been accepted, a contract in writing, to be signed & sealed on behalf of both parties, was prepared. Before the execution of this document by the Comrs. of Works the contractors wrote to say that they were sending the contract executed by them “on the assumption that in the event of the Bill dealing with the workmen’s insurance now before Parliament becoming law, the payments thereunder which will fall upon this co. as employers will be recouped to the co. under clause 15 of the contract.” No reply was received to this letter, & the contract was executed by the Comrs. of Works:—*Held*: the Comrs. were not bound by the terms of the letter, nor estopped from relying upon the true construction of the sealed contract.—*LESLIE & CO. v. COMRS. OF WORKS* (1914), 78 J. P. 462.

See, generally, CONTRACT.

12. Strike clause in small print—Whether binding.]—Pltfs. contracted to fit up a shop within a specified time. The contract was expressed to be subject to the terms & conditions set out in a type-written specification which contained a strike clause printed as part of the heading but in very small type. In an action by pltfs. for work & labour done, defts. counter-claimed under a time clause in the contract. It

n. — *Contractor assigning interest before acceptance—Proviso against sub-letting—Inserted after tender made.*—*ST. JAMES v. ST. GABRIEL CORPN.* (1885), Cass. Dig., 2nd ed. 147.—*CAN.*

o. — *Withdrawal before acceptance.*—A tender to erect buildings, enclosing a cheque as a deposit, may be withdrawn before acceptance, & in such case the tenderer is not liable to pay the amount of the cheque to a holder with notice.—*FRIPP v. UPTON* (1884), 3 N. Z. L. R. 237.—*N.Z.*

p. — *Forfeiture of deposit as liquidated damages.*—*STAFFORD v. SOUTH MELBOURNE CORPN.*, [1908] V. L. R. 584.—*AUS.*

q. *Estimate — Whether condition or warranty as to cost.*—There was a dispute as to the amount payable by deft. to pltfs. The agreement contained this clause: “We” (pltfs.) “estimate the cost of building the house, as shown on the plans submitted to us, to be about \$3,500.” Certain alterations were specified by deft. after this estimate was given:—*Held*: the estimate was not a condition limiting pltfs. as to amount, nor a warranty, being merely an expression of pltfs.’ judgment.—*MACKISSOCK & THOMAS, LTD. v. BLACK* (1912), 21 W. L. R. 424; 2 W. W. R. 465.—*CAN.*

r. *Ascertainment of terms — From plans & specifications.*—Plans & specifications drawn for the erection of buildings, the specifications being divided under the headings, “notes,” “conditions,” & “specifications,” referred to in the contract, & initialed

by the parties thereto, all bound up together & forming one document, must be read together as constituting one entire contract.—*RYAN v. CARLETON PLACE VILLAGE* (1900), 31 O. R. 639.—*CAN.*

s. — *Contract modifying terms of specification.*—Pltfs. entered into a contract with defts. to provide all the materials & perform all the work in the erection & completion of a building, according to certain plans & specifications. After the walls were up & the roof & concrete floors in, an accident occurred to the basement walls, resulting in considerable damage, & defts. terminated the employment of pltfs., under the provisions of the contract, & completed the building themselves, asserting that the damage was due to the default of pltfs., & that pltfs. refused to repair it except as extra work for which they should be paid. Pltfs. sued for the balance alleged to be due under the contract for work done & materials supplied, including a large amount for extras, up to the time their employment was terminated. They alleged the accident to the walls was due to the negligence or lack of judgment of the architects, & that they (pltfs.) were not responsible therefor, & that the termination of their employment by defts. was wrongful:—*Held*: the specifications, being incorporated with & constituting part of the contract, must be read with it, & in so far as the contract proper modified the terms of the specifications, the contract must prevail.—*GRACE v. OSLER* (1911), 19 W. L. R. 109, 326.—*CAN.*

was proved that defts. did not see the strike clause & that their attention was never drawn to it until the dispute arose:—*Held*: a person reading the specification ought to have noticed the clause, & pltfs. were entitled to judgment, the delay having been caused by a strike.—*SAGE (FREDERICK) & CO., LTD. v. SPIERS & PONDS, LTD.* (1915), 31 T. L. R. 204.

13. Agreement not to tender—Validity—Injunction to prevent breach.]—Tenders for the supply of stone having been invited by a corpn., it was agreed between A., B., C., & D., quarry owners, that B. should not tender, that C. & D. should tender above A.’s price, that A. should purchase certain quantities of stone from B., C., & D. at a fixed price, & that B., C., & D. should not supply the corpn. with stone during 1875. The stone was purchased, as agreed, by A., but B., in breach of the agreement, sent in a tender, which was accepted:—*Held*: the agreement was not void, & a bill would lie by A. to restrain B. from supplying the corpn. directly or indirectly during 1875 with stone, without making the corpn. parties.—*JONES v. NORTH* (1875), L. R. 19 Eq. 426; 44 L. J. Ch. 388; 32 L. T. 149; 39 J. P. 392; 23 W. R. 468.

14. Estimate—Equivalent to offer—Alleged custom.]—P. wrote to C. a letter in the following terms:—“Estimate. Our estimate to carry out the sundry alterations to the above premises, according to the drawings & specifications, amounts to £1,230”:—*Held*: (1) this was an offer to do the work for £1,230; (2) there was no custom that a letter in such form was not to be treated as an offer, & if there were such a custom, it was contrary to law; (3) C. having accepted there was a binding contract, from which P. could not withdraw.—*CROSHAW v. PRITCHARD & RENWICK* (1899), 16 T. L. R. 45; *sub nom. CROSHAW v. PRITCHARD*, 2 Hudson’s B. C., 4th ed., 274.

15. Necessity for writing—Sale of building materials—“Interest in land.”—A contract for the sale of “the building materials” of a house,

t. — *Regulation of terms by deed.*—A. & B. entered into a contract for the performance of certain works by A., according to a specification then put forward, & it was agreed that there should be executed by them a deed containing, amongst other things, the terms of the specification. A deed was, accordingly, prepared & executed by A., but not by B., containing these terms, & providing that the approbation of B.’s engineer should be a condition precedent to payment for the execution of the works, & it contained a proviso that it should be null & void unless it received the sanction of the Ct. of Ch. The original plan being defective, several alterations were, at the suggestion of B., made in the works, which were completed under his inspection, & A. having got a verdict, under the common counts, for the performance of the works, & the sanction of the Ct. to the deed not having been proved:—*Held*: A. was not bound by the provisions of the deed, & it did not regulate the terms of the contract.—*NICHOL v. GREVILLE* (1851), 3 Ir. Jur. 317.—*IR.*

a. *Terms embodied in letters — Formal agreement not executed.*—Negotiations were carried on by letter between the parties, whereby all the terms & conditions of a building contract between them were settled & assented to, & one of the letters contained the following words: “An agreement & bond in the terms of your offer will be prepared & submitted to you for execution as soon as the contract for the erection of the

1. 1.—Formation. Sect. 2: Sub-sect. 1.]

with a condition that all materials were to be taken down & cleared off the ground within two months, "after which date any materials then not cleared will be deemed a trespass & become forfeited, & the purchaser's right of access to the ground shall absolutely cease," is a contract for the sale of an interest in or concerning land within Stat. Frauds, s. 4, & from the absence of any sufficient description in the contract of the vendor, avoided.—*LAVERY v. PURSELL* (1888), 39 Ch. D. 508; 57 L. J. Ch. 570; 58 L. T. 846; 37 W. R. 163; 4 T. L. R. 353.

Annotation:—*Mentd. Jarvis v. Jarvis* (1893), 63 L. J. Ch. 10.

Offer & acceptance generally.—See CONTRACT.

Contracts with local authorities, etc.—Necessity for sealing, etc.]—See COMPANIES; CONTRACT; CORPORATIONS; LOCAL GOVERNMENT; METROPOLIS.

SECT. 2.—CONSTRUCTION.

SUB-SECT. 1.—IN GENERAL.

16. Evidence on construction—Usage of builders at particular place.—Pltfs. contracted in writing to build for deft. the front & back walls of a house "for 3s. per superficial yard of work 9 inches thick, & finding all materials, deducting all lights." The lower part of the walls to the height of 11 feet were of stone 2 feet thick, the remainder of brick 14 inches thick:—*Held*: evidence of the usage of builders at the place to reduce brickwork for the purpose of measurement to 9 inches, but not to reduce stonework unless

buildings has been awarded." The contract was awarded, & the bond executed, but no formal agreement was ever executed:—*Held*: there was a binding agreement between the parties.—*KOKSILAH QUARRY CO., LTD. v. R.* (1897), 5 B. C. R. 525.—CAN.

b. Agreement under seal—by person not party to it.]—Where an agreement under seal, for the completion of certain work, had been entered into by one of two pltfs., & the other, who was not mentioned in it, signed & sealed it also, & afterwards assisted in the work, & was recognised & paid by deft., for whose benefit the work was done, as a joint contractor with pltf. mentioned in the instrument:—*Held*: *assumpsit* was maintainable by both for the value of the work, an implied parol agreement having been substituted for the instrument under seal.—*ROSS v. TAIT* (1837), 1 Ont. Dig. 1281.—CAN.

c. Unnamed covenant—No date.—*COGHLAN v. TILBURY EAST SCHOOL TRUSTEES* (1874), 35 U. C. R. 575.—CAN.

PART II. SECT. 2, SUB-SECT. 1.

18 i. Evidence on construction—Parol evidence.—Parol evidence is admissible to show, that the putting in of tiles is not bricklayer work or the laying of cement mason work, if it does not contradict the written contract & enables the ct. to ascertain the subject-matter with reference to which the parties were contracting.—*PAGE v. GREEN* (1903), 20 O. W. R. 137; 30 O. W. R. 424.—CAN.

18 ii. ——Pltfs. tendered to build a house according to specifications containing the following clause: "Contractors to make themselves acquainted with the site & take the necessary levels, the line or fall of ground as shown on plan to be relied

on." Their tender was accepted & a contract signed. An error in the levels as shown on the plan necessitated extra work on the foundations. To an action brought by the contractors to recover the cost of this extra work deft. pleaded that by a clerical error which should have been apparent to the contractors the word "not" had been omitted after the word "plan" in the above clause in the specifications:—*Held*: oral evidence to vary the contract was not admissible.—*FORREST & LIGHT v. DE KLERK* (1908), E. D. C. 213.—S. AF.

18 iii. ——Pltf., by a written contract agreed to do the work of putting down artesian wells on defts.' station, defts. agreeing to supply the machinery, plant, & tools, & pltf. to engage & pay the labour & supervise the work. The contract specified all the articles with which defts. were to supply pltf., but made no mention of who was to supply the wood & water, for the engine, without which the work could not be done. Defts., after supplying pltf. with wood & water for some months, refused to continue to do so, & pltf. accordingly sued them for not permitting him to complete the contract. Pltf. tendered evidence to show that at the negotiations prior to the making of the contract an agreement was made that defts. were to supply the wood & water & that he signed the contract only on that understanding:—*Held*: the evidence was admissible.—*KEITH v. McEDWARD* (1895), 16 N. S. W. L. R. 182.—AUS.

f. — Reference to tender—Contract unambiguous.—Resps. had adopted a scheme for the erection of artisans' dwellings, & had, for the purpose of obtaining tenders, prepared a specification with a form of tender attached. Applt. sent in a tender on the form attached to the specification,

exceeding 2 feet in thickness, was admissible, & the proper construction of the contract was, that it provided only for the price of the brickwork, leaving the stonework to be paid for on a *quantum meruit*.—*SYMONDS v. LLOYD* (1859), 6 C. B. N. S. 691; 141 E. R. 622.

See, further, CONTRACT; CUSTOM & USAGES.

Initialed deleted words—Letters before contract signed.—A firm of shipbuilders agreed to lengthen & repair an iron steamship, the object being that she might be classed 100 A.1. at Lloyd's. The specification forming part of the contract contained the following stipulation:—"Iron work: The plating of the hull to be carefully overhauled, & repaired, [but if any new plating is required same to be paid for extra]" (fourteen words deleted signed A. & I., G.). "Deck beams, ties, diagonal ties, main & spar deck, stringers, & all iron work, to be in accordance with Lloyd's rules for classification":—*Held*: the shipbuilders were bound to supply without extra charge any new plates required to enable the vessel to be classed 100 A.1. at Lloyd's, & neither the letters of the parties before the contract was signed, nor the initialed deleted words in the contract, could be considered for the purpose of interpreting the intention of the parties.—*INGLIS v. BUTTERY* (1878), 3 App. Cas. 552, H. L.

Annotations:—*Mentd. Campbell v. Campbell* (1880), 5 App. Cas. 787; *Pearson v. Pearson* (1884), 51 L. T. 311; *Bristol Trams, etc., Carriage Co. v. Fiat Motors*, [1910] 2 K. B. 831; *G. W. Ry. & Mid. Ry. v. Bristol Corpn.* (1918), 87 L. J. Ch. 414.

Parol evidence to explain meaning of terms.—In a written contract verbally accepted resp. was to be allowed a commission on "the estimate of £35,000," & a further commission if "the total cost of the works was reduced below

& his tender was accepted. Subsequently, a contract under seal was entered into between applt. & resps. This contract, after reciting the tender, the specification, & certain drawings, & expressly incorporating the specification & drawings, provided that the works should be constructed agreeably to the specification & drawings:—*Held*: the contract being unambiguous in itself, the tender could not be referred to for the purpose of showing that a certain wall at the rear of the dwellings was included in the work to be done.—*KINLEN v. ENNIS URBAN DISTRICT COUNCIL*, [1916] 2 I. R. 299.—IR.

g. — Modifications to formal contract.—A formal contract between B. & T. to erect part of a building had been signed by B. subject to modifications contained in a letter from him to T., agreed to by T. orally before the contract was signed & afterwards confirmed by T., by letter:—*Held*: B. might prove that the formal contract was not the entire contract, but an item of another & wider one.—*BROCKLEBANK v. BARTER* (1914), 30 W. L. R. 159; 7 W. W. R. 775.—CAN.

h. — Oral agreement.—A contract for the construction of certain steamships contained this clause: "The following specification is subject to the plans which are to be submitted & approved by the owners before the work is commenced & which shall in all cases of divergence be held to overrule." The plans showed the vessels with straight keels but as actually built the keels were cambered. The shipowners having brought an action against the shipbuilders for damages for breach of contract in respect of the cambering of the vessels' defts. contended that pltfs. were barred from founding on the cambering for they had orally agreed to it while

£30,000":—*Held*: extrinsic evidence was admissible to show that the estimate referred to was for the execution of the work, exclusively of the cost of the land purchased, & the amount of commission.—*BANK OF NEW ZEALAND v. SIMPSON*, [1900] A. C. 182; 69 L. J. P. C. 22; 82 L. T. 102; 48 W. R. 591; 16 T. L. R. 211, P.C.

Annotations:—*Mentd.* *Charrington v. Woolder*, [1914] A. C. 71; *Banbury v. Bank of Montreal*, [1918] A. C. 626; *G. W. Ry. & Mid. Ry. v. Bristol Corpn.* (1918), 87 L. J. Ch. 414.

19. Accuracy of representation—Clause disclaiming responsibility—No protection against fraud.—A clause in a contract, by which the employer disclaims responsibility for the accuracy of the statements & information with which he supplies the contractor, & as to which the contractor is to satisfy himself, does not confer exemption on the employer for statements fraudulently or recklessly made by the employer or his agent. Whatever be the form of the contract, the party who makes an allegation of fraud is entitled to have the question submitted to a jury.—*PEARSON & SON, LTD. v. DUBLIN CORPN.*, [1907] A. C. 351; 77 L. J. P. C. 1; 97 L. T. 645, H. L.

Annotation:—*Mentd.* *Myers v. Bradford Corpn.*, [1915] 1 K. B. 417.

20. Contract made "void" on happening of event—Whether "voidable" at option.—By a contract made in 1913 a French co., called the builders, agreed to construct a steamer for a shipping co., called the purchasers, to be completed

by Jan. 30, 1915, subject to an extension of time if the construction was delayed by an unpreventable cause beyond the control of the builders, & in case the builders should be unable to deliver the steamer within, in the event of France becoming engaged in a European war, eighteen months from the date agreed by the contract for completion, "thereupon this contract shall become void & all money paid by the purchasers shall be repaid to them" with interest at 5 per cent. On Aug. 2, 1914, while the steamer was in course of construction, France became engaged in a European war, & continued to be so engaged, & the builders were prevented by unpreventable causes beyond their control from completing the steamer by Jan. 30, 1915, & were afterwards prevented by the same causes. On the expiration of the eighteen months on July 30, 1916, the question arose whether the builders were entitled to treat the contract as null & void, notwithstanding the purchasers required the builders to complete & deliver the vessel:—*Held*: the contract became void & not merely voidable at the option of the purchasers, & as the avoidance of the contract had not been brought about by any wrongful act or default on the part of the builders, the latter were not precluded from alleging that the contract was void.—*NEW ZEALAND SHIPPING CO. v. SOCIÉTÉ DES ATELIERS ET CHANTIERS DE FRANCE*, [1919] A. C. 1; 87 L. J. K. B. 746; 118 L. T. 731; 34 T. L. R. 400; 62 Sol. Jo. 519; 14 Asp. M. L. C. 291, H. L.; *affg.* S. C. *sub nom.* *Re NEW*

the vessels were in course of construction:—*Held*: defts. had failed to prove the alleged oral agreement.—*BURRELL & SON v. RUSSELL* (1900), 2 F. (Ct. of Sess.) 80.—*SCOT*.

k. — Unsigned document embodying terms of agreement.—In an action to recover payment for excavating work done by plffs. for defts., the matter in dispute was as to what work plffs. agreed to do. There was no written contract signed by the parties, but a document was submitted by defts. to plffs., which defts. afterwards repudiated, but which plffs. said contained the true agreement except as to one point. This document was not signed:—*Held*: nevertheless, it was evidence as far as it went, of what the agreement was, & was clearly evidence of the work which plffs. had figured on & agreed to do, & defts. were bound by it.—*DOLMER v. SHARPE* (1910), 15 W. L. R. 597.—*CAN.*

l. — General practice & usage of draughtsmen—Shading & marking of plans.—*ATKILL v. PLATT* (1884), 10 S. C. R. 425.—*CAN.*

m. — Expert witness—Who is.—*Held*: the evidence of a person who was a member of the Mining Engineers' Institute of America, & had been a contractor for various works, but had never practised as a civil engineer, & was not a professional man, was not admissible as that of an expert upon a question what an engineer would understand by an agreement in reference to the preparation of plans & specifications for harbour-works, or upon questions as to professional rules or professional practice in regard to plans & specifications.—*REYNOLDS v. NELSON HARBOUR BOARD*, [1904] 23 N. Z. L. R. 620.—*N.Z.*

n. Clerical error.—The contract price was intended to be \$25 a ft. for sinking two shafts. By an error the contract was drawn up for \$30 a ft., but no one on deft.'s behalf sanctioned or signed the contract for that sum:—*Held*: plff. was only entitled to be paid at \$25 a ft.—*HUNTON v. COLEMAN Co.* (1907), 10 O. W. R. 610.—*CAN.*

o. ——Where under a building contract work was to be completed by "Nov. 31" under penalty of damages:—*Held*: this must be construed to mean Nov. 30.—*MCBEAN v. KINNEAR* (1892), 23 O. R. 313.—*CAN.*

p. Time for completion—Difference between contract & specifications.—Where the time fixed by the contract for the completion of a building is different from the time fixed by the specifications, the latter, if clearly erroneous may be rejected.—*Re WEST-HOLME LUMBER CO. v. ST. JAMES* (1915), 30 W. L. R. 781; 8 W. W. R. 122; 21 D. L. R. 549.—*CAN.*

q. — Authority to suspend work.—Under the circumstances:—*Held*: the stipulation that the work should be done within such time as the engineers might appoint gave only a reasonable control as to time, & did not authorise the employers to suspend the work indefinitely.—*LAKE v. CAMERON* (1859), 18 U. C. R. 622.—*CAN.*

Time for completion, generally, see Sect. 3, *post*.

r. Whether contract joint or several—Executed by one party.—Defts. architects having by the defts.' instructions advertised for tenders for the construction of two wholesale stores, plff. tendered for the excavation & brick & stone work, etc., of the two stores at an entire sum of \$5,768, which was accepted by the architects; & an agreement was then drawn up, purporting to be between plff. of the one part, & defts. of the other part, under which plff. was to erect & build the two stores for \$5,768, which defts. covenanted to pay in the proportion of 85 per cent. as the work progressed, on the architects' certificate, & the remainder in one month after completion. This agreement was executed by plff., but not by defts. Plff. then entered upon the work, & from time to time during its progress received from the architects certificates addressed to defts. jointly, of the sums payable on the whole work, & not on each building separately, which plff. took to defts., & each paid half. On the completion of the contract, plff. obtained from the architects separate

statements of the amounts due from each deft., & after allowing a set-off which each deft. had against him, took their several notes for the balance due from each. Plff. swore he thought it was a joint contract, & had no intimation that defts. were not jointly interested in the stores, while the architects stated they had no instructions to draw a joint contract, & did not consider that this was one. In an action against both defts. on the common counts:—*Held*: the contract was a joint & not a several contract, & the fact of plff.'s dealings with defts. under it, as stated, could not alter its legal effect.—*HERBERT v. PARK* (1875), 25 C. P. 57.—*CAN.*

19 i. Accuracy of representations—Warranty of accuracy—Plans wholly incorrect.—To the specification upon which tenders were called for by a county council for the removal of the existing superstructure of a bridge, & the erection of a new superstructure, were attached drawings of the existing superstructure, the materials of which, by the terms of the specification, were when removed to become the property of the contractor. The specification contained the following clause: "The general construction of the piers respectively & also the character of the present superstructure is indicated approximately on the drawings; but tenderers must satisfy themselves as to the correctness of such drawings, as no responsibility shall attach to the council in respect thereof after the acceptance of a tender." The drawings were wholly incorrect, being drawings of an entirely different bridge. T., the successful tenderer, was aware of this, but formed his estimate & put in his tender on the assumption that the drawings were correct:—*Held*: there was a warranty by the council that the drawings were generally or approximately correct, & there was a breach of this warranty, for which T. was entitled to recover damages, notwithstanding his knowledge of the facts.—*AMURI COUNTY COUNCIL v. THOMAS* (1891), 9 N. Z. L. R. 664; 10 N. Z. L. R. 430.—*N.Z.*

t. Right to stop performance

Sect. 2.—Construction. Sub-sects. 1 & 2, A.]

ZEALAND SHIPPING CO. & SOCIÉTÉ DES ATELIERS ET CHANTIERS DE FRANCE, [1917] 2 K. B. 717, C. A.

Annotations:—Mentd. Re Suarez, Suarez v. Suarez, [1918] 1 Ch. 176; Lebeaupin v. Crispin, [1920] 2 K. B. 714; Re Meyrick's Settlement, Meyrick v. Meyrick (1920), 65 Sol. Jo. 155; Quesnel Forks Gold Mining Co. v. Ward, [1920] A. C. 222.

See, further, CONTRACT.

SUB-SECT. 2.—IMPLIED TERMS.

A. Site.

21. Immediate possession—Effect of delay.]—Pltfs., on Apr. 19, 1836, entered into a written contract to build, for £1,700, a brewery for defts., so far as regarded the carpenters' work, within four months & a half next ensuing the date of the agreement, & in default of completing same within the time thereinbefore limited, to forfeit to defts. £40 per week for each week that the completion of the work should be delayed beyond Aug. 31, the amount to be deducted from the £1,700, as liquidated damages. Pltfs. did not begin the work for four weeks after the date of the agreement, in consequence of defts. not being able to give them possession; they were afterwards delayed one week by the default of their own workmen & four weeks by the default of the masons, etc. employed by defts., and the work was not completed till five weeks after the time limited:—*Held*: defts. were not entitled to deduct from the £1,700 any sum in respect of the delay, either for the one or the four weeks.—*HOLME v. GUPPY* (1838), 3 M. & W. 387; 150 E. R. 1195.

Annotations:—Consd. Thornhill v. Neats (1860), 8 C. B. N. S. 831. Refd. Russell v. Da Bandeira (1862), 13 C. B. N. S. 149; Stadhard v. Lee (1863), 3 B. & S. 364; Westwood v. Secretary of State for India in Council (1863), 1 New Rep. 262; Roberts v. Bury Comrs. (1870), L. R. 5 C. P. 310; Dodd v. Churton, [1897] 1 Q. B. 562.

22. ———.]—Pltf., a contractor, undertook by two contracts to construct a graving dock for defts., a dock co. The first contract consisted of a specification issued by defts. with general conditions annexed, a tender by pltf. & an acceptance by defts. of that tender, with other subsidiary papers. Pltf.'s tender, dated Feb. 1, 1899, was for a lump sum of £38,791 17s. 9d., & he undertook to complete the works within seventy-five weeks from notification of the acceptance of his tender. The tender was accepted on Feb. 6. When the contract was entered into it was overlooked that there already existed a contract between defts. & A. & Co., by which that firm had undertaken to clear away the upper surface of the site of the intended dock down to a certain level. As the existence of that contract might interfere with the carrying out of pltf.'s contract, a second contract was made in Mar. 1899, which recited & annexed the documents constituting the first contract, & that it had been agreed to alter, vary, & extend that contract. By clause 1 (b) of the second contract it was provided:—"The co. will from time to time, as soon as is practicable as the firm of A. & Co. from time to time complete their contract with the co., give possession to the contractor of such portions of the site as have been completed by the firm, so as to enable him to carry out his contract within the time specified without

extra cost or expense to the contractor," & in pursuance of the clause possession of the dock site, from the eastern extremity up to the 220 foot line mentioned in that clause, was secured to pltf. The remainder of the site was obtained by him at various subsequent periods from defts. or from A. & Co. Pltf. proceeded to carry out the work, & certain sums were paid to him from time to time by defts. but on June 21, 1900, a large balance being then due to pltf., as he alleged, defts.' manager gave pltf. notice that he was dissatisfied with the mode of proceeding & rate of progress of the works, & cancelled the contract. At the trial of an action brought by pltf., pltf.'s counsel formulated two questions to be put to his witnesses:—(1) Did defts. give pltf. possession of the site so as to enable him to complete the contract within the time specified for its completion & without extra cost or expense to him. (2) Was the delay on the part of pltf. in carrying out his contract caused by defts.' failure to give pltf. possession of the site on which the dock was to be constructed, so as to enable pltf. to proceed with & carry out the contract at such a rate of progress as would be required to insure completion within the time. The judge excluded the proposed questions, & nonsuited pltf., but an appellate ct. set aside the nonsuit, & ordered a new trial. At the new trial a verdict was returned for pltf. for £11,139, but on appeal the verdict was set aside & a verdict directed for defts., on the ground that there was no sufficient evidence to go to the jury that pltf.'s delay, which led to the cancellation of the contract, was caused by defts.' failure to give him possession of the site:—*Held*: (1) defts. were absolutely bound to give him possession of the dock site outside the 220 foot line, so as to enable him to carry out his contract within the time specified without extra cost, & their obligation was not merely to give up the ground as A. & Co. finished their contract; (2) there was no evidence to go to the jury on which they could properly find that the condition of things with which defts.' manager was dissatisfied was caused by delay in giving possession of the site or any part of it.—*MORT'S DOCK & ENGINEERING CO., LTD. v. WADEY, WADEY v. MORT'S DOCK & ENGINEERING CO., LTD.* (1905), 22 T. L. R. 61, P. C.

23. ———.]—During a contract for carrying out alterations & additions to a dwelling-house, the contractor was delayed, & he claimed damages; the employer denied liability & counter-claimed for damages for non-completion to time. The time for completion had been extended by the architect, & was further extended by the arbitrator to the date of actual completion:—*Held*: this extension of time did not affect the damages claimed by the contractor against the employer for breaches of contract, *e.g.*, by not affording possession of the site, & by interference with execution of the work.—*Re TROLLOPE & SONS & COLLS & SONS, LTD. & SINGER* (1913), 1 Hudson's B. C., 4th ed., 849.

24. ——— Waiver — Reasonable time.]—A builder contracted to pull down fifteen old houses, & erect twelve new buildings on the site, the work to be completed within six months of the date of the contract. He consented to a delay of two weeks from the date of the contract in obtaining possession of the site. The building owner did

*before completion—On expenditure of certain sum.]—*A contract provided for the building of the walls of a dam to a height of 20 ft. above the level of the river. The walls could not be built unless the space between them

was filled in as the walls were being built. The material used in building the walls was to be supplied partly by the contractor & partly by the employer. The contract further provided that the co. might stop before

the stipulated height was reached if £600 was expended:—*Held*: this meant, expended on the walls & filling in, & not on the walls only.—*HUNTER v. NOKOMAI SLUICING CO., LTD.* (1903), 22 N. Z. L. R. 828.—N.Z.

not give possession at the expiration of that period, but subsequently gave it in parts, the last portion not being handed over until five months from the date of the contract :—*Held* : (1) a term must be implied in the contract that possession of the whole site should be given forthwith, but this being waived by the consent of the builder to a fortnight's delay it was altered to a reasonable time; (2) possession was not given within a reasonable time, & the builder was entitled to recover damages for loss sustained in consequence of the breach.—*FREEMAN & SON v. HENSLER* (1900), 64 J. P. 260; 2 Hudson's B. C., 4th ed., 292, C. A.

Annotation :—*Distd.* *Porter v. Tottenham U. D. C.*, [1914] 1 K. B. 603.

25. Uninterrupted possession—No implied warranty—Wrongful interference by third party.]—A contractor to execute sewerage for a sanitary authority acting under Public Health Acts is not entitled to throw up his contract because of difficulties created by the landowners under whose land the sewer is to be tunnelled.—*DICKINSON v. RICHMOND MAIN SEWERAGE BOARD* (1893), 2 Hudson's B. C., 3rd ed., 254.

26. ———.]—By a contract in writing it was agreed that pltf. should build a school for defts., upon a site belonging to them, within ten months after the date of the contract, & that he should commence work & be at liberty to enter upon the site forthwith. The only access to the site was from a road adjoining other land of defts. & over that land, & it was provided that pltf. should make a temporary sleeper roadway over that land from the street to the site. Possession of the site was given forthwith, & defts. made a gateway through the fence separating their land from the street, & pltf. made & used the sleeper roadway through the gateway to the street. The owner of the soil of the street, alleging that it was not a public highway, prohibited its use by pltf. & threatened to sue him for an injunction. Pltf. in consequence ceased work for more than two months until after defts. had sued the owner of the soil of the street & obtained a decision that it was a public highway. Pltf. claimed damages for loss caused by the delay of the work, alleging a breach of defts.' implied contract to give free & uninterrupted possession of & access to the site :—*Held* : there was no warranty to be implied from the contract to the effect that pltf. should be at liberty to work upon the land without interruption, & defts. were not liable to indemnify pltf. against the loss caused by the wrongful interference of a third party with the means of access to the site.—*PORTER v. TOTTENHAM URBAN COUNCIL*, [1915] 1 K. B. 776; 84 L. J. K. B. 1041;

112 L. T. 711; 79 J. P. 169; 31 T. L. R. 97; 13 L. G. R. 216, C. A.

27. Condition—Works on seashore—Action of wind & sea.]—Where a contract is entered into to construct a sea wall the contractor & not the employer takes the risks of interference with the work while in progress by the action of the winds & seas which, in the ordinary contemplation of all, are risks incidental to the complete performance of the contract, & there is no implied contract by the employer that the seashore on which the proposed works are to be executed shall remain in the same condition as at the date of the contract. The fact that the employer is by a special Act of Parliament bound to protect the adjacent shore from the action of the winds & seas does not create any obligation on his part in favour of the contractor or exonerate him from the special terms of his own contract.—*JACKSON v. EASTBOURNE LOCAL BOARD* (1886), 2 Hudson's B. C., 4th ed., 81, H. L.

28. ——— Defects in soil.]—In the absence of any specific guarantee or definite representations as to the nature of the soil in which the works are to be executed, a contractor is not entitled to abandon the contract on discovery of the nature of the soil.—*BOTTOMS v. YORK CORPN.* (1892), 2 Hudson's B. C., 4th ed., 208, C. A.

Annotations :—*Refd.* *McDonald v. Workington Corpn.* (1893), 2 Hudson's B. C., 4th ed., 228. *Mentd.* *Re Rubel Bronze & Metal Co. & Vos*, [1918] 1 K. B. 315.

29. ———.]—A contractor is not entitled to throw up a contract because the nature of the soil makes it difficult or impossible to construct the contract works in accordance with the specification.—*M'DONALD v. WORKINGTON CORPN.* (1893), 9 T. L. R. 230; 2 Hudson's B. C., 4th ed., 228, C. A.

30. Obstruction—Removal within reasonable time.]—Pltf. contracted with defts. to remove a certain quantity of the bed of the river Mersey within a certain time, but in case a temporary staging erected in the river was not removed by defts. in sufficient time to enable pltf. to complete his contract within the time agreed upon, he was to be entitled to such extension of that time as the engineer should deem reasonable. Pltf. was to be paid 80 per cent. of the value of the work certified by the engineer as having been completed each month, & the balance when the work was finished. The work was not completed till some time after the date stipulated for by the contract, but this pltf. alleged to be due to the non-removal of the staging. The engineer admitted that pltf. was entitled to compensation for the time, thirty-eight days, during which he incurred expenses by the delay caused by the non-removal of the

PART II. SECT. 2, SUB-SECT. 2.—A.

25 i. Uninterrupted possession—Implied condition.]—In a contract to execute a work on land there is an implied condition that the contractor shall have quiet possession of the land during performance of the contract as against any person rightfully claiming the site under a superior title.—*SLOWEY v. LODDER* (1901), 20 N. Z. L. R. 321.—N.Z.

a. Condition — Latent defect.]—M. entered into a contract with a borough council to construct a tunnel. After partly performing the work he abandoned it. The sureties for the due performance of the contract contracted with S. that he should complete the work under the superintendence of the engineer of the borough. During the work S. was ordered by the engineer to increase the thickness of the brick-work, & to do this he had to remove

the wooden lining already erected, excavate further soil, & re-erect the lining, which were dangerous operations, to the knowledge of S., the ground being treacherous. While this was being done the portion of the tunnel which had been constructed collapsed, causing large additional expense & loss of material. It appeared that before the contract with S. there had been a slip in the earth above the tunnel, leaving a cavity, which had been packed with brush-wood & logs; & it was alleged that this was a latent defect of which S. had no knowledge, & that there was an implied warranty against such latent defects. S. claimed from the sureties the loss & expense incurred by the collapse :—*Held* : there was no implied warranty.—*SLOWEY v. LODDER* (1901), 20 N. Z. L. R. 321.—N.Z.

b. Obstruction — Liability for removal.]—A corpn. erecting a church,

made a contract with M. for the excavating & brick & stone work. M. failed in the execution of the contract & the corpn. entered into an agreement by which applts. undertook to supply material & perform labour in connection with the building of the foundations, setting steps, construction of basement floor, grading, & to do all the work required to be done for the purpose of fulfilling the contract of M. Applts. contended that, upon making the contract, the corpn. became bound to remove all materials, so that the work could be readily & conveniently executed :—*Held* : applts. were wrong in their contention as they knew that they had to enter upon the premises as they were, & work in conjunction with other trades.—*Re THAMES QUARRY CO., LTD., & ROMAN CATHOLIC EPISCOPAL CORPN. OF THE DIOCESE OF TORONTO* (1915), 9 O. W. N. 40.—CAN.

Sect. 2.—Construction: Sub-sect. 2, A., B.

staging, but the full amount for extra work & expenses could not be agreed on between him & pltf.:—*Held*: the engineer had no authority to make an express contract on behalf of defts. that no unreasonable delay should occur in removing the staging, but there was an implied contract to that effect, & if pltf. was in fact prevented from completing the contract in time by reason of any such unreasonable delay, he was entitled to damages, the proper measure of such damages being the loss which pltf. had unavoidably sustained in consequence of such unreasonable delay.—*LAWSON v. WALLASEY LOCAL BOARD* (1882), 11 Q. B. D. 229; 52 L. J. Q. B. 302; 47 L. T. 625, D. C.; *affd.* (1883), 48 L. T. 507, C. A.

Annotations:—*Distd.* *Porter v. Tottenham U. D. C.*, [1914] 1 K. B. 663. *Mentd.* *City of Dublin Steam Packet Co. v. R.* (1908), 24 T. L. R. 657.

B. Plans and Specifications.

31. Duty to provide within reasonable time—Entire contract.—Deft. agreed to supply pltf. with 150 tons weight of iron girders, at a certain price per ton, & according to plans to be furnished by pltf. Plans were furnished within a reasonable time from the date of the agreement, & at the same time 14 tons weight of girders were ordered. Four months after the date of the agreement the 14 tons were demanded, & other plans were furnished, & orders given for 60 tons more girders. Deft. then repudiated the contract:—*Held*: the contract was entire, & as pltf. had not furnished plans for the whole 150 tons within a reasonable time from the date of the agreement, he could not recover for the non-delivery of the 14 tons for which plans had been furnished within a reasonable time from such date.—*KINGDOM v. COX* (1848), 5 C. B. 522; 17 L. J. C. P. 155; 10 L. T. O. S. 328; 12 Jur. 336; 136 E. R. 982.

32. — Delay caused by non-supply.—During a contract for carrying out alterations & additions to a dwelling-house, the contractor was delayed (*inter alia*) by the non-supply of drawings & details & information. For this delay he claimed damages, & the employer denied liability & counter-claimed for damages for non-completion to time. The time for completion had been extended by the architect & was further extended by the arbitrator to the date of actual completion:—*Held*: this extension of time did not affect the damages claimed by the contractor against the employer.—*Re TROLLOPE & SONS & COLLS & SONS, LTD., & SINGER* (1913), 1 Hudson's B. C., 4th ed., 849.

33. Whether warranty that work can be executed—Duty of contractor to make independent

. 2, SUB-SECT. 2.—B.

33 i. Whether warranty that work can be executed—Duty of contractor to make independent inquiries.—An engineer prepared certain plans & specifications for a reservoir that deft. proposed building. The plans showed certain strata. The first and second strata were described as sand and quicksand, & their respective depths were shown; the next stratum was marked blue clay, but there was no indication of its depth. The conditions of contract contained a clause specially requiring the contractor to satisfy himself as to the correctness of the information contained in the plans, & providing that in the event of their proving incorrect he would have no claim:—*Held*: (1) it was extremely doubtful whether the plans, taken by themselves, amounted to a warranty; (2)

the condition that the contractor was to satisfy himself as to the correctness of the information, was an intimation that there might be errors, & expressly negatived a warranty.—*GEE v. SUMNER BOROUGH COUNCIL* (1893), 12 N. Z. L. R. 63.—N.Z.

33 ii. — — — — ——*BRENNAN & HOLLINGWORTH v. HAMILTON CITY* (1917), 39 O. L. R. 367; 37 D. L. R. 368.—CAN.

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c. Obligation to furnish work.—When one contracts to do work for another, the preparation for which involves outlay & expense, a corresponding agreement, in the absence of any express provision, will be implied on the part of the person with whom he contracts to furnish the work; but no such implication will be made

inquiries.—Where plans & a specification, for the execution of a certain work, are prepared for the use of those who are asked to tender for its execution, the person asking for the tenders does not enter into any implied warranty that the work can be successfully executed according to such plans & specification, & the contractor for the work cannot sustain an action for damages, as upon a warranty, should it turn out that he could not execute it according to such plans & specification.

T. contracted with defts. to take down an old bridge & build a new one. Plans & a specification prepared by defts.' engineer were furnished to him, & he was required to obey the directions of the engineer. The descriptions given were stated to be "believed to be correct," but were not guaranteed, & in one particular matter at least, he was warned to make examination for himself. Part of the plan consisted in the use of caissons. These turned out to be of no value, & the work done in attempting to use them was wholly lost, & the bridge had to be built in a different manner. In this way much labour & time was wasted. The contract contained provisions as to the payment for extra work, & that work had, with the contract work, been duly paid for. The contractor sought for compensation for his loss of time & labour occasioned by the failure of the caissons, & in his declaration alleged that defts. had warranted that the bridge could be inexpensively built according to the plans & specification. There was no express warranty to that effect in the contract:—*Held*: none could be implied. *Semble*: if he had any remedy in the circumstances it was not in an action for damages as for breach of warranty, but for compensation as upon a *quantum meruit*.—*THORN v. LONDON CORPN.* (1876), 1 App. Cas. 120; 45 L. J. Q. B. 487; 34 L. T. 545; 40 J. P. 468; 24 W. R. 932, H. L.

Annotations:—*Reid.* *Jackson v. Eastbourne L. B.* (1886), 2 Hudson's B. C., 4th ed., 81; *Re Ford & Bemrose* (1902), 18 T. L. R. 443; *Porter v. Tottenham U. D. C.*, [1914] 1 K. B. 663. *Mentd.* *Robb v. Green*, [1895] 2 Q. B. 1; *Re Shell Transport & Trading Co. & Consolidated Petroleum Co.* (1904), 20 T. L. R. 517; *Pearson v. Dublin Corpn.*, [1907] A. C. 351.

Liabilities of architects & engineers.—*See* Part XVI., *post*.

Bills of quantities.—*See* Part XVII., Sect. 1, *post*.

C. Other Cases.

34. Contract to construct well—Obligation to erect steam engine.—By deed, reciting that defts., a waterworks co., had determined to construct a well, etc., & that the engineers of the co. had prepared the necessary drawings for same, & made a general specification referring to

where, from circumstances known to, & in the contemplation of, both parties at the date of the agreement to do the work it was, & continued to be, beyond the power of the party to carry out such implied agreement.—*McKENNA v. McNAMEE* (1887), 15 S. C. R. 311.—CAN.

d. Prevention of wrongful or unreasonable delay.—Upon the construction of the contract:—*Held*: there was an implied contract by deft. with each contractor that he should not be wrongfully or unreasonably delayed in carrying out his contract, but the brick work being necessarily delayed by frost, & pltf.'s work being thereby impeded, deft. was not responsible.—*LEX v. BOWWELL* (1874), 24 C. P. 109.—CAN.

e. As to condition of subject-matter—Contract to place engine in &

the drawings of all the works to be done, & of the materials to be found & provided for that purpose, that pl'tfs. had agreed to make the well, etc., & to execute all the works particularised in the specification, & which might be implied therefrom or incidental thereto, for £3,880, & that to the drawings & specification the corporate seal of the co. had been affixed, & that pl'tfs. had signed same, pl'tfs. covenanted to complete the well, etc., & works mentioned & specified in the specification or shown in the drawings, or which might be reasonably implied therefrom or be considered incidental thereto, & that they would find all materials required in the making & completing the works of such sort, etc., as in the specification described, & all scaffolding, engines, pumps, etc., mentioned in the specification, as required to be provided by the person contracting to perform the work, as might be found necessary to complete the works, & labour, etc., necessary for the construction & completion of the well in a workmanlike manner, & in all respects conformable to the specification, & fully to complete the works in a workmanlike manner on or before Sept. 22 then next, with power to the engineer of the co. to delay the work & grant an extension of time if he should think proper. If not completed in manner aforesaid on Sept. 22, pl'tfs. were to be liable to a penalty of 20s. weekly. Defts. covenanted to pay the £3,880, & such further sums as should be payable in respect of deviations from the works. The specification, which was under the seal of the co. contained the following passage:—"The contractor will be required to sink the well, etc., to the depth of 120 feet, etc., after which the co. will undertake the erection of the permanent steam-engine & permit the pumping to be performed by it, sufficient interval of time being allowed for the erection of the steam-engine, & such time added to the period assigned to the contractor for the performance of the works":—*Held*: there was an implied covenant on the part of the co. to erect the permanent steam-engine as provided in the specification.—*KNIGHT v. GRAVES-END & MILTON WATERWORKS CO.* (1857), 2 H. & N. 6; 27 L. J. Ex. 73; 29 L. T. O. S. 83; 157 E. R. 3.

35. Works let by municipal corporation—Assent of Commissioners of Woods & Forests—No implied covenant to obtain.—A corp'n. agreed with pl'tf. to let pl'tf. the making of certain works to be made under the authority of an improvement Act, paying him a stipulated price, & pl'tf. agreed to take the works, & as to a certain portion of them which might require the assent of the above

Comrs., that he "would well, truly & faithfully construct, make & execute the works as set forth & described in the specification & laid down on the plan, at & for £4,987, subject to the following provisions" Then followed certain provisions, that the assent of the above Comrs. should be obtained, that the corp'n. should not be prevented from proceeding with the works by a certain railway co., or any person acting under the powers given to that co. to make part of the works in question, & that the approbation of the Treasury should be given to the corp'n. to borrow the money required on mtge. On demurrer to a declaration, assigning as a breach that the corp'n. omitted to procure or obtain the assent of the Comrs. or the approbation of the Treasury within a reasonable time:—*Held*: although it might have been expected on both sides that such assent & approbation should be obtained, there was no implied covenant on the part of the corp'n. to obtain it, & the breach was bad.—*SMITH v. HARWICH CORPN.* (1857), 2 C. B. N. S. 651; 26 L. J. C. P. 257; 22 J. P. 55; 140 E. R. 572.

Annotation:—*Reid. Treloar v. Biggo* (1874), 43 L. J. Ex. 95.

36. Contract to complete house—Flooring & flooring boards included.—Pl'tf. agreed to build a house for deft., who prepared a specification which contained particulars of the different portions of the work. Under the head "carpenter & joiner" there was specified the scantling of the joists for the different floors, the rafters, ridge & wall pieces, but no mention was made of the flooring. The specification stated that "the whole of the materials mentioned or otherwise in the foregoing particulars, necessary for the completion of the work, must be provided by the contractor." At the foot of the specification pl'tf. signed a memorandum, whereby he agreed with deft. "to do all the works of every kind mentioned & contained in the foregoing particulars, according in every respect to the drawings furnished or to be furnished, for £1,100. The house to be completed & fit for deft.'s occupation by Aug. 1, 1858." Pl'tf. prepared the flooring boards, brought them to the premises, & planed & fitted them to the several rooms, but refused to lay them down without extra payment, because the flooring was not mentioned in the specification, whereupon deft. put an end to the contract, took possession of the works, & proceeding to complete the building used the flooring boards so prepared & fitted by deft.:—*Held*: (1) pl'tf. was not entitled to recover for the flooring as an extra, because it was included in the contract though not mentioned

repair steamship.—Suppliants entered into a contract with the Crown to "place a secondhand compound screw surface condensing engine" in a certain steamship belonging to the Dominion Govt.; & to convert the vessel from a paddle steamer into a screw propeller. By the specifications annexed to & forming part of the contract it was stipulated, *inter alia*, that the old engine & paddle wheels were to be broken & taken out of the steamer at the contractors' expense, & that they should stop up all the holes both in the bottom & side of the vessel; that the contractors were to make new any part of the engine or machinery although not named in the specifications, which might be required by the minister, etc., the whole to be completed & ready for sea, on a full steam pressure of 95 lbs. per square in., ready to commence running on a certain date, the whole work to be of first class style to the entire satisfaction of the engineer appointed to superintend the work. It was further

agreed that the steamer was to be put in perfect running order; that the alterations of any parts of the steamer, for the purpose of fitting up the new works, & any openings or cuttings or rebuilding, were to be executed & furnished at the cost of the contractors. It was also provided that the steamer was to have a satisfactory trial trip of at least four hours' duration, steaming full speed, before being handed over to the department. The vessel was built of iron & very old. Suppliants had taken the old engine out of the hull, & had grounded her, preparatory to placing her in a dry dock in order to complete their work under the contract. Owing to the fact that the bottom of the vessel under the old engine seat had been eaten away by rust, it gave way & was broken in when she grounded. It was established that the accident did not occur through the negligence of suppliants; but the Crown insisted that suppliants were liable to repair this damage under the terms of the

contract & specifications:—*Held*: (1) there was nothing to show by the terms of the contract & specifications that either party at the time of entering into the contract contemplated that the portion of the steamship lying below & hidden by the engine seat would require renewing; & the stipulation in the specifications that "the steamer was to be put in perfect running order" was intended to apply only to work suppliants had expressly agreed to do, & should not be extended to other works or things which they did not agree to do or to replace or renew; (2) in such a contract as this, neither by the law of England nor by that of the province of Quebec is there any warranty to be implied on the part of the owner of the thing upon which the work is to be performed that the same shall continue in a state fit to receive the work contracted for.—*LAINÉ v. R.* (1896), 5 Exch. C. R. 103.—*CAN.*

Sect. 2.—Construction: Sub-sect. 2, C.; sub-sect. 3.]

in the specification; (2) pltf. could not maintain trover for the flooring boards left on the premises by him & subsequently used by deft.—**WILLIAMS v. FITZMAURICE** (1858), 3 H. & N. 844; 32 L. T. O. S. 149; 157 E. R. 709.

Annotation:—**Reid. Dakin v. Lee** (1914), 112 L. T. 645.

37. Rates paid by contractor—No obligation to repay.—A corpn. were the owners of a railway which had been laid by them some time before for the construction of other portions of their waterworks undertaking, but which had become derelict. By a clause in the specification the contractor had to "take over" the railway & put it in repair & the contractor had to pay all wayleaves payable by the corpn. to landowners over whose land the railway was constructed. There was no provision as to the payment of rates on the railway. The rating authorities rated the contractor as the occupier of the railway, & while disputing his liability he paid the rates & claimed to recover them from the corpn. The dispute was referred to arbn., & the arbitrator found that the contractor was not the occupier of the railway & that the corpn. were bound to repay to him the rates which he had been compelled to pay in order to prevent a distress being levied:—**Held**: there was no implied undertaking by the corpn. to repay to the contractor the rates so paid by him as the rated occupier of the railway.—**Re NOTT & CARDIFF CORPN.**, [1918] 2 K. B. 146; 118 L. T. 487; 82 J. P. 181; 16 L. G. R. 253, C. A.; *reversd.* on another point *sub nom.* **BRODIE v. CARDIFF CORPN.**, [1919] A. C. 337, H. L.

SUB-SECT. 3.—WORDS AND PHRASES IN BUILDING CONTRACTS.

38. "Approved plan."—An underlessee of premises for an unexpired term of fifty years, under a covenant to repair & keep up the demised

work.—Pltf. agreed by instrument under seal, to do certain decorative work at defts.' hotel, the work to be done to the satisfaction of defts.' architect & to be completed by Aug., 1902, leave being given to defts. to cancel the agreement should these conditions not be fulfilled. Pltf. was unable to commence work until Oct., 1902, owing to the walls of the hotel not being ready to receive pltf.'s work. The work had ultimately to be suspended through no fault of pltf.'s. On being requested to resume work, pltf. considered the walls were not in a fit condition & defts. cancelled the contract. In an action for damages:—**Held**: it was an implied term of the contract, that defts. were to hand over the premises to pltf. in a fit condition, for the performance by him of the work which he had contracted to do.—**SLOANE v. TORONTO HOTEL CO.** (1905), 5 O. W. R. 460.—CAN.

Contract to instal bowling alleys—Provision for ventilation.—Under a contract to instal bowling alleys which provides that the foundation therefor is to be prepared by the owner according to the instructions of the contractor, the latter is bound to make reasonable provision for ventilation of the floor.—**SMITH v. BRUNSWICK BALKE CAILLENDER CO.**, [1917] 3 W. W. R. 1071; 38 D. L. R. 455; 25 B. C. R. 37.—CAN.

E. Contract to construct heating & ventilating apparatus—Temporary heating.—Pltf. had a contract in writing

for the construction of a warehouse according to certain plans & specifications. Defts. contracted with pltf. to instal heating & ventilating apparatus. Disputes having arisen, pltf. by notice terminated the contract & proceeded to complete the work himself. This action was brought to restrain defts. from entering upon the premises & to recover damages for the cost of temporary heating:—**Held**: the contract did not provide for temporary heating & no provision therefor was reasonably to be implied.—**BRADEN v. VARLOW FOUNDRIES** (1916), 8 O. W. N. 575.—CAN.

k. Substitution of work—Implied terms expressly excluded.—**GILBERT BLASTING & DREDGING CO. v. R.** (1902), 33 S. C. R. 21.—CAN.

PART II. SECT. 2, SUB-SECT. 3.

1. "Actual cost."—H. entered into a contract with the Govt. for the construction of a line of railway, by which it was provided that in case of certain defaults on the part of the contractor, the Govt. should be at liberty to take over the incomplete work & pay to the contractor the "actual cost" thereof, which was to be ascertained by the certificate of the Govt. engineer, who was to be at liberty to inspect the contractor's books:—**Held**: such "actual cost" was the cost actually incurred by the contractor in constructing the work, & did not include interest on payments, or expenditure wasted in consequence

premises, was required by a local board to treat with them for the purchase of a strip of land on which the buildings stood. The underlessee proposed to pull down the demised premises & re-erect them upon plans sanctioned by the local board, but, in fact, in contravention in some respects of their bye-laws:—**Held**: even though the plans had been passed by the local authority, the underlessee would not be entitled to erect buildings in contravention of any of their bye-laws. **Semble**: a local authority empowered to make bye-laws had no power to sanction plans in contravention of bye-laws properly made.—**Re MCINTOSH & PONTYPRIDD IMPROVEMENTS CO.** (1891), 61 L. J. Q. B. 164; 8 T. L. R. 128, D. C.; *affd.* (1892), 8 T. L. R. 203, C. A.

Annotations:—**Folld. Yabbicom v. King**, [1899] 1 Q. B. 444. **Reid. Dover Picture Palace & Pessers v. Dover Corpn. & Crundall, Wraith, Gurr & Knight** (1913), 11 L. G. R. 971.

39. —.—A local authority, empowered to make bye-laws for the regulation of buildings within its jurisdiction, has no power to sanction plans in contravention of bye-laws properly made.

An "approved" plan is a plan which has been lawfully approved by a local authority, & not one which has merely received their approval in fact.—**YABBICOM v. KING**, [1899] 1 Q. B. 444; 68 L. J. Q. B. 560; 80 L. T. 159; 63 J. P. 149; 47 W. R. 318; 43 Sol. Jo. 190, D. C.

Annotation:—**Reid. Dover Picture Palace & Pessers v. Dover Corpn. & Crundall, Wraith, Gurr & Knight** (1913), 11 L. G. R. 971.

See, further, PUBLIC HEALTH & LOCAL ADMINISTRATION.

40. "Completion."—**"Completion"** **Held**: to mean certified completion, & not completion in fact.—**CUNLIFFE v. HAMPTON WICK LOCAL BOARD** (1893), 9 T. L. R. 378; 2 Hudson's B. C., 4th ed., 250, C. A.

"Completion of the contract"—**Whether certificate condition precedent.**—*See* Part III., Sect. 1, *post*.

— **Locomotives Act, 1898 (c. 29), s. 12 (1).**—*See* HIGHWAYS, STREETS, & BRIDGES.

of any part of the work having been condemned by the engineer, or any work or material of which the Govt. had not received the benefit, or payments made to solrs. or agents acting solely in the interests of the contractor in connection with alterations in the contract.—**HILLS v. COLONIAL GOVERNMENT** (1903), 20 S. C. 416; 13 C. T. R. 661; 2 Buch. A. C. 355.—S. AF.

m. "Total cost."—**Held**: in construing a building contract the words "total cost" were ambiguous, & the ct. must be guided in their construction by the context & the circumstances in which the parties then were.—**ARMOUR v. OAKVILLE** (1914), 26 O. W. R. 430; 6 O. W. N. 453.—CAN.

n. "Clear."—Pltf. contracted to sink the shafts 5 ft. by 7 ft. "clear":—**Held**: "clear" meant a right parallelepipedon 5 ft. by 7 ft.—**HUNTON v. COLEMAN CO.** (1907), 10 O. W. R. 610.—CAN.

40 i. "Completion of the works"—**Extras included.**—Where a contract provides for the doing of certain specified works, & such additional or extra works as may be properly ordered, & fixes a date "for the completion of the works" the contract is not performed until the completion not only of the works originally specified, but of all additions or extras properly added thereto.—**WARE v. LYTTELTON HARBOUR BOARD** (1882), 1 N. Z. L. R. 191.—N.Z.

41. "For the purpose of building."—A., by an agreement in writing, agreed to win stones, etc., "for the purpose of building" certain cottages:—*Held*: the term "building" did not include the completion of the buildings by plastering & tile-pointing.—*CHARLTON v. GIBSON* (1844), 1 Car. & Kir. 541, N. P.; *subsequent proceedings*, 4 L. T. O. S. 96.

42. "Necessary approaches."—A railway co. agreed with a landowner, through whose estate the railway would pass, to construct & maintain a siding connected with their railway at B., together with all necessary approaches thereto for public use, for the reception & delivery of goods:—*Held*: "necessary approaches" meant "proper approaches."—*LYTTON v. GREAT NORTHERN RY. CO.* (1856), 2 K. & J. 394; 27 L. T. O. S. 42; 2 Jur. N. S. 436; 4 W. R. 441; 69 E. R. 836.

43. "Premises."—The word "premises," although in popular language it is applied to buildings, in legal language means "the subject or thing previously expressed."—*BEACON LIFE & FIRE ASSURANCE CO. v. GIBB* (1862), 1 Moo. P. C. C. N. S. 73; 1 New Rep. 110; 7 L. T. 574; 9 Jur. N. S. 185; 11 W. R. 194; 1 Mar. L. C. 269; 15 E. R. 630, P. C.

Annotation:—*Reid. County Hotel & Wine Co. v. L. & N. W. Ry. Co.*, [1918] 2 K. B. 251.

44. "Probationary drawings."—A declaration in *assumpsit* against defts., sued as clerk to a committee of visitors appointed pursuant to 8 & 9 Vict. c. 126, for the regulation, etc., of a county lunatic asylum, stated that it was agreed by & between pltf. & the committee of visitors, that, in consideration that pltf. would render his services as an architect in examining the site for a proposed lunatic asylum, & preparing the requisite probationary drawings for the approval of the committee of visitors, & all other drawings & documents required to be submitted to the comrs. in lunacy, & afterwards to the Secretary of State, pursuant to the statutes, & subsequently would prepare the whole of the working-drawings, estimates, & specifications for an asylum to contain two hundred patients, the committee agreed that £437 10s. should be paid to pltf. The declaration then alleged that pltf. did render his services in examining the site, & did prepare the requisite probationary drawings for the approval of the committee, & had always been ready & willing to prepare all other drawings & documents required to be submitted to the comrs. in lunacy, & Secretary of State, & subsequently to prepare the whole of the working-drawings, estimates, & specifications, of which the committee had notice, but that they refused to permit him to complete the agreement, & wrongfully discharged him from the further performance thereof. Plea, that pltf. did not prepare the requisite probationary drawings in the count mentioned:—*Held*: the term "probationary drawings," meant drawings to be approved of by the committee, & if approved of, then to be submitted to the comrs. in lunacy & Secretary of

State, & the plea was proved, it appearing, that, although certain drawings had been submitted to the committee, none had been approved by them.—*MOFFATT v. DICKSON* (1853), 13 C. B. 543; 22 L. J. C. P. 265; 17 Jur. 1009; 1 C. L. R. 294; 138 E. R. 1311.

Annotations:—*Mentd. Moffatt v. Laurie* (1855), 15 C. B. 583; *Kendall v. King* (1856), 17 G. B. 483.

45. "Retention money."—A contractor agreed to construct sewerage works for a rural district council. Payment was to be made as the work proceeded, the work being measured monthly & 80 per cent. of the value of the work being paid to the contractor upon the certificate of the engineer. It was further provided that when the whole of the works had been certified as duly completed, a further sum of 15 per cent. should be paid, & the balance within six months after the works should have been delivered up to the council & should have been certified by the engineer to be completed. The contractor gave defts. a charge on the "retention money," & subsequently mortgaged all the money payable to him under the contract to pltf. On an issue to determine the meaning of the phrase "retention money":—*Held*: the contract intended & was understood by defts. as intending to include not only 5 per cent., but also the 15 per cent. as "retention money."—*WEST YORKSHIRE BANK, LTD. v. ISHERWOOD BROTHERS, LTD.* (1912), 76 J. P. 456; 28 T. L. R. 593.

46. "Several works."—With regard to the time of completion:—*Held*: "the several works" meant the whole works, & not each section thereof.—*CUNLIFFE v. HAMPTON WICK LOCAL BOARD* (1893), 9 T. L. R. 378; 2 Hudson's B. C., 4th ed., 250, C. A.

47. "Weekly account."—Pltf., a builder, by deed contracted with defts. to build for them a house & premises for a certain sum. The deed provided that "no alterations or additions shall be admitted unless directed by the architect of" defts. "in writing under his hand, & a weekly account of the work done thereunder shall be delivered to the architect or the clerk of the works on every Monday next ensuing the performance of such work, & the delivery of such account shall be a condition precedent to the right of" pltf. "to recover payment for any such addition or alteration." In an action by pltf. to recover the balance due under the contract, the claim including charges for additions & alterations:—*Held*: parol evidence was admissible for pltf. to explain that the expression "weekly account" was a term of art well known in the building trade, & meant, by the usage of the trade, an account of the day work expended in each week on the additions & alterations, & the materials used in such day work.—*MYERS v. SARL* (1860), 3 E. & E. 306; 30 L. J. Q. B. 9; 7 Jur. N. S. 97; 9 W. R. 96; 121 E. R. 457.

Annotations:—*Mentd. Miller v. Tetherington* (1861), 6 H. & N. 278; *Re Sutro & Hellbut, Symons & Co.*, [1917] 2 K. B. 348.

o. "Decayed timber"—*Worm-eaten*.—Pltf. contracted to replace with sound timber, all "decayed timber":—*Held*: worm-eaten timber was not included.—*STAUNTON & KING v. WELLINGTON EDUCATION BOARD* (1909), 28 N. Z. L. R. 449.—N.Z.

p. "In earth"—*Clay*.—Where a contract stipulated that the work to be done in the construction of a canal was to be "in earth," & a good deal of the material excavated by the contractor & deposited by him in the

banks of the canal consisted of hard clays:—*Held*: clay fell within the term "earth," & the contractor was not entitled to regard excavation in clay as an extra & to claim a higher rate of payment for such excavation.—*BOTHWELL v. UNION GOVERNMENT (MINISTER OF LANDS)* (1917), App. D. 262.—S. AF.

q. "To" & "from" streets.—The words "from" & "to" streets mentioned in specifications for the construction of works undertaken by

an agreement in writing, as shown on a plan annexed to & declared to form part of the contract, are not necessarily exclusive.

Where the agreement provided that the works should be constructed "along N. street from B. street to L. street, as shown on the said plan":—*Held*: the words meant, "as far as the plan shows along N. street, but not exceeding the most distant side of L. street."—*CITY OF MONTREAL v. CANADIAN PACIFIC RY. CO.* (1903), 33 S. C. R. 396.—CAN.

SECT. 3.—TIME FOR COMPLETION.

SUB-SECT. 1.—WHETHER TIME OF ESSENCE OF CONTRACT.

48. Date of completion merely directory—Acceptance of completed work.]—Pltf. contracted to build cottages by Oct. 10; they were not finished till the 15th. Deft. having accepted the cottages:—*Held*: pltf. might recover the value of his work, on a declaration for work & labour & materials.—*LUCAS v. GODWIN* (1837), 3 Bing. N. C. 737; 3 Hodg. 114; 4 Scott, 502; 6 L. J. C. P. 205; 132 E. R. 595.

Annotations:—*Mentd.* Lamprell v. Billericay Union (1849), 3 Exch. 283; *Dakin v. Lee*, [1916] 1 K. B. 566.

See, further, CONTRACT.

SUB-SECT. 2.—DELAY BY ORDERING EXTRAS.

A. No Provision in Contract as to Extension of Time.

49. Second agreement to perform additional work—Waiver of time of original contract.]—To an action for work & labour, deft. pleaded that the work was done under an agreement in writing whereby pltf. agreed to build for him six houses, & completely finish & give up the premises to him on or before Mar. 20, 1859, under a penalty of £1 for each house for each & every week the works should remain incomplete & possession withheld from deft. after that date, the amount of the penalty to be paid out of the money which might become due to pltf. under the agreement, that the houses remained incomplete & possession was withheld from deft. for twelve weeks after & beyond

the day stipulated, wherefore deft. claimed to deduct £72. To this plea pltf. replied that, after the making of the agreement in the plea mentioned, & before any of the alleged penalties had been incurred, it was mutually agreed that pltf. should perform certain other work in & upon the houses in addition to the work in the first agreement mentioned, such additional work to be done within a reasonable time, that the work under the second agreement was so mixed up with the work in the first agreement mentioned, being part & parcel thereof, that it became impossible to complete the work in the first agreement mentioned until the work under the second agreement was also completed, as deft. at the time of making the last-mentioned agreement well knew, & that pltf. had performed all the work under both agreements within a reasonable time:—*Held*: a good legal answer to the claim for penalties, on the ground of waiver. *Semble*: (BYLES, J.) the replication afforded a good equitable answer, on the ground that the performance of the original agreement had become impossible by the act of deft.—*THORNHILL v. NEATS* (1860), 8 C. B. N. S. 831; 2 L. T. 539; 141 E. R. 1392.

Annotations:—*Mentd.* Williams v. Agius, [1914] A. C. 510; *Morris v. Baron*, [1918] A. C. 1.

B. Express Contract to complete whole Work within specified Time.

50. Whether time essential part of contract—Extras ordered by architect.]—By agreement under seal, between pltf. of the one part, & defts., guardians of the poor, of the other part, after reciting (*inter alia*) that pltf. had proposed to contract to erect the workhouse at B., & perform all

PART II. SECT. 3, SUB-SECT. 1.

r. Contract reserving penalty.]—Time is not of the essence of the contract where the contract reserves a penalty.—*BECK v. YORK* (1913), 25 O. W. R. 730; 5 O. W. N. 836.—CAN.

s. Oral agreement—No proper plans or specifications.]—Pltf. agreed to build the walls & foundation of a house for deft. The agreement was not in writing, & no proper plans or specifications were prepared. Pltf. claimed the price agreed upon & certain sums for extras. Deft. counter-claimed damages for defective work & for non-completion of the whole work by the time agreed upon:—*Held*: it was not a term of the contract that pltf. was to complete the work at any special time.—*IREDALE v. DREWERY* (1912), 19 W. L. R. 931; 4 D. L. R. 868.—CAN.

t. Contract to build & deliver ship—Payment by instalments.]—By contract in writing pltf., in consideration of £95,905, agreed to build & deliver to defts. a steam vessel on or before Aug. 1, 1897. The £95,905 was to be paid in six instalments at specified times, the fifth instalment to be paid when the vessel was handed over, & as to the sixth instalment of £5,000, it was provided that if the "contract shall be in all respects duly performed by the contractors (ptfs.) & the vessel shall have been completed, & shall have made her trial trip, & shall be ready to be handed over on or before Aug. 1, 1897," etc., then defts. should pay the sum of £5,000, being the balance of the contract price of £95,905. The vessel was not delivered until Sept. 18, 1897, but otherwise the contract was duly carried out, & defts. suffered no damage by reason of the delay. Pltf. having sued defts. for £5,000, the last instalment:—*Held*: the delivery of the vessel on Aug. 1, 1897, was not of the essence of the contract so as to

constitute it a condition precedent to pltf.' right to recover the £5,000.—*LAIRD BROTHERS v. CITY OF DUBLIN STEAM PACKET CO.* (1899), 34 I. L. T. 9.—IR.

a. Contract to supply & erect steel work—Completion within reasonable time.]—A clause in a contract for the supplying & erecting of steel work for buildings & machinery, provided that the contractors expected to make shipments of the material about Apr. 1 & to complete erection of the steel work in about two months after its arrival at the site:—*Held*: this did not amount to a contract to ship & complete the works at the dates mentioned but only bound the contractors to ship the material & complete the work within, in each case, a reasonable time.—*CANADA FOUNDRY CO., LTD. v. EDMONTON PORTLAND CEMENT CO.*, [1918] 3 W. W. R. 866; 43 D. L. R. 583.—CAN.

b. Installation of plant—To be put in operation before payment.]—The R. Co. having sued the city of T. for the contract price of the installation of a complete electric plant, which, under the terms of the contract, was to be put in operation for at least six weeks before payment of the price could be claimed, the ct. referred the case to experts on the question whether the contract had been substantially fulfilled, & they found that owing to certain defects the contract had not been satisfactorily completed:—*Held*: it being found that applts. had not fulfilled their contract within the time specified, they could not recover.—*ROYAL ELECTRIC CO. v. CITY OF THREE RIVERS* (1894), 23 S. C. R. 289.—CAN.

c. No date fixed—Completion within reasonable time.]—*ALLEN v. PIERCE* (1895), 3 Terr. L. R. 319.—CAN.

d. Question of fact.]

CORCORAN v. OLLIS (1861), 13 Ir. Jur. 393.—IR.

PART II. SECT. 3, SUB-SECT. 2.—A.

e. Further agreement to perform within reasonable time.]—Pltf. contracted in writing with defts. for the erection of a bridge, to be completed by a day named, subject, in case of their failure to complete the work by that day, to a penalty of £3 for every day afterwards until completion. Subsequently to the written contract, & before any penalties had been incurred, a parol agreement was entered into between the parties for certain additional work, consisting of alterations in the structure of the bridge, & of such a nature that, until they were finished, the bridge itself could not be completed. Pltf. did not complete the bridge for a considerable period after the time appointed; & in an action brought by them for the amount due for its construction, defts. made a counterclaim for £942 as penalties:—*Held*: (1) pltf. had used due & reasonable despatch in executing the works after the further agreement had been entered into; (2) the further agreement was one to be performed within a reasonable time; (3) the original contract having become, by the further agreement & the nature of the work to which it related, a contract to complete within a reasonable time, it was impossible by the exercise of all due & reasonable despatch to complete the bridge within the time originally stipulated, & pltf. were entitled to judgment for the entire amount of their demand.—*COURTNEY v. WATERFORD & CENTRAL IRELAND RY. CO.* (1878), 4 L. R. Ir. 11.—IR.

PART II. SECT. 3, SUB-SECT. 2.—B.

f. General rule.]—A clause in a building contract providing for completion by a certain date & for payment of damages in default, is not

the works particularised in a specification prepared by S. & M., the architects, for £5,500, pltf., in consideration of the payments to be made to him, agreed with defts. that he would, in a workmanlike manner, do all the works mentioned in the specification, at the times therein mentioned, & would completely finish the whole by June 24, 1840, & it was agreed that if the architects should think proper to make any alterations or additions in the progress of the works, they should give to pltf. written instructions for same, signed by them; & in consideration of the premises, defts. agreed with pltf. that they would pay him £5,500, at the rate of £75 per cent. on the amount of work done, & the remaining £25 per cent. within thirty days from the full completion of the contract, provided that pltf. should not be entitled to receive any payment until the works on which such payments were made to depend should have been completed, to the satisfaction of the architects, & pltf. thereby bound himself that, if he should fail in the completion of all the works by June 24, 1840, unless hindered by fire, or other cause satisfactory to the architects, he would pay to defts. £10 per week, by way of liquidated damages, so long as the works should remain incomplete. Pltf. proceeded to execute the works, & while they were in progress the architects required him to execute additional works; the whole of the works original & additional, were completed in a workmanlike manner, & to the satisfaction of the architects, but, by reasons of the additions, the final completion of the work was necessarily delayed till Dec. 1840, at which time defts. took possession of the whole:—*Held*: the time of the completion of the works was not an essential part of the contract.—*LAMPRELL v. BILLERICAY UNION* (1849), 3 Exch. 283; 18 L. J. Ex. 282; 12 L. T. O. S. 533; 13 J. P. 235; 154 E. R. 850.

Annotations:—*Mentd.* Diggle v. London & Blackwall Ry. Co. (1850), 19 L. J. Ex. 308; Clarke v. Cuckfield Union (Grdns. (1852), Bail Ct. Cas. 81; Finlay v. Bristol & Exeter Ry. Co. (1852), 7 Exch. 409; Lowe v. L. & N. W. Ry. Co. (1852), 21 L. J. Q. B. 361; R. v. Greene (1852), 16 Jur. 663; Pauling v. L. & N. W. Ry. Co. (1853), 1 C. L. R. 997; Henderson v. Australian Royal Mail Steam

Navigation Co. (1855), 5 E. & B. 409; Northampton Gaslight Co. v. Parnell (1855), 3 C. L. R. 409; Smart v. West Ham Grdns. (1855), 10 Exch. 867; Russell v. Sa Da Bandeira (1862), 13 C. B. N. S. 149; Thames Iron Works Co. v. Royal Mail Steam-Parcel Co. (1862), 13 C. B. N. S. 358; Nicholson v. Bradley Union Grdns. (1866), 7 B. & S. 774; Hunt v. Wimbledon L. B. (1878), 3 C. P. D. 208; Lawford v. Billericay R. C., [1903] 1 K. B. 772.

51. ———.]—Where in a contract for the execution of specified works it is provided that the works shall be completed by a certain day, & in default of such completion, the contractor shall be liable to pay liquidated damages, & there is also a provision that other work may be ordered by way of addition to the contract, & additional work is ordered which necessarily delays the completion of the works, the contractor is exonerated from liability to pay the liquidated damages, unless by the terms of the contract he has agreed that, whatever additional work may be ordered he will nevertheless complete the works within the time originally limited.—*DODD v. CHURTON*, [1897] 1 Q. B. 562; 66 L. J. Q. B. 477; 76 L. T. 438; 45 W. R. 490; 13 T. L. R. 305; 41 Sol. Jo. 383, C. A. *Annotation*:—*Mentd.* Wells v. Army & Navy Co-op. Soc. (1902), 86 L. T. 764.

C. Provision for Extension of Time by Architect or Engineer.

52. Time not extended—Whether original date binding.]—A contract for building a steamer contained a provision that the engineer for the time being should have power to direct additions, deductions, alterations, & deviations, to & from the contract work, & should have power to extend the time for completion of the contract, & that unless he did so, the time should be deemed not extended by reason of such extra works. It also contained a provision that £5 should become due as liquidated damages for every day beyond the time specified in the contract, on which the work remained uncompleted. In an action brought in respect of certain extra works:—*Held*: a replication that deft. had, by directing extra works, rendered the performance of the contract work impossible within the appointed time, was a good

binding where extras have been ordered.—*HAMILTON v. VINEBERG* (1912), 21 O. W. R. 75; 3 O. W. N. 605; 2 D. L. R. 921; 22 O. W. R. 238; 4 D. L. R. 827.—*CAN.*

g. Extras ordered by employers.]—A building contract, entered into by G. for the erection of artisans' cottages for an urban district council, stipulated that, in consideration of the payment of the contract price by instalments, payable on the certificate of the council's engineer, the contractor should within one week from the signing of the contract begin, & within nine months from that date complete, the contract works, unless delayed by strikes or lock-outs. The contract works were not completed within the contract time; but certain extra works had been ordered by the council, & were executed by the contractor:—*Held*: as pltf. had been prevented from completing within the contract time by the extra works ordered, the penalty clause of the contract was extinguished, & pltf. was entitled to judgment on his claim.—*GALLIVAN v. KILLARNEY URBAN DISTRICT COUNCIL*, [1912] 2 I. R. 356.—*IR.*

h. — Time for ordering.]—Where the owner reserves the right to make alterations or additions, he may reasonably exercise the said right up to the last minute of the completion of the work.—*Re WESTHOLME LUMBER Co. v. ST. JAMES* (1915), 30 W. L. R. 781; 8 W. W. R. 122; 21 D. L. R. 549.—*CAN.*

k. — Completion within reasonable time.—Onus of proof.]—*BROWN CONSTRUCTION CO. v. BANNATYNE SCHOOL DISTRICT CORPN.* (1912), 21 W. L. R. 827; 5 D. L. R. 623.—*CAN.*

PART II. SECT. 3, SUB-SECT. 2.—C.

52 i. Time not extended—Whether original date binding.]—Under a building contract, in writing, the contractor agreed that, subject to any extensions of time by the architect, the building should be finished by a named day, & that in default he would pay \$50 a week as liquidated damages. It was also provided that all extras, etc., should form a part of the contract, if authorised by the architect, who was first to fix the price, & grant such extension of time therefor as he thought necessary, & power was also given him to extend the time for completion in case of a strike. The building was not completed for over four months after the time fixed, & this action for the balance of the contract price was commenced within the time the final payment was made payable under the contract. Although some extras were done, & there was evidence as to delay by strikes, the architect was not asked for, & did not grant, any extension of time:—*Held*: the contract must govern, & defts. were entitled to recover, by way of counterclaim, the sum provided by the contract as liquidated damages.—*MCMANARA v. SKAIN* (1892), 23 O. R. 103.—*CAN.*

52 ii. ———.]—A condition in a building contract provided that the work was to be completely finished on or before a day named under a penalty of £10 for each day's delay, provided that should the architect order any additional work that should necessarily delay the completion of the whole or otherwise cause the work to be delayed either in commencement or progress the contractor was to be allowed such additional time as the architect should at the time of giving the order fix; & in such case the penalty for non-completion was not to become payable until after the expiration of such additional time; the architect to be the absolute judge of the extent of the additional time to be allowed. The work was not completed within the time fixed by the contract. After the actual completion of the contract the architect signed & delivered to pltf. a document purporting to be his final certificate under the contract certifying that work had been done under the contract entitling pltf. to a sum named in terms of the contract agreement. A statement at the foot showed that this sum had been arrived at without making any deduction for penalties. The architect afterwards wrote to deft. that he did not consider himself justified in imposing any penalties. In an action by pltf. to recover the balance of the contract price & for extras, deft. counter-claimed for damages for breach of contract:—*Held*: (1) the failure of the architect to fix the additional time

Sect. 3.—Time for completion: Sub-sect. 2, C.; sect. 3.]

answer to a claim to deduct penalties for its non-performance, although the engineer had not extended the time for its completion.—**WESTWOOD v. SECRETARY OF STATE FOR INDIA IN COUNCIL** (1863), 1 New Rep. 262; 7 L. T. 736; 11 W. R. 261.

Annotations:—Distd. Roberts v. Bury Improvement Comrs. (1869), L. R. 4 C. P. 755; **Jones v. St. John's College, Oxford** (1870), L. R. 6 Q. B. 115; **Tew v. Newbold-on-Avon United District School Board** (1884), Cab. & El. 260. **Folld. Dodd v. Churton**, [1897] 1 Q. B. 562. **Refd. Stadhard v. Lee** (1863), 3 B. & S. 364; **Roberts v. Bury Improvement Comrs.** (1870), L. R. 5 C. P. 310.

53. ———.]—Pltf. entered into a written agreement with defts. that he would execute certain works within a certain period, & that, in case of non-completion within such period, for every day after such period until the completion of the work, pltf. would pay to defts. £3 as & for liquidated damages, defts. to be entitled to deduct such sums from the amount due from them to pltf. In an action for the money due to pltf. on completion of the works, defts. claimed to be entitled to deduct £873 as & for such liquidated damages. Pltf. replied that certain alterations ordered by defts. had been so mixed up with the works as to render completion within the stipulated time impossible. Defts. rejoined that such alterations had been made by order of the clerk of the works, etc., in accordance with powers contained in the contract, & that the period within which the works & alterations were so ordered was not by the terms of the contract to be extended except by order of the clerk of the works, etc., & that such extension had not been ordered:—Held**: pltf., having bound himself in his contract to complete**

did not leave the whole, with the extras, to be done within the contract time but left the time unfixed within which the whole was to be done, with the result that the penalties were not recoverable; (2) ordering of extras not in writing was an interference & departure from the contract on the part of deft. which prevented the operation of the penalty clause.—**MURDOCH v. LOCKIE** (1896), 15 N. Z. L. R. 296.—N.Z.

1. ——— Contract left at large.]—Pltf. contracted to build a house for deft. within 20 weeks, weather permitting, from the date of execution, & to pay to the deft. £3 per week after such time until the work should be completed, such sum to be deducted from the contract money, any direction by the architect to perform extra work was not to vitiate or annul the contract. The work was not completed until 24 weeks after the period agreed upon. One week of the overtime was caused by the inclemency of the weather, & 2 weeks' overtime by extra work directed by deft. to be done. The architect gave no direction in writing during progress of the work as to when the contract should be completed, & made no allowance for the 3 weeks' overtime, but he marked on the final certificate "21 weeks overtime":—Held**: by reason of the delay of 3 weeks, caused by no fault on the part of pltf., the contract, as to its time of completion, was left at large, & the deft. could not deduct the penalty of £3 per week for the 21 weeks' overtime from the money due by him on the contract.—**PARLE v. LEISTIKOW** (1883), 4 N. S. W. L. R. 84.—AUS.**

m. ——— Failure to apply to architect.]—Pltf.'s contract bound him to complete a building for the deft. within a specified time, & to pay a penalty of \$20 a week in case of delay

the alterations & works within a certain time, unless an extension of time should be granted by the clerk of the works, must abide by the consequences of the decision of the clerk of the works, even though it involved his performing an impossibility.—**JONES v. ST. JOHN'S COLLEGE, OXFORD** (1870), L. R. 6 Q. B. 115; 40 L. J. Q. B. 80; 23 L. T. 803; 19 W. R. 276.

Annotations:—Distd. Dodd v. Churton, [1897] 1 Q. B. 562. **Folld. Sattin v. Poole** (1901), 2 Hudson's B. C., 4th ed., 306. **Refd. Howell v. Coupland** (1874), L. R. 9 Q. B. 462; **Walker v. L. & N. W. Ry. Co.** (1876), 1 C. P. D. 518; **Tew v. Newbold-on-Avon United District School Board** (1884), Cab. & El. 260.

54. ———.]—A contractor undertook to execute works, with addition, enlargement, etc., within a specified time, the architect having power to extend the time for completion in proportion to the extra works so ordered. Additions were ordered & executed, & caused delay in completion of the works beyond the time specified, but the architect did not extend the time:—Held**: the contractor was bound to complete the works within the time specified, & was liable to pay for the stipulated damages for non-completion within such time.—**TEW v. NEWBOLD-ON-AVON UNITED DISTRICT SCHOOL BOARD** (1884), 1 Cab. & El. 260.**

55. Time extended—Completion after extension —Jurisdiction of architect.]—S. contracted to build a house for P. by a certain day. The contract provided that "if in the opinion of the architect the works be delayed by reason of authorised extras or additions, or in consequence of the contractor not having received in due time necessary instructions from the architect, for which he shall have specifically applied in writing, the architect shall make a fair & reasonable extension of time." The contract also provided for £12 per

beyond the time, subject to clauses providing for an extra time allowance in case pltf. should be obstructed or delayed in the prosecution or completion of the work by the act, neglect, delay, or default of the owner or the architect or of any other contractor on the house, but no such allowance was to be made unless a claim therefor was presented in writing to the architect within 36 hours of the occurrence of such delay:—**Held**: pltf. was bound by this last proviso, & was liable for the stipulated penalty, although the delay in completion was entirely owing to causes beyond his control, & a large part of it took place before he commenced his work at all, as he had failed to give notice in writing to the architect of any claim for extra time allowance.—**GREY v. STEPHENS** (1906), 4 W. L. R. 201; 16 Man. L. R. 189.—CAN.

n. ——— Provision for automatic extension—Whether damages for delay recoverable.]—A building contract provided that the contractor should pay liquidated damages for each week's delay in the completion of the works shown in the plans & specifications, but that for any authorised extra causing delay the contractor should be allowed such additional time for completion as might be agreed upon by him & the architect, & that in default of any such agreement the extension of time should be determined by an arithmetical formula of which the money value of the extra was an essential factor:—Held**: the omission to fix an extension of time when the extras were ordered did not prevent the application of the provision for liquidated damages, but left the period of extension to be determined by the automatic provision contained in the contract after the extras had been completed & the price ascertained.—**Re ELLISON & BASTEN** (1917), N. Z. L. R. 209.—N.Z.**

o. ——— Onus of proof.]—In an action by a builder against the proprietor, deft. pleaded that under the penalty clause he was entitled to take credit for the amount of 10s. per day from the time fixed for completion up to date of actual completion. It appeared that pltf. had not applied for any certificate from the architect entitling him to an extension of time in respect of alterations, but deft. did not object to pltf. leading evidence of justification for the delay. To what extent the alterations were ordered before or after the time fixed, or what effect they had in delaying the work, did not appear:—Held**: the onus of proof was on pltf. to show that the non-completion of the work within the time was due to the act or omission of deft. having failed to do so deft. was entitled to enforce the penalty clause.—**STEEL v. BELL** (1900), 3 S. C. (5th Series) 319.—SCOT.**

p. ——— Independent contract—Not an extra contemplated in original contract.]—Where completion of the work originally contracted for was delayed by reason of an independent contract entered into for the construction of an additional work, which was not such an extra as was contemplated by a provision for extension of time:—Held**: this set at large the penalties which the contract provided for in case of delay in completion.—**MEYER v. GILMER** (1899), 18 N. Z. L. R. 129.—N.Z.**

55 i. Time extended — Completion after extension.]—Where a building contract contains a stipulation making the contractor liable to pay liquidated damages for every day exceeding the date fixed by the contract for completion, with a provision that the said date be extended upon the ordering of additional work, the contractor is liable for the number of days' delay less the time allowed for the perform-

week as liquidated damages for delay. The work was delayed beyond the time fixed, & S. wrote to the architect asking him to grant or certify for an extension of time. The architect did not reply at once. S. then issued a writ claiming £681, which the architect certified as due to S., subject to the question of penalties. The architect then wrote extending the time, but not to such a late date as that of completion, & certifying that £231 was due to P. as liquidated damages for delay. S. wished to call evidence before the Official Referee to prove that the delay was caused by P. or his architect in ordering extras, in supplying material after the specified date, in delay in the selection of stone to be used & in the alteration of the plans & in other matters. The Official Referee refused to admit this evidence:—*Held*: his decision was right, on the grounds that the builder had applied to the architect for his decision as to an extension of time, & was bound by that decision, & that the architect had jurisdiction under the contract to decide particular questions of delay.—*SATTIN v. POOLE* (1901), 2 Hudson's B. C., 4th ed., 306, D. C.

SUB-SECT. 3.—DELAY BY OTHER ACTS OF EMPLOYER OR ARCHITECT.

56. In giving possession of site—Default of workmen of both parties.]—Pltfs. entered into a written contract to build, for £1,700, a brewery for defts., so far as regarded the carpenters' work, within four months & a half next ensuing the date of the agreement, & in default of completing same within the time thereinbefore limited, to forfeit to defts. £40 per week for each week that the completion of the work should be delayed beyond a certain date, the amount to be deducted from the £1,700 as liquidated damages. Pltfs. did not begin the work for four weeks after the date of the agreement, in consequence of defts. not being able to give them possession; they were afterwards delayed one week by the default of their own workmen, & four weeks by the default of the

masons, etc., employed by defts.; & the work was not completed till five weeks after the time limited:—*Held*: defts. were not entitled to deduct from the £1,700 any sum in respect of the delay, either for the one or the four weeks.—*HOLME v. GUPPY* (1838), 3 M. & W. 387; 150 E. R. 1195.

Annotations:—*Consd.* *Thornhill v. Neats* (1860), 8 C. B. N. S. 831. *Distd.* *Russell v. Sa Da Bandeira* (1862), 13 C. B. N. S. 149. *Consd.* *Westwood v. Secretary of State for India in Council* (1863), 1 New Rep. 262. *Distd.* *Roberts v. Bury Improvement Comrs.* (1870), L. R. 5 C. P. 310. *Reid.* *Stadhard v. Lee* (1863), 3 B. & S. 364; *Dodd v. Churton*, [1897] 1 Q. B. 562.

57. — Sufficiency of evidence.]—*MORT'S DOCK & ENGINEERING CO., LTD. v. WADEY, WADEY v. MORT'S DOCK & ENGINEERING CO., LTD.*, No. 22, *ante*.

58. In supplying materials—Independent covenants.]—In an action of debt, the declaration stated that, by an indenture of Dec. 1837, in consideration of £250,000, pltf. covenanted with defts. to make & complete a certain railway, & to provide railway bars or rails & chairs on or before May 1, 1840; that afterwards, by another indenture of Mar. 1839, in consideration of the further sum of £15,000, pltf. covenanted with defts., that he, being provided by them with bars or rails & chairs for temporary & permanent use, would complete the railway, & certain other works, on or before June 1, 1840, provided that, if pltf. should not complete the railway by that day, he should pay defts. £300, & the like sum for every succeeding day until the work should be completed, so that the whole amount forfeitable should not exceed £15,000. Breach, that defts. detained from & did not pay pltf. £20,000, parcel, etc. Plea, as to £7,500, parcel of the £20,000, that the £7,500 was parcel of the £15,000 agreed to be retained by defts., that pltf. did not complete the railway on June 1, 1840, nor until twenty-four days after, whereby pltf. then became liable to pay defts. £300 per day for the twenty-five days during which the railway remained incomplete, by reason of which defts. deducted & retained the £7,500 out of the money payable by them to pltf. Replication, that pltf. did not become, nor was liable to pay defts., *modo et forma*. At the trial, it was proved

ance of the additional work.—*WESTHOLME LUMBER CO. v. ST. JAMES* (1915), 30 W. L. R. 781; 8 W. W. R. 122; 21 D. L. R. 549.—*CAN.*

55 ii. Pleading.]—A contract provided that in the event of any alterations or additions being required, the engineer should allow such an extension of time as he should think adequate; & at the expiration of the time so allowed deductions for delay should come into operation. Alterations & additions were required by the engineer, & were executed by the contractor, but it was impossible to complete the works until the alterations & additions were also completed:—*Held*: (1) in the event of any alterations or additions being required the works were not to be completed by the fixed date, but that the engineer was bound to allow such an extension of time as he should think adequate; (2) if the engineer failed to allow the necessary time the contractor would not be subject to the same responsibility as to completion to time as if no alterations or additions had been required; (3) the provisions as to deductions for delay had not come into operation.

It was not alleged in the petition that the engineer did not extend the time for completion:—*Held*: it was consistent with the allegations that he did extend it, & that the contractor failed to complete the contract within

the extended time.—*FULLER v. R.*, 3 J. R. N. S. 125.—*N.Z.*

PART II. SECT. 3, SUB-SECT. 3.

56 i. In giving possession of site—Furnishing lines & levels—Extras.]—*Held*: delay in putting pltf. in possession of the premises, & in furnishing lines & levels, & delay caused by extra work which he was called upon to perform, relieved pltf. from his obligation to complete the work by the date agreed, & deft. was debarred from enforcing payment of the penalty.—*MUNRO v. WESTVILLE TOWN* (1903), 36 N. S. R. 313.—*CAN.*

56 ii. —.]—Where it is the duty of the employer of a contractor to provide & prepare a site for the work to be done & he fails to provide & prepare the site, & the completion of the work is delayed in consequence, the right to recover penalties for non-completion by a given time is gone, even if the contractor would not have completed the work in time if no such delay had been caused.—*BASKETT v. BENDIGO GOLD DREDGING CO., LTD.* (1902), 21 N. Z. L. R. 166.—*N.Z.*

q. Contractor prevented from entering upon work—At time agreed upon.]—Where a contract prescribes a fixed period for the completion of certain works, & the employer prevents the contractor from entering upon the work at the time agreed upon, the employer cannot insist upon the com-

pletion of the work within a similar period from the time when the contractor was allowed actually to begin, the condition as to time ceasing to apply.—*FINDLAY v. CAMERON* (1878), 4 V. L. R. 191.—*AUS.*

r. — Non-removal of goods.]—A penalty clause in a building contract held to have been set at large by the proprietor having caused delays by not removing certain goods so as to enable the contractor to proceed, & by not doing certain work which he was to do himself promptly.—*DILLON v. JACK* (1903), 23 N. Z. L. R. 547.—*N.Z.*

58 i. In supplying materials.]—A contractor under a building contract was 17 days late in completing it, a delay occasioned by deft.'s non-delivery of certain materials which he was bound to supply:—*Held*: pltf. was not liable to any penalty for the delay in completion, which was due to deft.'s default.—*DEGAGNE v. CHAVE* (1896), 2 Terr. L. R. 210.—*CAN.*

58 ii. —.]—Where the materials to be supplied by the owners formed a very substantial part of the contract & their failure to supply them rendered impossible the completion in the stipulated time by the contractor:—*Held*: the owner could not recover.—*PAGE v. GREEN* (1904), 3 O. W. R. 404.—*CAN.*

58 iii. — Machinery for erection.]—

. 3.—*Time for completion: Sub-sects. 3 & 4.]*

that pltf. did not complete the railway until twenty-four days after June 1, but that defts. had not provided him with sufficient bars or rails & chairs to enable him to complete it by that day, whereupon the judge directed the jury that such supply was a condition precedent to defts.' right to deduct the penalty:—*Held*: this was a misdirection, the covenants being independent, & the supply of the bars, etc. not a condition precedent to the right of defts. to make the deduction.—*MACINTOSH v. MIDLAND COUNTIES RY. CO.* (1845), 14 M. & W. 548; 3 Ry. & Can. Cas. 780; 14 L. J. Ex. 338; 5 L. T. O. S. 537; 153 E. R. 592.

59. In delivering plans.]—Pltf. entered into a contract with defts. to erect certain buildings, & do other works by a fixed day. The contract provided that in case the contractor, pltf., was, in the opinion of the architect, unduly delayed in the completion of his contract, the architect was empowered to grant an extension of time, & if the contractor failed in the performance of any part of his undertaking, or did not, in the opinion & according to the determination of the architect, exercise such due diligence & make such due progress, so as to enable the works to be completed by the day fixed, the burial board, defts., were empowered to determine the contract. The architect neglecting to supply the contractor with the necessary plans, the contractor was unable to complete his contract by the fixed day, whereupon the burial board determined the contract:—*Held*: the rule of law relied upon by pltf. was applicable, that defts. could not take advantage of their own wrong, & they had no power to determine the contract.—*ROBERTS v. BURY IMPROVEMENT COMRS.* (1870), L. R. 5 C. P. 310; 39 L. J. C. P. 129; 22 L. T. 132; 34 J. P. 821; 18 W. R. 702, Ex. Ch.

Annotations:—*Consd. Walker v. L. & N. W. Ry. Co.* (1876), 1 C. P. D. 518; *Sattin v. Poole* (1901), 2 Hudson's B. C., 4th ed., 306. *Appld. Mort's Dock & Engineering Co. v. Wadey* (1905), 22 T. L. R. 61. *Reid. Jones v. St. John's College, Oxford* (1870), L. R. 6 Q. B. 115; *Lawson v. Wallasey L. B.* (1883), 11 Q. B. D. 229; *Re Rio de Janeiro Flour Mills & Granaries & De Morgan, Snell* (1891), 8 T. L. R. 108; *Lodder v. Slowey*, [1904] A. C. 442.

60. Refusal to allow contractor to employ merchants.]—A contract for the construction of an electric light generating station, whereby pltf. undertook that the works should be completed on

or before Oct. 20, 1900, contained the following clause: "If in the opinion of the engineer, the works be delayed by reason of any exceptionally inclement weather, or by reason of instructions from the engineer in consequence of proceedings taken or threatened by, or disputes with, adjoining or neighbouring owners or by the works or delay of other contractors or tradesmen engaged or nominated by the corpn. or the engineer and not referred to in the specification, or by reason of authorised extras or additions, or in consequence of any notice reasonably given by the contractor in pursuance of clause 10, or by reason of any local combination of workmen or strikes or general lock-out affecting any of the building trades, or in consequence of the contractor not having received in due time necessary instructions from the engineer for which he shall have specifically applied in writing, the engineer shall make a fair & reasonable extension of time for completion in respect thereof. In case of such strike or lock-out the contractor shall, as soon as may be, give to the engineer written notice thereof. But the contractor shall nevertheless use his best endeavours to prevent delay & shall do all that may reasonably be required to the satisfaction of the engineer to proceed with the work." The works were not completed until Feb. 21, 1901. In an action by pltf. claiming the balance payable in respect of the contract defts. counterclaimed for £200 as damages by reason of delay on the part of the pltf. Pltf., in his defence to the counterclaim, pleaded that the delay in completing the contract was caused by defts., their engineer, agents, or servants, more especially by their failure to deliver plans & details in due time, by the refusal of the engineer to allow pltf. to employ certain merchants for the supply of roof trusses, & by the orders given by defts. for extra works. Defts. contended that if the delay was caused as alleged by pltf. the above clause offered a special remedy to pltf. by which he might have obtained an extension of time, that if the engineer had refused an extension of time, pltf. could have proceeded under the arbn. clause, & that as pltf. had not taken the remedy provided by the contract, he was debarred from alleging that the delay was caused by defts.:—*Held*: the ordinary remedy or defence at law was not taken away by any special remedy inserted in the contract.—*MINTER v. REIGATE URBAN DISTRICT COUNCIL* (1903), 67 J. P. Jo. 101.

Non-delivery by the employer till after the time for completion of the contract of parts of machinery to be erected by the contractor relieves the contractor from penalties for non-completion at the time fixed by contract.—*BASKETT v. GIBBS' BEACH GOLD DREDGING CO., LTD.* (1901), 21 N. Z. L. R. 201.—N.Z.

59 i. In delivering plans—Dismissal of contractor.]—Under a building contract, certain work was to be done agreeably to the plans & to the satisfaction of the employer's engineer. The contractor was warned that he was not progressing satisfactorily, & he admitted that his foreman was not good in dealing with men, though otherwise satisfactory. There was delay in delivering complete plans & specifications to the contractor. Subsequently the engineer refused to issue certificates for progress payments, owing to dissatisfaction with the contractor's delay & defective work. The contractor was dismissed & prevented from doing any further work:—*Held*: the contractor was not liable for damages for non-completion within the time specified in the contract.—*WINGER v. STREETS-VILLE* (1909), 13 O. W. R. 635; *affd.* 14 O. W. R. 216.—CAN.

a. Variation of plans & specifications.]—Where the parties to a building contract, by agreement before the time specified for the completion of the work, made an important variation of the plans & specifications which was essential to the successful carrying out of the contract:—*Held*: the contractor was exonerated from performance on the specified date, & the employer could not claim liquidated damages for failure to complete on the specified date.—*SCOTT BROTHERS, LTD. v. CHRISTCHURCH (MAYOR)* (1914), 34 N. Z. L. R. 229.—N.Z.

b. —.]—To a declaration upon a sealed agreement to build a vessel for pltf., of a certain size & according to a certain model, by a certain day, deft. pleaded that he procured materials, & before breach of the agreement he was ordered by pltf. to build a vessel of larger size; & that in pursuance of pltf.'s directions, & by his order & request, he did erect & build such larger vessel, & was consequently compelled to take a longer time, which was the breach complained of:—*Held*: no answer to the declaration.—*GASKIN v. COUNTER* (1856), 6 C. P. 99.—CAN.

c. —.]—Declaration on a contract

by testator to build a marine boiler & steam engine for pltf., alleging partial completion by testator before his death, & a promise by defts. as exors. to complete it for the balance due, but that they did not complete it in time, & delivered it unfinished and not according to the specifications. Defts. pleaded that after testator's contract & promise, it was agreed between him & pltf. in his lifetime that he should not perform them, but that instead testator should deliver to pltf., who was to accept, a different boiler & engine, larger & more valuable, requiring a longer time for construction; & afterwards, before action, testator in his lifetime, & defts. as exors., did make & deliver to pltf., who accepted the same upon such terms, & paid the price thereof:—*Held*: bad.—*LEONARD v. NORTHY* (1871), 22 C. P. 11.—CAN.

d. —.]—Changes in the plans & specifications causing delay in completion are not a waiver of the penal clause beyond the actual delay so caused, & if the architect's certificate is silent on the point it is not necessarily final or conclusive.—*McLEOD v. WILSON* (1897), 2 Terr. L. R. 312.—CAN.

Implied stipulations as to site.]—See Part II. Sect. 2, sub-sect. 2, A., ante.

Implied stipulations as to plans.]—See Part II. Sect. 2, sub-sect. 2, B., ante.

61. Interference—By employer or agents.]—

A contract for building a vessel provided that if the ship should not be delivered complete on a certain day, a penalty of £5 a day should be paid by pltf. to deft. as liquidated damages, but that if the ship should not be so delivered for any cause not under the control of pltf., same to be proved to the satisfaction of deft.'s agent, & to be certified by him in writing, then the penalty should not be enforced for such number of days or for such time as deft.'s agent should in such certificate name. The ship was not delivered till long after the time appointed, but a large portion of that delay was occasioned by the interference of deft. or his agents in the course of the performance of the contract:—**Held:** in these circumstances, no penalties were recoverable by deft., & none could be set off against pltf.'s claim.—**RUSSELL v. SA DA BANDEIRA (Viscount) (1862), 13 C. B. N. S. 149; 32 L. J. C. P. 68; 7 L. T. 804; 9 Jur. N. S. 718; 143 E. R. 59.**

Annotations:—**Refd.** Roberts v. Bury Improvement Comrs. (1870), L. R. 5 C. P. 310; Tew v. Newbold-on-Avon United District School Board (1884), Cab. & El. 260; Dodd v. Churton, [1897] 1 Q. B. 562; **Rc** Nott & Cardiff Corpn., [1918] 2 K. B. 146. **Mentd.** British Columbia

61 i. Interference—By employer or agents.]—In an action by a contractor against the Govt. of V. the Govt. claimed large sums for penalties for non-completion within the contract time. The contractor tendered evidence that the completion was delayed by the action of the Govt. or its servants:—**Held:** the evidence was admissible.—**BRUCE v. R. (1865), 2 W. W. & A. B. 193.—AUS.**

e. Delay by employer.]—Where delays are occasioned by the owner of a building under repairs, the contractor, under a penal clause, cannot be held answerable for such delays.—**BOIVIN v. PAQUET (1915), Q. R. 25 K. B. 69.—CAN.**

f. —.]—In an action for the contract price of building an engine & boiler for defts. the defence was that the work was not done within the time provided for in the contract, & that defts. were entitled to deduct \$20 a day for each day's default in completion:—**Held:** the delay was caused by defts. themselves, & pltf. were entitled to recover the full contract price.—**FRENCH RIVER TUG CO. v. KERR ENGINE CO. (1894), 24 S. C. R. 703.—CAN.**

g. — & his architect.]—Held: a penalty clause in a contract for the erection of a building could not be enforced where, owing to the dilatoriness of the employers & their architect, the contractor was precluded from completing his contract within the time stipulated.—**EDWARDS v. PUBLIC SCHOOL BOARD S.S. OXFORD (1913), 25 O. W. R. 437; 5 O. W. N. 537.—CAN.**

h. —.]—Pltf. were delayed in their work by the architects being dilatory in supplying details & by material changes in the plans & designs. The pltf. made no claim to the architects for an extension for this reason, & the architects made no allowance:—**Held:** by the delay for which defts. were responsible, the time when the liquidated damages would commence to run had been rendered inoperative & there was no provision under which a new date could be substituted. All right, therefore, to recover the sums stipulated as liquidated damages had gone.—**GRACE v. OSLER (1911), 19 W. L. R. 109, 326.—CAN.**

k. contractor.]—When the

proprietor & the contractor are both at fault, the penalty clause providing for the forfeiture of a certain sum of money daily for non-delivery of the building is without effect.—**GUERTIN v. PAPINEAU (1911), Q. R. 40 S. C. 97.—CAN.**

l. Extension of time granted—Penalty clause not waived.]—**LUND v. VANCOUVER EXHIBITION ASSOCN. (1915), 32 W. L. R. 845; 24 D. L. R. 133; 9 W. W. R. 556; 22 B. C. R. 258.—CAN.**

m. Suspension of work—Power of architect to allow extension.]—A condition in a building contract gave the architect power to suspend the work at any time, provided that he might make an allowance for any extra cost occasioned thereby, to the contractor. By a subsequent condition the work was to be completely finished on or before a day named under a penalty, but should the architect cause the work to be delayed either in commencement or progress, the contractor was to be allowed such additional time, as the architect at the time of giving the order should fix:—**Held:** the power to allow pecuniary compensation for a suspension of the work did not affect the power to allow an extension of time in respect of such suspension.—**MURDOCH v. LOCKIE (1896), 15 N. Z. L. R. 226.—N.Z.**

n. Non-performance of condition precedent.]—Deft. agreed to build a house for pltf. & finish it by Apr. 1, 1876, & pltf. agreed to pay deft. \$400 on Aug. 15 next, & to make other payments as the work progressed. No payment after the \$400 to exceed the amount of work done. In an action against deft. for breach of the agreement in not finishing the house by Apr. 1, 1876:—**Held:** payment of the \$400 was a condition precedent to pltf.'s right to recover, & the declaration was bad as there was no averment in it of the payment of that sum.—**DRISCOLL v. BARKER (1878), 2 P. & B. 407.—CAN.**

o. — Locating site—Alteration in plans.]—A person who undertakes by contract to build a bridge to be completed and delivered at a stated date, under a penalty is not liable for delay caused by failure of the employers to locate, as agreed, the site of the abutments, or by their altering the

Saw Mill Co. v. Nettleship (1868), L. R. 3 C. P. 499; Yzquierdo v. Olydebank Engineering & Shipbuilding Co., [1902] A. C. 524.

SUB-SECT. 4.—OTHER EXCUSES FOR DELAY.

62. Performance endangering life.]—If a man covenant to build a house before a certain day & the plague break out & continue till after the fixed day, the breach is excusable as to time, because the law will not compel the builder to risk his life, but he must complete as soon as may be after.—**LAWRENCE v. TWENTIMAN (1611), 1 Roll. Abr. tit. "Condition," p. 450, pl. 10.**

Annotation:—**Consd.** Hall v. Wright (1859), 29 L. J. Q. B. 43.

63. Bad weather.]—Where it was part of a condition precedent to a claim of £80, in addition to the purchase-money for a new house, that the pavement in front of the adjoining houses should be laid down by Apr. 21:—**Held:** a delay of four days, though occasioned by bad weather, which prevented the workmen from proceeding, was sufficient to prevent the recovery of such claim.—**MARYON v. CARTER (1830), 4 C. & P. 295, N. P.**

64. Reasonable time not elapsing—Since request to build.]—In an action on a covenant for building a house within a reasonable time, it is no defence that a reasonable time had not elapsed

work, during performance, & substituting iron railings for the wooden ones mentioned in the contract.—**DUPUIS v. LAPRAIRIE (1904), Q. R. 28 S. C. 196.—CAN.**

PART II. SECT. 3, SUB-SECT. 4.

p. Delay by the contractors—Implied term.]—A firm of building contractors entered into a contract with a co. to execute the joiner work on tenements to be erected by the co., in terms of which they undertook "to finish our dept. of the work by Apr. 15 next." The co. employed other contractors to do the mason & plaster work on the tenements, & the co. at the time they entered into the contract with the building contractors informed them that both the mason & plasterer were also bound to finish their work within a limit of time, but in point of fact the plasterer's contract was never signed. Owing to delay on the part of the mason & plasterer the building contractors were prevented from finishing the joiner work by Apr. 15. In an action by the building contractors against the co. for payment of the price of the joiner work, defts. pleaded that pltf. had broken the contract by failing to finish the joiner work within the stipulated time:—**Held:** pltf. were absolved from the obligation to finish the joiner work by Apr. 15, & were only bound to finish the joiner work within a reasonable time, because there was an implied condition in the contract to the effect that the other work on the tenements should be completed at such date or dates as to make it possible for pltf. to finish the joiner work by Apr. 15.—**DUNCANSON v. SCOTTISH COUNTY INVESTMENT CO., LTD. (1915), 52 Sc. L. R. 790.—SCOT.**

q. —.]—Pltf. contracted with defts. to complete certain work for them by a certain day; that became impossible through the delay of another contractor, without fault of defts. The contract provided that the proprietors were not to be responsible to any contractor for the non-completion of a prior contractor's work at the time named:—**Held:** the clause barred recovery of damages for delay.—**WEBB v. PEASE FOUNDRY CO. (1914), 26 O. W. R. 447; 6 O. W. R. 416; 7 O. W. R. 212.—CAN.**

r. — Pleading.]—Declaration for

Sect. 3.—Time for completion: Sub-sects. 4 & 5.
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since pltf. required deft. to build the house.—**FISHER v. FORD** (1840), 1 Arn. & H. 12; 4 Jur. 1034.

Annotation:—Mentd. Ryalls v. Bramall (1848), 1 Exch. 734.

65. Causes beyond builders' control.]—A contract for building a ship provided that due allowance should be made for delays through certain causes, "or other circumstances beyond the builders' control." It was within the contemplation of the parties that the ship should be commenced as soon as a suitable berth became vacant, & the first berth which became vacant was one in which another ship was being built, & delay was caused in the completion of this ship by the same kind of causes which were provided for in the contract relating to the ship in question:—**Held:** allowances were properly made for delay in building the ship in the contract, owing to the delay in completing the former vessel.—**Re LOCKIE & CRAGGS & SON** (1901), 86 L. T. 388; 9 Asp. M. L. C. 296; 7 Com. Cas. 7.

66. — Pleading.]—Declaration on a deed whereby deft. covenanted with pltf. to use his best endeavours & all due diligence to forward the works comprised in a certain contract, so that same should be completed in as short a time as practicable. Breach, that deft. did not nor would use his best endeavours or due or any diligence to forward the works comprised in the contract, so that same might be completed in as short a time as practicable, but wholly neglected so to do, & the works by the default of the deft. remained & were incomplete & unperformed. Plea, that deft. did use his best endeavours & all due diligence to forward the works comprised in the contract, so that same might be completed in as short a time as practicable, but that by causes wholly beyond his control, & without any default on his part, he was & had been hindered & prevented from forwarding the works:—**Held:** the plea, though informal, was good as a traverse of the breach.—**VICKERS v. OVEREND** (1861), 7 H. & N. 92; 30 L. J. Ex. 388; 158 E. R. 405.

SUB-SECT. 5.—EVIDENCE OF EXTENSION OF TIME.

67. Parol agreement.]—Pltf. covenanted to build two houses for £500 by a certain day, &

liquidated damages fixed by contract for not finishing by the day named a house to be erected by defts. for pltf. Plea, that defts. were delayed by the masons employed by pltf., & were thereby, without any default on their part, hindered & prevented from completing the work within the time:—**Held:** good.—**PAPP v. MELVILLE** (1857), 16 U. C. R. 124.—**CAN.**

65 i. Causes beyond builder's control —Delay caused by strikes.]—An agreement provided for a penalty if the work was not completed by a certain date; the work was not completed by that date, & the work done & material used were defective; the owner claimed for damages for delay & defective work & material. Pltfs. replied that the delay, if any, was occasioned by the owner:—**Held:** the owner was not entitled to damages for delay, as the delay was caused by strikes.—**ALBIP v. ROBINSON** (1911), 18 W. L. R. 39.—**CAN.**

65 ii. — Question for court—Though certificate given by architects.]—A contract provided that the contractor should not be liable for delays arising from fire, general strikes or combinations of workmen, or other causes over which the contractor could

not in any possibility have control. The architect gave a certificate to the building owner, in terms of the contract, that the work could reasonably have been completed by a certain date long prior to the date of actual completion:—**Held:** despite the architect's certificate to the building owner, it was open to the ct. to decide whether the delays were due to causes over which the contractor had no control or to the fault of the building owner himself.—**HENDRICKS & SOEKER v. ATKINS** (1903), 20 S. C. 310.—**S. AF.**

PART II. SECT. 3, SUB-SECT. 5.

68 i. Final certificate not allowing for penalties.]—**JANSE-MITCHELL CONSTRUCTION CO. v. CALGARY CITY**, [1919] 3 W. W. R. 150; 59 S. C. R. 101; 48 D. L. R. 328.—**CAN.**

t. Payments on certificates—Waiver.]—**BARRETT BROTHERS v. CORNWALL TOWNSHIP** (1908), 12 O. W. R. 970.—**CAN.**

a. Deduction of penalties in certificate from fixed date.]—A contract to build a bridge provided that, should the works not be completed on a day fixed, the contractor should pay for every day until completion the sum of

averred, in an action of covenant for the money, that the houses were built in the time:—**Held:** evidence that the time had been enlarged by parol agreement, & the houses finished within the enlarged time, did not support the declaration.—**LITTLER v. HOLLAND** (1790), 3 Term Rep. 590; 100 E. R. 749.

Annotations:—Refd. Goss v. Nugent (1833), 2 Nev. & M. K. B. 28; Warro v. Calvert (1837), 2 Nev. & P. K. B. 126; Albert v. Grosvenor Investment Co. (1867), 8 B. & S. 664. **Mentd.** Thompson v. Brown (1817), 7 Taunt. 656; R. v. Bingham (1829), 3 Y. & J. 101.

68. Final certificate not allowing for penalties.]—By a building contract, the engineer had power to extend the time for completion of the work. He sent in certificates from time to time after the date for completion, & in his final certificate no account was taken of the penalties:—**Held:** this afforded evidence that the engineer had extended the time.—**LAIDLAW v. HASTINGS PIER CO.** (1874), 2 Hudson's B. C. 4th ed. 13, Ex. Ch.

Annotation:—Consd. Laphorne v. St. Aubyn (1885), Cab. & El. 486.

69. —.]—Pltfs., building owners, sought to recover penalties from defts., builders, for non-completion of certain building work on the date agreed under the contract, which provided that the architect might, in certain circumstances, extend the time for the completion of the work, but did not expressly give him power to deal with penalties. The final certificate made by the architect after the completion of the work was as follows: "We hereby certify £536 15s. 5d. is due to defts. in settlement of contract." Defts. pleaded as follows: "Defts. say that the architect's certificate as to amounts due by pltfs. to defts., or to be deducted by pltfs. from the amount payable to defts. are final & binding on all parties, & the final certificate of the architect as to the balance due by pltfs. to defts. under the contracts mentioned in the statement of claim estops pltfs. from maintaining their claim in the action," & by a further paragraph: "Alternatively, if (which is denied) there was any delay on the part of defts. in carrying out the works, the architect has allowed an extension of time covering the whole of the delays. The allowance is contained in the final certificate of the architect":—**Held:** the architect's certificate, having regard to the fact that the contract did not expressly give him power to deal with the question of penalties, was at the most a very strong presumption, which must be acted on

£3 as liquidated damages. It was also provided that in the event of any extra work being required, the engineer should allow such an extension of time as he should think adequate in consequence thereof; & any sum to become payable by way of damages for non-completion should be computed from the expiration of such extended time. Extra works were ordered, but no reference was at the time made to any extension of time. Some months after the time fixed by the contract for completion of the works the engineer, in giving his certificate for a monthly progress payment, deducted, for the first time, penalties at £3 per day as for the previous month, & in subsequent certificates continued to deduct penalties as from the same period. Still later, further extra works were ordered & carried out, but no reference was made to any further extension of time:—**Held:** even if the deduction in the certificate, of penalties from a fixed date, amounted to an extension of time to that date, such extension was ineffective, & should have been allowed when the extra works were ordered.—**ANDERSON v. TUAPEKA COUNTY COUNCIL** (1900), 19 N. Z. L. R. 1.—**N.Z.**

if not rebutted, but it was not conclusive on the face of it that the circumstances had arisen which gave him jurisdiction in the matter of extending the time for completion, & the above defence was not in law a complete answer to pltfs.' claim.—**BRITISH THOMSON HOUSTON CO., LTD. v. WEST BROTHERS** (1903), 19 T. L. R. 493.

Penalties & liquidated damages.—See Part VIII., Sect. 3, *post*.

SECT. 4.—RESCISSION AND RECTIFICATION.

70. Rescission—Secret commission—Fraudulent agreement with engineer.—A telegraph works co. agreed with a telegraph cable co. to lay a cable, the cable to be paid for by a sum payable when the cable was begun, & by twelve instalments payable on certificates by the cable co.'s engineer, who was named in the contract. Shortly afterwards the engineer, who was engaged to lay other cables for the works co., agreed with them to lay this cable also for a sum of money to be paid him by instalments payable by the works co. when they received the instalments from the cable co.:—**Held**: in the circumstances, the agreement between the engineer & the works co. was a fraud, which entitled the cable co. to have their contract rescinded, & to receive back the money which they had paid under that contract, on the ground (**MELLISH, L.J.**) that the works co. had by their fraudulent conduct prevented the cable co. from having the full benefit of the contract.—**PANAMA & SOUTH PACIFIC TELEGRAPH CO. v. INDIA RUBBER, GUTTA PERCHA & TELEGRAPH WORKS CO.** (1875), 10 Ch. App. 515; 45 L. J. Ch. 121; 32 L. T. 517; 23 W. R. 583, L. JJ.

Annotations:—**Reid**. **Grant v. Gold Exploration & Development Syndicate**, [1900] 1 Q. B. 233; **Rowland v. Chapman**, **Rowland v. Corrie**, **Rowland v. Brandreth** (1901), 17 T. L. R. 669; **Bartram v. Lloyd** (1903), 88 L. T. 286. **Mentd.** **Phosphate Sewage Co. v. Hartmont** (1877), 5

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b. Rescission—What amounts to.—Deft. had agreed with pltfs. for the erection by them of a house on his land; & while engaged in such work pltfs. alleged unnecessary delays in their operations caused, as they said, by the neglect of deft. in supplying material for the building. In the course of a discussion deft. told pltfs.: "If you won't go on with your work, go away":—**Held**: this did not amount to a rescinding of the agreement, & pltfs. were not warranted in treating the agreement as abandoned by deft., who was entitled to counter-claim against pltfs. for the increased cost to him of finishing the building.—**CLAYTON v. McCONNEL** (1888), 15 A. R. 560.—CAN.

resp. contractors having agreed to do all work necessary to put down a well & erect a pump, & having been directed to stop boring by the engineer, put in a pump & brought an action upon the contract, in which they failed for want of the engineer's certificate. They subsequently offered to do what was necessary under the contract to complete the contract as being at an end. The resp. brought a second action for

work & materials:—**Held**: the first action had not put an end to the contract.—**ATHLONE (No. 2) RURAL DISTRICT COUNCIL v. CAMPBELL & SON** (1912), 47 I. L. T. 142.—IR.

d. — Change of site—Breach of contract.—Defts. by a contract with pltfs. for the erection of dredging machinery on pontoons were bound to find a convenient site, & did provide a convenient site near defts.' claim, but before pltfs. commenced the erection of the machinery it became impossible, owing to causes not under defts.' control, to erect the machinery on that spot. Defts. forthwith placed the pontoons at another convenient site on the claim. The increase in the cost of erection of the machinery at the new site would have been trifling as compared with the contract price:—**Held**: even if the change of site amounted to a breach of the contract pltfs. were not entitled to determine the contract, but must seek their remedy in damages.—**BURT (A. & T.) CO., LTD. v. GENTLE ANNIE GOLD-DREDGING CO., LTD.** (1901), 21 N. Z. L. R. 237.—N.Z.

e. — Excessive error in estimates.—The work required to be done under a contract turned out to be

Ch. D. 394; **Lagunas Nitrate Co. v. Lagunas Syndicate**, [1899] 2 Ch. 392; **Rhymney Ry. Co. v. Brecon & Merthyr Tydfil Ry. Co.** (1900), 83 L. T. 111; **Kelghley Maxsted & Co. v. Durant** (1901), 70 L. J. K. B. 662; **Cummings v. Stewart** (1912), 30 R. P. C. 1.

71. — Innocent misrepresentation — Completion after full knowledge.—A claim by contractors for the rescission of a contract for the construction of a railway, on the plea that the contract had been entered into under essential error induced by the innocent misrepresentation of the railway co. as to the nature of the strata through which the railway passed, was rejected on the ground that *restitutio in integrum* had become impossible by reason of the completion of the railway by the contractors after full knowledge of the facts.—**GLASGOW & SOUTH WESTERN RY. v. BOYD & FORREST**, [1915] A. C. 526; 84 L. J. P. C. 157, H. L.

See, further, CONTRACT.

72. Rectification — To carry out intention of parties—Mutual mistake.—In an action by contractors to recover from a corpn. the balance alleged to be due for work & labour done under a contract for laying down tram lines & road making, the point at issue was whether pltfs., on a true construction of the contract, were entitled to charge £14,600 for preparing the bed of the wood pavement, or whether that work was covered by the contract price for the paving of 12s. 7d. per yard. The jury found that both parties intended that the bed should be an extra charge:—**Held**: (1) in order to carry out the intentions of the parties, the contract required rectification, which the ct. had power to direct; (2) judgment should be given for pltfs. for an amount to be ascertained when certain items had been settled on a reference in accordance with the findings of the jury.—**MACARTNEY, M'ELROY & CO. v. BRIGHTON CORPN.** (1904), *Times*, May 21.

See, further, MISTAKE.

16 per cent. in excess of the estimate upon which the contractor's tender was based:—**Held**: this was an excessive percentage entitling the contractor to refuse to go on with the contract.—**McKILLOP TOWNSHIP v. PIDGEON & FOLEY** (1908), 11 O. W. R. 401.—CAN.

72 i. Rectification—To carry out intention of parties—Mutual mistake.—Pltfs., building contractors, tendered to defts. for the building of an asylum. Defts., deeming the cost too high, directed their quantity surveyors to prepare bills of reductions, showing reduced works & reduced prices. Owing to a reference letter being misplaced, there was an error in the total cost as appearing from the bills of reductions, the total sum being put at £830 less than the correct figure. Pltfs., in the mistaken belief that the aggregate cost of the reduced works was as stated in the reduced bills of quantities, tendered for one bulk sum, which tender was accepted by defts., & the works completed. In an action for rectification, & recovery of the sum due on the rectified contract:—**Held**: the mistake could be rectified so as to carry out the real intention of the parties.—**COLLEN v. DUBLIN CO COUNCIL**, [1908] 1 I. R. 503.—IR.

Part III.—Certificates.

SECT. 1.—AS CONDITIONS PRECEDENT TO PAYMENT.

73. When condition precedent.]—In a building contract it was provided that the contract should not be vacated by any additions or alterations, but that the price to be paid for such alterations should be settled by a surveyor, who was to be sole arbitrator in settling such price & all disputes arising in or about the premises, & deft., the employer, agreed to pay certain proportions of the contract price upon receiving a certificate in writing, signed by the surveyor, testifying that certain portions of the building had been done, & his approval thereof, & the balance that should be found due after deducting the previous payments, within two months after receiving the surveyor's certificate that the whole of the works had been completed to his satisfaction:—*Held*: the surveyor's certificate was a condition precedent to pltf.'s right to sue upon the contract in respect of alterations.—*MORGAN v. BIRNIE* (1833), 9 Bing. 672; 3 Moo. & S. 76; 131 E. R. 766.

Annotations:—*Distd.* *Dallman v. King* (1837), 4 Bing. N. C. 105; *Roberts v. Watkins* (1863), 14 C. B. N. S. 592. *Reid.* *Andrews v. Belfield* (1857), 2 C. B. N. S. 779; *Elmes v. Burgh Market Co.* (1891), 2 Hudson's B. C., 4th ed., 170.

74. —.]—Declaration on a building contract, by which the works were to be executed to the satisfaction of the architect; additions or alterations not to be executed without his order, & the value to be ascertained by him; the money to be paid on completion of the work. Averment,

that the architect required additions to the work, which were executed by pltf., & that all things had happened to entitle him to have the values & amounts ascertained, but that the architect did not ascertain same, & that the balance of the whole account was unpaid. Plea, that all things necessary to entitle pltf. to have the values & documents ascertained had not happened, because the certificate of the architect that the works had been completed to his satisfaction had not been obtained:—*Held*: (1) the satisfaction of the architect was a condition precedent to entitle pltf. to have the amounts & values of the extra work ascertained; (2) the declaration was bad, for not alleging that the certificate of satisfaction had been obtained, unless the general averment was sufficient for that purpose; (3) if it were, the plea was a good answer to the action.—*GLENN v. LEITH* (1853), 21 L. T. O. S. 141; 1 C. L. R. 569.

75. —.]—Defts. advertised for tenders for a gas-holder tank. One of the terms of the specification was, that payments were to be made in cash on the certificate of defts.' engineer, 75 per cent. during the progress of the work, 25 per cent. three months after its completion to his satisfaction. The tank was put up, but it leaked, & the engineer refused his certificate. Pltf. having been non-suited appealed on the ground that he ought to have been permitted to show that the work was done in a way that ought to have satisfied the engineer, & that the certificate was required only for the 75 per cent.:—*Held*: if builders agreed to

PART III. SECT. 1.

73 i. When condition precedent.]—Where a contract with a builder provides that payment is not to be made until a certificate approving of the work & materials is issued, the issue of such certificate is a condition precedent to the bringing of an action by the contractor for payment.—*WAUGH v. GRAYSON* (1905), 2 W. L. R. 330.—CAN.

73 ii. —.]—An architect's certificate is a condition precedent to a claim for recovery of money under the contract only when the contract makes clear provision to that effect. When the terms of the contract are ambiguous such a term will not be implied.—*MARTIN v. WILLSON* (1911), T. P. D. 737.—S. AF.

73 iii. —.]—A clause in a building contract provided that payments were to be made on the certificate of the architect on the measured value of the work executed, less 20 per cent., one-half of which was to be paid on the completion of the work & the balance six months afterwards, on receipt of the architect's certificate:—*Held*: the production of the architect's certificate was a condition precedent to the builder's right to recover any portion of the balance.—*SCOTT v. SYTNER* (1891), 9 S. C. 50.—S. AF.

73 iv. —.]—Where work was to be done, under a special agreement, to the satisfaction of a surveyor, & the jury, notwithstanding that a certificate of the surveyor was not produced, gave a verdict for pltfs.:—*Held*: the verdict must be set aside.—*COATS-WORTH v. TORONTO CITY* (1855), 7 C. P. 490; 8 C. P. 364.—CAN.

73 v. —.]—Pltf. contracted with defts. to construct a gravel road, according to plans & specifications annexed, payments to be made monthly on the estimate of the engineer in charge, who was to determine the amount of work to be paid for, & all

disputes:—*Held*: pltf. could not recover for work done under such contract, without a certificate of the engineer.—*EKINS v. BRUCE COUNTY* (1870), 30 U. C. R. 48.—CAN.

73 vi. —.]—*Held*: as the contract required that any work done on the road must be certified to by the chief engineer, until he so certified & such certificate was approved of by the comrs., the contractors were not entitled to be paid anything.—*JONES v. R.* (1877), 7 S. C. R. 570.—CAN.

73 vii. —.]—*R. v. MCGREEVY* (1890), 18 S. C. R. 371.—CAN.

73 viii. —.]—O. & Co. contracted with the govt. to complete certain telegraph works, & M. afterwards contracted with O. & Co. to construct part of the works, in which latter contract O. & Co. covenanted to pay M. at the rate mentioned therein per mille, but the contract was expressed to be subject to the condition that the payments should be made to M. within twenty days after the estimate of the engineer in charge, to be by him put in from time to time to the minister of public works, & service of a copy of such estimate on O. & Co.:—*Held*: this was sufficient to make such estimate & service of a copy thereof a condition precedent to M.'s right to recover for work done under his contract.—*MCDONALD v. OLIVER* (1882), 3 O. R. 310.—CAN.

73 ix. —.]—A building contract provided that the works embraced in the contracts should be fully & entirely complete in every particular, & given up under final certificate & to the satisfaction of the engineers. The contractors claimed a large sum of money for extra work, & stated that until a satisfactory arrangement was arrived at they would be unable to proceed & complete the work. Notices were given & the contracts were taken out of their hands & completed at the

cost of the contractors:—*Held*: the contractors not having previously obtained from, or been entitled to, a certificate from the chief engineer, for or on account of the money which they claimed, the claim should properly be dismissed.—*BERLINGUET v. R.* (1886), 13 S. C. R. 26.—CAN.

73 x. —.]—Pltf. entered into a contract with defts. for the construction of certain main sewers. The contract provided that the work & material should in all things be performed & provided according to the plans & specifications, to the entire satisfaction of the engineer in charge of the work. The specifications provided that the contractor should, on the first day of each month, hand in to the engineer his account for work during the preceding month, & be paid on the certificate of the engineer. No final certificate was obtained from the engineer of the completion of the work, nor was the work completed to his satisfaction. In an action to recover the balance alleged to be due under the contract:—*Held*: the certificate of the engineer as to the completion of the work was a condition precedent to the right to recover.—*ROBINSON v. OWEN SOUND TOWN* (1888), 16 O. R. 121.—CAN.

73 xi. —.]—S. made a contract for the construction of a bridge for a lump sum. After the completion of the bridge, a final certificate was given by the chief engineer & payment thereof made, but S. preferred a claim for the value of work, not included in such final estimate, alleged to have been done in the construction of the bridge, & caused by changes & alterations ordered by the chief engineer of so radical a nature as to create, according to the contention of claimants, a new contract between the parties:—*Held*: the claim came within the original contract which made the certificate of the engineer a condition precedent to

such conditions, they must be bound by them, & appeal dismissed.—**COUCHMAN v. BROMLEY GAS Co.** (1858), 32 L. T. O. S. 92.

76. —.—Pltfs. contracted with a corpn. to perform works, & the corpn. agreed to pay for them in a specified manner, with a proviso that no sum should be considered due, nor should pltfs. make any claim on account of any work executed by them, unless the engineer of the corporation should certify the amount thereof, & that pltfs. were reasonably entitled thereto. The corpn. also had the power of determining the contract if pltfs. should not in the opinion & according to the determination of the engineer exercise due diligence, & thereupon the engineer was to fix the amount earned by pltfs. The contract was determined by the corpn., & pltfs. filed a bill for an account:—**Held**: the certificate of the engineer not having been given, & not being shown to have been fraudulently withheld, the bill must be dismissed, with costs.—**SCOTT v. LIVERPOOL CORPN.** (1858), 3 De G. & J. 334; 28 L. J. Ch. 230; 32 L. T. O. S. 265; 5 Jur. N. S. 105; 7 W. R. 153; 44 E. R. 1297, L. C.

Annotations:—**Expld.** *Ormes v. Beadel* (1860), 2 Giff. 166. **Consd.** *Russell v. Sa. Da. Bandeira* (1862), 13 C. B. N. S. 149; *Stadhard v. Lee* (1863), 3 B. & S. 364; *Larivière v. Morgan* (1872), 7 Ch. App. 554, n. **Refd.** *Goodyear v. Weymouth & Melcombe Regis Corpn.* (1865), Har. & Ruth. 67; *Cooke v. Cooke* (1867), L. R. 4 Eq. 77; *Wadsworth v. Smith* (1871), L. R. 6 Q. B. 332; *Edwards v. Aberayron Mutual Ship Insee. Soc.* (1876), 1 Q. B. D. 563; *Hart v. Hart* (1881), 18 Ch. D. 670; *Botterill v. Ware Grdns.* (1886), 2 T. L. R. 621. **Mentd.** *Bliss v. Smith* (1865), 34 Beav. 508; *Re Brighton Club & Norfolk Hotel Co.* (1865), 35 Beav. 204; *Hood v. N. E. Ry. Co.* (1870), 19 W. R. 266.

77. —.—A building contract contained provisions making the certificate of the engineer con-

clusive between the parties, & it was provided that all accounts relating to the contract should be submitted to & settled by the engineer, & that his certificate for the ultimate balance should be final & conclusive:—**Held**: in the absence of fraud on the part of the engineer, & where his certificate had been made a condition precedent to payment, his certificate must be conclusive between the parties.—**SHARPE v. SAN PAULO RY. Co.** (1873), 8 Ch. App. 597; 29 L. T. 9, L. JJ.

Annotations:—**Consd.** *Re Hohenzollern Act. für Locomotivbau & City of London Contract Corpn. & Common Law Procedure Act, 1854* (1886), 54 L. T. 596. **Distd.** *Re Nott & Cardiff Corpn.*, [1918] 2 K. B. 146. **Refd.** *Re Ford & Bemrose* (1902), 18 T. L. R. 443. **Mentd.** *Meldrum v. Scorer* (1887), 56 L. T. 471.

78. —.—Where payments under a contract are to be made so soon as an engineer or an architect shall give a certificate for same, & such certificate is honestly & *bonâ fide* withheld, no action can be maintained by the contractor for the amounts alleged to be due to him.—**BOTTERILL v. WARE GUARDIANS** (1886), 2 T. L. R. 621, C. A.

Annotation:—**Refd.** *Kellett v. New Mills U. D. C.* (1900), 2 Hudson's B. C., 4th ed., 298.

79. —.—Where a certificate of the engineer is under the contract a condition precedent to the contractor's right to payment, the contractor in abandoning the contract is not entitled to payment for work done without producing a certificate of the engineer, unless he can show that the certificate is collusively withheld.—**M'DONALD v. WORKINGTON CORPN.** (1893), 9 T. L. R. 230; 2 Hudson's B. C., 4th ed., 228, C. A.

80. —.—A building contract provided that the works should be completed in all respects on or before Dec. 16, 1901, to the satisfaction of the

recovery, & such certificate not having been obtained, the claim must be dismissed.—**R. v. STARRS** (1889), 17 S. C. R. 118.—**CAN.**

73 xii. —.—Where pltf. agreed with the deft. to do certain work on terms embodied in correspondence, part of which read: "I'll pay you on the completion of each 80 ft. of tunneling; all you need to do is to have M. to certify that you have done the work":—**Held**: pltf. could not recover in the absence of certificate from M.—**LEROY v. SMITH** (1900), 8 B. C. R. 393.—**CAN.**

73 xiii. —.—By the contract, the building was to be erected according to certain plans & specifications prepared by defts. J. & B., architects, & all payments were to be made upon the written certificates of the architects to the effect that such payments had become due, & it was provided that, before the issue of the final certificate, the contractor should furnish evidence of payment to material-men & workmen. The contractor entered upon the performance of the work, & from time to time received certificates from the architects, the amounts whereof were paid; but a final certificate was refused, & this action was brought to recover payment from the owners & to compel the architects to give a certificate:—**Held**: pltf. was not entitled to recover without the certificate of the architects, that being a condition precedent to payment, collusion between the owners & the architects not being established.—**LAWRENCE v. KERN** (1910), 14 W. L. R. 337; 3 Sask. L. R. 253.—**CAN.**

—Pltf. made a contract with deft. F., through F.'s agents, to plough, pack, disc, & drag 480 acres of land, at certain rates of payment per acre. By the terms of the contract, before payment, the work was to be passed upon by an inspector, "upon whose certificate of approval, duly

signed, payment will be made for all work so completed." The inspector refused to pass the work, when it was completed, & so reported to F., who refused to pay the balance, for which pltf. sued:—**Held**: the certificate of the inspector as to the performance of the work in accordance with the contract in a satisfactory manner was a condition precedent to the obligation to pay, the good faith of the inspector not being impugned & no collusion being shown or suggested.—**SCHULTZ v. FABER & Co.** (1912), 21 W. L. R. 163; 4 D. L. R. 707.—**CAN.**

73 xv. —.—Contractors brought an action against the owners of certain buildings & the architect thereof, for the price of certain excavations & concrete work done. They had not obtained the certificate of the architect as provided for in the contract. No collusion or improper motive was shown:—**Held**: the action being premature must be dismissed.—**VANDERWATER v. MARSH** (1913), 25 O. W. R. 178; 5 O. W. N. 213.—**CAN.**

73 xvi. —.—**CANTY v. CLARK** (1879), 44 U. C. R. 222.—**CAN.**

73 xvii. —.—**MCGREEVY v. McCARRON**, [1885] 12 Q. L. R. 373.—**CAN.**

73 xviii. —.—**ARDAGH v. TORONTO CITY** (1886), 12 O. R. 236.—**CAN.**

73 xix. —.—**DAVIDSON v. FRANCIS** (1902), 14 Man. L. R. 141.—**CAN.**

73 xx. —.—**ITALIAN MOSAIC MARBLE Co. v. VOKES** (1913), 24 O. W. R. 970; 5 O. W. N. 15.—**CAN.**

73 xxi. —.—**MANDERS v. MOOSE JAW CITY** (1914), 28 W. L. R. 821.—**CAN.**

73 xxii. —.—Pltfs. contracted for the performance of certain works, for which payment was to be made in a specified manner. A balance was to be retained by deft. as a guarantee for the completion of the contract, & was

to be paid to the contractors within one month after the certificate of deft.'s engineer, specifying the completion of the works to his satisfaction. The certificate was not given, & whilst the matter was still in dispute deft. took possession of the works. Pltfs. brought their action for the balance due on the contract. No fraud or collusion as to the refusal of the certificate was alleged:—**Held**: the engineer's certificate was a condition precedent to pltfs.' right to recover.—**KENNARD v. FRATHERSTON** (1867), 1 C. A. 15.—**N.Z.**

73 xxiii. —.—Under a building contract payments were to be made to the contractor upon the certificate, in writing, of the engineer. The contractor having been required by the engineer to perform works for which he declined to give an order in writing, & the contractor contending that the works were not within the contract, the works were executed, & a claim was made by the contractor in respect thereof as for extras:—**Held**: the contractor could not recover the value of such works without a certificate in writing from the engineer.—**BRUCE v. HARRIS, Mac.** 386.—**N.Z.**

73 xxiv. —.—The certificate of the chief engineer was made by the contractor a condition precedent to any right or cause of action on the part of the contractor for payments of money under the contract:—**Held**: such certificate was a condition precedent & the conduct of the chief engineer or the Govt. was not such as would make it inequitable that such condition precedent should be relied on.—**ANNEAR v. RAILWAYS COMRS.** (1883), 1 Q. L. J. 162.—**AUS.**

73 xxv. —.—In an action on a builder's contract, which provided that all the works should be left complete & clear, to the satisfaction of the architect, & did not contain any provision for payment by instalments:—**Held**: (1) the completion of the works

Sect. 1.—As conditions precedent to payment. Sect. 2.]

surveyor to be testified by a certificate under his hand, & in default of such completion the contractor should forfeit & pay to defts. £1 for each day during which the works should be incomplete after the time as & for liquidated damages, & that the contractor should be paid by defts. at the rate of 80 per cent. of the value of the work done in each month & the balance one month after the completion of the contract, provided that defts. should not be required to pay to the contractor any sum exceeding the value as valued by the surveyor or other officer of so much of the works as should have been executed by the contractor during the preceding month:—*Held*: a certificate by the surveyor that the work had been completed to his satisfaction was a condition precedent to the payment of the retention money.—*WALLACE v. BRANDON & BYSHOTTLES URBAN DISTRICT COUNCIL* (1903), 2 Hudson's B. C., 4th ed., 362, C. A.

.]—Clause 26 of a building contract provided that "the certificate of the architect is a condition precedent to the contractor's right of action against the employer." Clause 27 provided that "the architect is to be the sole arbitrator or umpire between the employer & contractor, & is to determine any question, dispute or difference that may arise either during the progress of the work or in determining the value of any variations that may be made in the work contracted for, & the certificate of the architect's decision upon such question, dispute or difference shall be final & binding between the employer & contractor & without further appeal whatsoever." The contractor was paid the whole of the amounts which were certified by the architect as due to him, but he alleged that he was entitled to a further sum which he claimed to recover in an action. He had made no application for arbn. under clause 27:—*Held*: the provision of clause 26, making it a condition

to the satisfaction of the architect was a condition precedent to the builder's right to recover on foot of the contract; (2) he was not entitled to recover for the value of work done, as to which, while incomplete, the architect had expressed approval so far as then partially executed, but which was not subsequently completed to the architect's satisfaction.—*RICHARDSON v. MAHON*, [1879] 4 L. R. Ir. 486.—IR.

73 xxvi. — Pleading.]—Action brought by a builder to recover sums of money from deft. for alleged work & labour in construction of certain buildings. Agreement that pltf. should, under direction of deft.'s architect, carry on the work in conformity with plans & specifications, under superintendence of the architect. At the trial the jury were directed to find for deft., on the ground that the architect's certificate was a condition precedent to a demand for payment, & pltf. had not fulfilled his special contract:—*Held*: deft. should have produced evidence to show that he paid pltf. the full value of the work done, & should have shown he had not himself prevented the completion of the works.—*CALLAN v. MARUM* (1871), 5 I. L. T. 48.—IR.

g. When not condition precedent.]—Where the granting of a certificate by an architect is a purely ministerial function, the production of a certificate is not a condition precedent to the recovery of payment.—*BAGLEY v. DE KOK* (1912), W. L. D. 68.—S. AF.

h. —.]—The contract was for the performance of certain specified work at a price named, in conformity with the instructions of H., the overseer of the works. By it H. was made the sole judge as to the state & com-

pletion of the work, & generally as to any question arising under the contract; he was empowered to reject any materials which he might think unfit, & to employ others in the event of pltf. not using sufficient despatch, & no payments were to be made without his written certificate:—*Held*: there was clearly no covenant by defts. that the overseer should give certificates when pltf. were entitled thereto, as alleged in the declaration.—*KEMPSTER v. BANK OF MONTREAL* (1871), 32 U. C. R. 87.—CAN.

k. —.]—*Held*: the non-production of an architect's certificate approving of the work done, though required by the contract with the dismissed contractor, as a condition precedent to payment, did not preclude the sub-contractor from recovering under the oral agreement, provided the work was so done as to morally entitle him to such certificate.—*PETRIE v. HUNTER, GUEST v. HUNTER* (1882), 2 O. R. 233; *affd.* 10 A. R. 127.—CAN.

l. —.]—In an action to recover for services under a contract for repair of a drain:—*Held*: the right to recover was not subject to a condition precedent that an engineer's certificate of approval should be produced.—*WALLACE v. TILBURY EAST TOWNSHIP* (1906), 7 O. W. R. 34.—CAN.

m. —.]—*SMITH v. FINKLESTEIN* (1910), 1 O. W. N. 528.—CAN.

n. — Architect employed to supervise work.]—An architect was employed to supervise work:—*Held*: it could not be inferred that a certificate from him was a condition precedent to payment.—*GAMBLE v. ARNOLD* (1909), 12 W. L. R. 91.—CAN.

precedent to the contractor's right of action that he should have the certificate of the architect that the amount claimed was due to him, was unaffected by clause 27, & in the absence of a certificate pltf. was not entitled to maintain the action, unless he could show, & that he failed to show, improper dealing between the employer & the architect.—*EAGLESHAM v. McMASTER*, [1920] 2 K. B. 169; 89 L. J. K. B. 805; 123 L. T. 198; 84 J. P. 146.

82. When not condition precedent — Contract with third party guaranteeing loan.]—By an agreement dated Apr. 28, 1876, T. agreed to build six houses upon land belonging to deft., according to certain plans & specifications, under the direction of deft.'s surveyor. T. covenanted to complete the houses before the ensuing Sept., & in default of so doing to pay deft. £5 per week for liquidated damages so long as they should remain unfinished. Deft. covenanted to pay to T. for the work £1,085 in certain specified instalments, each instalment being paid under the certificate of deft.'s surveyor. The last instalment was to be paid within three days after deft.'s surveyor should certify in writing that all the works had been fully completed according to the contract. Deft. afterwards agreed to extend the time for completing the houses till Oct., & on Oct. 12, the houses being still unfinished, T. agreed to borrow £110 from pltf., & deft. signed & handed to pltf. the following document: "In consideration of your advance, & T.'s authority of this date, I promise to pay to you £110 on the completion of six houses in accordance with a contract dated Apr. 28, 1876, between myself & T." T. having received the £110 from pltf., proceeded with the completion of the houses, but no certificate in writing that the works had been fully completed according to the contract was ever given by deft.'s surveyor. In an action upon deft.'s guarantee the jury found that the houses

o. — Extras.]—A contract provided that the contractor should be paid for work & extras, if any, on the certificate of the superintendent of the work. The contractor died after doing part of the work, & pltf. agreed to deliver all the material referred to in the late (contractor's) contract, & all the conditions of that contract were to apply. Disputes having arisen, the superintendent gave pltf. under deft.'s instructions a certificate that pltf. had furnished all the material according to specifications, except small matters which he would adjust under the terms of the contract:—*Held*: as to extra material furnished by pltf., the condition as to the superintendent's certificate did not apply; & the certificate in fact given put an end to the contract & relieved pltf. from doing anything further under it, so that the non-completion of the small matters in dispute formed no defence.—*LUDLAM v. WILSON* (1901), 21 C. L. T. 554; 2 O. L. R. 549.—CAN.

express declaration.]—A building contract required that "a certificate should be" obtained & signed by the architect:—*Held*: production of such certificate to the owner was not necessary, before suing on the contract.—*ALLEN v. PIERCE* (1895), 3 Terr. L. R. 319.—CAN.

q. — —.]—The only reference to a written certificate of the architect was in a clause of the contract relating to payments, in these words: "The remaining 20 per cent. on the contract price to be paid thirty-three days after the works are entirely completed to the satisfaction of the architect & accepted by him, provided that in each case where payment is de-

were completed according to the contract before the commencement of the action:—*Held*: the finding of the jury was conclusive, & the surveyor's certificate was not a condition precedent to the payment of the £110 to pltf. under the guarantee.—*LEWIS v. HOARE* (1881), 44 L. T. 66; 29 W. R. 357, H. L.

Dispensing with final certificate, *see* Sect. 3, sub-sect. 4, *post*.

83. — Controlled by arbitration clause.]—A contract for the supply of locomotives for a tramway co. contained provisions that the locomotives should be built according to plans, to be made to the satisfaction of an engineer named, & under his inspection & to his satisfaction, & that payment should be made on his certificate, & also contained an arbn. clause. The engineer declined to certify, & the contractor demanded arbn.:—*Held*: the absence of a certificate was not conclusive against the contractor's right to payment, a dispute as to the certificate being a dispute within the arbn. clause.—*Re HOHENZOLLERN ACT. LOCOMOTIVBAU & CITY OF LONDON CONTRACT & COMMON LAW PROCEDURE ACT, 1854* (1886), 54 L. T. 596; 2 T. L. R. 470; 2 Hudson's B. C., 4th ed., 100, C. A.

Annotation:—*Consd. Re Nott & Cardiff Corpn.*, [1918] 2 K. B. 146.

Effect of arbitration clause on conclusiveness of final certificate, *see* Sect. 3, sub-sect. 2, C.,

84. Architect improperly influenced.]—Under a building contract the decision of the architect of the building owners relating to any matters or thing or the goodness or sufficiency of any work, or the extent or value of any extra or omitted work, was to be final, conclusive, & binding on all parties, & payments as the work proceeded were to be made on the certificate of the architect. The architect having taken a wrong view of his posi-

tion & being improperly influenced by the building owners, delayed issuing his certificate for the outstanding balance due to the contractor. After the work had been completed & after the period of maintenance had expired, the contractor brought an action against the building owners to recover the balance due to him. After the commencement of the action the architect issued his final certificate:—*Held*: the building owners could not, as a defence to the action, rely on the issue of the certificate being a condition precedent to the right of the contractor to commence proceedings for the recovery of the balance.—*HICKMAN & Co. v. ROBERTS*, [1913] A. C. 229; 82 L. J. K. B. 678; 108 L. T. 436, n.; *sub nom.* *ROBERTS v. HICKMAN & Co.*, 2 Hudson's B. C., 4th ed., 426, H. L.

Annotation:—*Consd. Re Nott & Cardiff Corpn.*, [1918] 2 K. B. 146; *Eaglesham v. McMaster*, [1920] 2 K. B. 169. *Reid. Bristol Corpn. v. Aird*, [1913] A. C. 241.

SECT. 2.—PROGRESS CERTIFICATE.

85. Effect of—Right to dispute workmanship—Withholding final certificate.]—A contractor engaged to execute in a "workmanlike manner" certain buildings, etc., for a burial board, to the entire satisfaction of the architect, the payments in respect of the works to be made to the contractor from time to time as the work proceeded, & the balance on the final certificate of the architect that the work had been executed according to the contract. Certificates from time to time had been given by the architect, & the contractor received payments on account. It appeared, subsequently, that parts of the work had not been done in a "sound & workmanlike manner," & the final certificate was withheld. On bill filed by the contractor to have it declared that the withholding of the final certificate was a fraud upon the

mandated a certificate shall be obtained from & signed by the architect in charge to the effect that he considers the payments properly due":—*Semble*: under this, a written certificate was not a condition precedent to recovery by the contractor.—*WATTS v. MCLEAY* (1911), 19 W. L. R. 916.—CAN.

r. — — — .]—A contract for the performance of work provided for payment of the contract price upon completion of the work & made no mention of the architect:—*Held*: although while the work was in progress both parties tacitly assumed that the work must be to the satisfaction of the architect, his certificate was not required before payment could be demanded for the work which was admitted to have been completed.—*SCOTT v. SYTNER* (1891), 9 S. C. 50.—S. AF.

83 i. — Controlled by arbitration clause.]—A contract for the erection of electric plant provided that the price should be payable by instalments, & such instalments should be paid within fourteen days after production of the engineer's certificate that such instalments were due. The contract further provided: "Certificates other than the final certificate of the engineer, shall not be considered conclusive evidence as to the sufficiency of any work or materials to which they relate, nor shall they relieve contractors from any obligations under this contract. The engineer shall not be bound to give a final certificate if he is of opinion that the contractors have not performed all obligations under this contract, but any question arising under this clause as to whether the contractors have performed all their obligations shall be

subject to the provisions for arbitration herein contained." In an action by the sellers for payment of the price, the plant having been rejected by the buyer's engineer, who was the engineer under the contract:—*Held*: the engineer's final certificate had not been made a condition precedent to payment, & the sellers were entitled to sue the buyers for the price.—*HOWDEN & Co., LTD. v. POWELL DUFFRYN STEAM COAL CO.* (1912), 49 Sc. L. R. 605.—SCOT.

*s. — Right to payment accruing on substantial performance.]—*BROWN CONSTRUCTION CO. v. BANNATYNE SCHOOL DISTRICT CORPN. (1912), 21 W. L. R. 827; 5 D. L. R. 623.—CAN.

*t. — Acceptance & user—Work satisfactorily performed.]—*HAMILTON v. MYLES (1874), 24 C. P. 309.—CAN.

PART III. SECT. 2.

*a. Whether condition precedent.]—*Pltf. sued on an agreement, by which he undertook to do certain work for defts. on a railway, in accordance with the instructions of the engineers of the road, & to receive such estimates as they might allow, certain prices being specified, & defts. agreed to make monthly payments. Pltf. complained that defts. would not make monthly payments to him in accordance with the agreement. Defts. pleaded to both counts, that they paid pltf. the amount of the estimates of all work done by him in pursuance of the agreement, under the directions of the engineers, & for which estimates were allowed by them:—*Held*: no defence, for the agreement required the payments to be made monthly, whether

the estimates were furnished by the engineers or not.—*LAKE v. CAMERON* (1859), 18 U. C. R. 622.—CAN.

b. — .]—*McDONNELL v. CANADA SOUTHERN RY. CO.* (1873), 33 U. C. R. 313.—CAN.

85 i. Effect of—Right to dispute workmanship.]—*Held*: a builder was not entitled to recover for the value of work done as to which while incomplete the architect had expressed approval so far as then partially executed but which was not subsequently completed to the architect's satisfaction.—*RICHARDSON v. MAHON* (1879), 4 L. R. Ir. 486.—IR.

*c. Whether conclusive — Revision by successor in office.]—**Held*: though the value of the work certified to by the monthly certificates was only approximate & subject to revision on completion of the whole, yet where the engineer in charge had changed the character of a particular class of work & when completed had classified it & fixed the value, his decision was final & could not be reopened & revised by a succeeding engineer.—*MURRAY v. R.* (1896), 26 S. C. R. 203.—CAN.

*f. — As to quantities mentioned.]—*TEMISKAMING & NORTHERN ONTARIO RY. COMMISSION v. WALLACE (1906), 37 S. C. R. 696.—CAN.

*g. — Given by clerk of the works.]—*Pltfs. were to act under the directions & to the satisfaction of the architects, whose decision was to be final & all payments were to be made only under the written certificate of the architects:—*Held*: the certificates of the clerk of the works relied on by pltfs. were not certificates of the

Sect. 2.—Progress certificate. Sect. 3: Sub-sect. 1.]

contractor:—*Held*: on proof of the "unsound & unworkmanlike manner of the buildings," the withholding of the final certificate was not a fraud upon pltf., although the architect had given certificates from time to time to enable the builder to obtain money on account.—*COOPER v. UTTOXETER BURIAL BOARD* (1864), 11 L. T. 565.

86. Whether withdrawable.]—An engineer or architect, who has once signed an interim certificate for a payment to a contractor, cannot afterwards withdraw it.—*DAVEY v. GRAVESEND CORPN.* (1903), 67 J. P. 127.

Whether orders in writing—In relation to extras.]
—See Part VI., Sect. 3, sub-sect. 1, *post*.

87. Contents of—Inclusion of materials not affixed—Power of engineer.]—Pltfs., contractors for a railway line, received from the co.'s engineer a certificate in the form agreed on by the co., that £96,200 was due to them for work done & materials supplied under the articles of agreement, one of the clauses of which authorised the engineer from time to time to "ascertain the extent & value of the works then executed & the materials then provided for the works by the contractors." Of this £11,000 represented materials provided for, but not actually affixed to the line:—*Held*: it was competent to the co.'s engineer to certify for "materials."—*PICKERING v. ILFRACOMBE RY. CO.* (1868), L. R. 3 C. P. 235; 37 L. J. C. P. 118; 17 L. T. 650; 16 W. R. 458.

Annotations:—Mentd. *Robinson v. Nesbitt* (1868), L. R. 3 C. P. 264; *Mosse v. Killick* (1881), 44 L. T. 149; *Punchard v. Tomkins* (1882), 31 W. R. 286; *Baker v. Hedgcock* (1888), 39 Ch. D. 520; *Re Burdett, Ex p. Byrne* (1888), 20 Q. B. D. 310; *Re Leavesley*, [1891] 2 Ch. 1; *B. v. B.* (1892), 8 T. L. R. 636; *Brunton v. Dixon* (1892), 36 Sol. Jo. 556; *Farmers & Cleveland Dairies Co. v. Riley* (1893), 9 T. L. R. 260; *Cole v. Eley*, [1894] 2 Q. B. 180; *Royal Exchange Assce. Corpn. v. Sjörforsakrings Akt. Vega*, [1901] 2 K. B. 567; *Stagg v. Medway (Upper) Navigation Co.*, [1903] 1 Ch. 169; *Vacuum Oil Co. v. Ellis*, [1914] 1 K. B. 693; *Wild v. Simpson*, [1919] 2 K. B. 544.

architects & had no effect.—*WINNIPEG STONE CO. v. SENECA* (1910), 14 W. L. R. 570.—CAN.

h. — Provision against conclusiveness.]—*Held*: although the progress estimates submitted by pltfs. from time to time were never disputed by the architect or deft., the full amount should not be allowed, because the contract provided, they should not be conclusive.—*ALBERTA BUILDING CO. v. CALGARY CITY* (1911), 16 W. L. R. 443.—CAN.

k. — Given after dismissal.]—*Held*: a progress certificate given by an architect after his dismissal is not binding on the building proprietor.—*HOARE v. MCCARTHY*, [1916] V. L. R. 656.—AUS.

l. — Construction of agreement.]—*MOORE v. FERGUSON, MOORE v. FERGUSON & MITCHELL* (1892), 18 V. L. R. 266.—AUS.

m. — —.]—*Re ONTARIO & WEST SHORE RY. CO.* (1911), 19 O. W. R. 209; 2 O. W. N. 1041.—CAN.

n. — Certifier adopting decision of referee—After previous rejection of claim.]—*GOODWIN v. R.* (1897), 28 S. C. R. 273.—CAN.

o. — Recovery back of payments made on—Proof of errors—Discovery of documents.]—*CANADIAN PACIFIC RY. CO. v. CONMEE* (1886), 11 P. R. 297.—CAN.

88 l. Whether withdrawable—Waiver.]—Where on discovery of a

SECT. 3.—FINAL CERTIFICATE.**SUB-SECT. 1.—NATURE AND FORM.**

88. Not an award.]—A builder agreed to build a house for deft. for a certain sum, payable by instalments of 75 per cent. upon each sum of £400 certified by the architect, the residue to be paid upon completion of the work. In case of bkpcy. of the builder, deft. might determine the contract by notice, & in that case deft. was to pay him only such sum in addition to previous instalments as deft.'s architect should certify that in all circumstances he was entitled to receive. Work had been done by the builder at the time of his bkpcy. to the amount of £1,600 & he had been paid £1,200. To an action by his assignees for the remainder, deft. pleaded that his architect had certified that the builder was only entitled to £22 in addition to the instalments already paid, & a tender of that sum. Pltfs. replied that no notice to attend was given & no opportunity given of being heard or giving evidence before the architect, & contended that the certificate was in the nature of an award, & that the architect ought to have heard both parties:—*Held*: the plea was good, & the replication bad.—*LOADER v. HATHAWAY* (1855), 26 L. T. O. S. 60.

89. Form—Mere checking of builder's charges.]
—Deft. was to pay for building, upon receiving an architect's certificate that the work was done to his satisfaction. The architect checked the builder's charges, & sent them to deft.:—*Held*: this did not amount to such a certificate of satisfaction as to enable the builder to sue deft., although deft. had not objected to pay on the ground that no sufficient certificate had been rendered.—*MORGAN v. BIRNIE* (1833), 9 Bing. 672; 3 Moo. & S. 76; 131 E. R. 766.

Annotations:—Consd. *Dallman v. King* (1837), 4 Bing. N. C. 105. **Distd.** *Roberts v. Watkins* (1863), 14 C. B. N. S. 592. **Folld.** *Elmes v. Burgh Market Co.* (1891), 2 Hudson's B. C., 4th ed., 170. **Refd.** *Andrews v. Belfield* (1857), 2 C. B. N. S. 779.

90. — Mere statement that sum due.]—A certificate must be given as such; a mere statement

by the engineer; that he should determine the total amount to be paid, & on his final certificate payment should be made. A claim for damages for stopping the work under the contract having arisen, the engineer gave a document purporting to be a final certificate. This document in itself did not contain any reference to damages claimed for hindering or stopping the execution of the contract:—*Held*: (1) it was only a final certificate for work actually done, & was quite consistent with the terms of it, that a large sum might be due for damages; (2) there was nothing to show that the engineer had taken such a claim into consideration; (3) it was not an award under the clause referring disputes to the engineer.—*GOWAN v. BOARD OF LAND & WORKS* (1872), 3 V. R. (Law) 241.—AUS.

90 l. Form—Mere statement of amount due—Measurements not recorded.]—The contract provided that the schedule should be based "on the yard cube of concrete with all reinforcements, shuttering, excavating & centrings at £2 per yard cubic inclusive." The certificates did not give any measurements, but merely certified for amounts as due for "work done & material supplied." The architect stated in evidence that in fact such certificates were based on actual measurements, & he produced his record of such measurements:—*Held*: the certificates could not be impeached on the ground that they did not conform to the contract.—*MILNE v. PADDAY* (1914), E. D. L. 277.—S. AF.

p. When dispensed with—Improperly withheld.]—*Held*: withholding by the architect of a progress certificate upon improper grounds would not disentitle pltfs. to recover the amount due to them.—*ALBERTA BUILDING CO. v. CALGARY CITY* (1911), 16 W. L. R. 443.—CAN.

q. Refusal of—When justified.]—*GRACE v. OSLER* (1911), 16 W. L. R. 627; varied 21 Man. L. R. 641.—CAN.

r. Neglect of engineer—Whether owners liable.]—*FARMER v. COOK COUNTY (CHAIRMAN, COUNCILLORS & INHABITANTS)* (1894), 13 N. Z. L. R. 311.—N.Z.

s. Demand for payment after certificate granted—Waiver.]—*POUPORE v. R.*, 24 C. L. T. 163.—CAN.

PART III. SECT. 3, SUB-SECT. 1.

88 i. Not an award.]—A contract contained a condition that if any dispute should arise during the currency of the contract, it should be decided

that a sum is due is not sufficient.—**GOODMAN v. LAYBORN** (1881), Roscoe's B. C., 4th ed., 162.

91. — Writing not essential—In absence of specific provision.]—Under a builder's contract, certain instalments were to be paid as the work progressed, & the balance within two calendar months after the completion of the contract, "provided the architect should have certified that the whole of the work had been done to his satisfaction:—*Held*: it was not necessary that the architect should certify in writing.—**ROBERTS v. WATKINS** (1868), 14 C. B. N. S. 592; 2 New Rep. 246; 32 L. J. C. P. 291; 8 L. T. 460; 10 Jur. N. S. 128; 11 W. R. 783; 143 E. R. 577.

Annotation:—**Consd. Jones v. Gough** (1865), 3 Moo. P. C. C. N. S. 1.

92. — — — — —.]—A certificate of completion may be given orally, in the absence of

91 i. — Whether writing essential.]—Where pltf. had entered into a contract with defts. to execute certain works in & about the sinking of a well & erection of a pump "to the satisfaction of the architect" appointed by defts. & in accordance with certain specifications, which contained (*inter alia*) the following words: "The whole of the work to be done to the entire satisfaction of the engineer; the contractor shall be held responsible for the proper working of the pump for a period of six months from the date of final certificate":—*Held*: the giving of a final certificate in writing of his intention by the engineer appointed by defts. was a condition precedent to pltf. being able to recover payment for the work done by him.—**HANLON v. DUNDALK RURAL DISTRICT COUNCIL** (1911), 46 I. L. T. 57, 159.—**IR.**

91 ii. — — — — —.]—*Held*: a certificate of satisfactory completion need not be in writing, oral expression of satisfaction by the architect being sufficient.—**MEYER v. GILMER** (1899), 18 N. Z. L. R. 129.—**N.Z.**

91 iii. — — — — —.]—**ARDAGH v. TORONTO CITY** (1886), 12 O. R. 236.—**CAN.**

a. — Mere statement that contract passed.]—*Held*: a memorandum by an engineer, stating that he had passed the contract, was not equivalent to a certificate that the work had been completed to his satisfaction.—**KNOX v. PATUTAH ROAD BOARD** (1892), 11 N. Z. L. R. 496.—**N.Z.**

b. — Departure from agreed form—Acquiescence of owner.]—When a certificate is issued by an inspector under a contract, which he intends should be a final certificate & which is accepted & dealt with as such by the owner, although the certificate is not in the exact form stipulated for in the contract it will be binding upon the owner.—**PIGGOTT v. BATTLEFORD** (1913), 6 Sask. L. R. 235; 24 W. L. R. 365.—**CAN.**

93 i. — Whether satisfaction implied—By certificate for payment.]—A building contract provided for progress payments & that the balance of the stipulated price "shall be paid by the proprietor to the contractor within fourteen days from the architect's certificate being given that the works are completed to his satisfaction." The architect gave a certificate in this form: "I hereby certify that S. Bros. are entitled to £135 13s. 5d., being balance of amount due to them on account of contract & extras for your house at S":—*Held*: this was a sufficient certificate by the architect under the contract that the works were completed to his satisfaction.—**HARMAN v. SCOTT** (1874), 2 C. A. 407.—**N.Z.**

93 ii. — — — — —.]—A building contract provided that payments

should be made upon the architect's certificates in writing & the final balance retained until after the architect had certified to the satisfactory completion of the work. On the contractor submitting a fresh account, the first having been reduced by the architect, the architect wrote the words: "I certify this account is correct":—*Held*: a sufficient certificate in writing. *Qu.*: whether sufficient as to satisfactory completion.—**MEYER v. GILMER** (1899), 18 N. Z. L. R. 129.—**N.Z.**

93 iii. — — — — —.]—One of the conditions of a building contract provided that percentage payments should be made to the contractor, at intervals during the progress of the works, at the discretion of the architect, upon certificates in writing under his hand & the balance when the whole work was completed to his satisfaction, & his certificate given to that effect. The architect certified that the contractor was entitled to receive a certain sum, "this being the final certificate in full of all demands":—*Held*: this was a certificate to the effect that the whole of the work was completed to the architect's satisfaction.—**CLARKE v. MURRAY** (1885), 11 V. L. R. 817.—**AUS.**

93 iv. — — — — —.]—*Held*: although the certificate did not in words state that the works were completed to the satisfaction of the architect, that was to be implied from the statement that the contractors were entitled to final payment.—**BROWN CONSTRUCTION Co. v. BANNATYNE SCHOOL DISTRICT CORPN.** (1912), 21 W. L. R. 80; *varied* 2 W. W. R. 742.—**CAN.**

93 v. — — — — —.]—In terms of a building contract the work had to be performed to the satisfaction of the architect, & a certain percentage of the contract price was only to be paid to the contractor "two months after the date of the certificate of final completion, when the architect shall have certified that the works are completed in terms of the contract & to his satisfaction & the roofs have been proved watertight." The architect gave a certificate as follows:—"Final instalment. Certificate. I hereby certify £16 13s. 9d. is due to G. on account of work executed & materials supplied":—*Held*: the certificate was a final certificate in terms of the contract & implied the work had been done to his satisfaction.—**LOWTHER v. SWAN & Co.** (1915), T. P. D. 494.—**S. AF.**

d. — Qualified statement — Defects developing on user.]—H. contracted with the A. Co. to renew certain furnaces to the full satisfaction of the co.'s inspector, upon whose certificate only they were to be taken over. Payment was to be made on presentation of the certificate. Upon being asked for his certificate the inspector

specific provision to the contrary.—**ELMES v. BURGH MARKET Co.** (1891), 2 Hudson's B. C., 4th ed., 170.

93. — Expression of satisfaction—By letter.]—The final balance of a building contract was not to be paid until the architect had given his final certificate. The architect had by letter expressed his satisfaction with the work, but the final certificate was not given until more than a year afterwards. Another clause of the contract provided that only 80 per cent. was to be paid as the work proceeded, & the balance in two months after the architect should have expressed his satisfaction with the completion of the work. An action was commenced within two months of the delivery of the final certificate:—*Held*: the intention of the parties was that the satisfaction of the architect was to be expressed by his final certificate, & as

wrote to the managing director of the co. in the following terms: "I certify that H. has rebuilt the furnaces with fire-clay bricks & cylinders, & has worked them twelve days as per contract. Upon my examining them I found they were working satisfactorily. Since then they have been cooled down, & upon examination it was found the centre cylinders in two cases had cracked, & the joints in the outer cylinders had opened. These H. assures me can be stopped with a mixture of plumbago, which will render the furnace perfectly sound":—*Held*: this did not amount to a certificate upon which H. was entitled to payment by the co.—**HUTSON'S OFFICIAL ASSIGNEE v. NEW ZEALAND ANTIMONY Co., LTD.** (1891), 10 N. Z. L. R. 143.—**N.Z.**

e. — — — — — Defects to be remedied.]—A certificate setting out the existence of certain defects, & recommending payment of the balance still due on the contract, on these defects being remedied:—*Held*: in the circumstances, to be equivalent to a final certificate.—**MCCARTHY v. VISSER** (1904), 22 S. C. 122; 15 C. T. R. 72.—**S. AF.**

f. — — — — — Trivial items to be finished.]—An architect's certificate certifying for payment contained the words: "It is understood that certain small items are at once completed to the owner's satisfaction." The items were of a trivial character:—*Held*: the words should be read as a reservation & not as a condition, & did not prevent the certificate being regarded as final.—**BAGLEY v. DE KOK** (1912), W. L. D. 68.—**S. AF.**

g. — — — — — Deductions.]—In a contract for the performance of certain works, it was provided that after certain progress payments had been made to the contractor, no money should be considered to be due or owing to the contractor, nor should the contractor make any claim for or on account of any work executed or maintained by him unless a certificate that the works have been finally & satisfactorily completed & that the balance was due to the contractor, had been given by the superintending officer & countersigned by the engineer-in-chief. Under the specification of the works to be done were provisions that certain contingencies were to be provided for by the contractor at his own expense.

The superintending officer gave, & the engineer-in-chief countersigned, a certificate purporting to be a final certificate, but in the certificate were contained deductions in respect of matters mentioned in the specification. In an action by the contractor to recover the amount deducted:—*Held*: the certificate was merely a certificate in respect of the sum therein certified to be due, & was not a final certificate entitling the contractor to recover the balance of moneys alleged to be due

Sect. 3.—Final certificate:

the action had been commenced before the expiration of two months from delivery of the final certificate, deft. was entitled to judgment.—**COLEMAN v. GITTINS** (1884), 1 T. L. R. 8.

Certificate as condition precedent.—See Sect. 1, *ante*.

SUB-SECT. 2.—EFFECT AND CONCLUSIVENESS.**A. In General.**

94. When not conclusive—Architect acting fraudulently or in collusion.—Pltfs., contractors, covenanted to do certain works for a co. by Oct. 1, 1848, for £112,000, payable from time to time, according to the certificate of the chief engineer of the co. for the time being of the amount of work done, & on pltfs. failing to complete the works to the satisfaction of the engineer, the co. were to be at liberty to enter into possession & use pltfs.' plant, & complete the works. Pltfs. having been informed, in 1847, by the engineer, that the co. would not require the works to be completed within the contract time, the speed of the operations was lessened, & the works were not completed within the time limited by the contract. The co. having given notice of their intention to enter, under the agreement, & complete the works, pltfs. filed their bill, stating that they had not been fully paid for the works actually done by them, & that they had done all the works which they were bound to do, except certain portions which the co. had prevented them from doing, & charging the

to him under the contract.—**SHAW v. MELBOURNE & METROPOLITAN BOARD OF WORKS** (1898), 24 V. L. R. 70.—**AUS.**

h. ——— Security for defective work.—Pltfs., contractors, sought from defts. payment of money under a contract for the erection of a dam across a river. Some extensions or alterations were decided upon, & a further agreement was entered into. Provision was made for payments according to progress estimates of defts.' engineers. Completion to the satisfaction of the engineers was a condition precedent to the right to final payments. Payments according to some progress estimates were made, but further payment was withheld, on the ground that the work had not been completed according to contract. Pltfs. based their demand upon a writing signed by the engineers, denominated "Estimate No. 8," which referred to defective work on sheet piling & sluice-way, & purported to retain a portion of the contract price pending repairs.—**Held**: this was not a certificate of final completion, nor a progress certificate, being merely a proposal by the engineers that the stipulated contract price be paid to the contractors with the return of their deposit, less an amount to be retained to ensure their remedying certain defects.—**MERRIAM v. PUBLIC PARKS BOARD OF PORTAGE LA PRAIRIE**, [1911] 18 W. L. R. 151; *affd.*, [1912] 20 W. L. R. 603; 1 W. W. R. 1082; 2 D. L. R. 702.—**CAN.**

k. ——— Certificate subject to counterclaim.—An architect upon completion of the works, gave the following certificate: "I hereby certify that M., contractor, is entitled to receive £660 as final payment of contract & extras in erecting residence at S. This certificate is issued subject to any counterclaim you may have against M., this being the final instalment."

The contractor brought an action against the proprietor under this certificate, claiming the amount certified therein, & deft. put in a counterclaim

for damages for not doing the work according to the plans & specifications, for omitting certain work, & for doing a portion of the work in a negligent & improper manner.—**Held**: (1) the certificate was a final certificate, & pltf. was entitled to recover the amount claimed; (2) deft. was precluded from setting up any counterclaim as to matters arising under the contract.—**MACHIN v. SYME** (1892), 18 V. L. R. 472.—**AUS.**

l. ——— Combined certificate on separate matters.—Where a building contract provided that, upon a certificate of the architect that the work had been completed to his entire satisfaction, the contractor should be paid such sum as, with any previous payment would amount to 97½ per cent. on the contract price, & upon a further certificate to the same effect, but further stating the final balance due, such balance should be paid within a time named.—**Held**: (1) the two certificates might be combined in one; (2) if such certificate was qualified, stating the contractors were entitled to receive the balance less a sum retained as security for reparation of defects, it could not be treated as a final certificate, entitling the contractor to payment of the final balance.—**WALKER v. BLACK** (1879), 5 V. L. R. 77.—**AUS.**

certificates read as one.—**DAVIDSON v. FRANCIS** (1902), 14 Man. L. R. 141.—**CAN.**

n. ——— Erroneous construction of contract.—**KINLEN v. ENNIS URBAN DISTRICT COUNCIL** (1916), 50 I. L. T. 1.—**IR.**

o. ——— Final estimate—On completion.—**GUILBAULT v. MCGREEVY** (1890), 18 S. C. R. 609.—**CAN.**

p. ——— Showing amount due on forfeiture.—**MCGREEVY v. BOOMER**, Cass. Dig. 2nd ed. 139.—**CAN.**

q. ——— Report by successor in office—Approval of commissioners not obtained.—**R. v. MCGREEVY** (1890), 18 S. C. R. 371.—**CAN.**

engineer with having purposely, fraudulently, & in collusion with the co., certified less than the amount due to pltfs., & praying for an injunction & account. A general demurrer to the bill was overruled, but upon the co. consenting to the removal of the plant by pltfs., a motion afterwards made for an injunction was refused, pltfs. having failed to establish a case of *mala fides* against the co. or their engineer.—**WARING v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.** (1849), 7 Hare, 482; 18 L. J. Ch. 450; 14 Jur. 613; 68 E. R. 199; *affd.* (1850), 2 H. & Tw. 239, L. C.

Annotations:—**Conad.** **Bliss v. Smith** (1865), 34 Beav. 508. **Reid.** **Garrett v. Banstead & Epsom Downs Ry. Co.** (1865), 4 De G. J. & Sm. 462; **Garrett v. Salisbury & Dorset Junction Ry. Co.** (1866), L. R. 2 Eq. 358; **Smith v. Howden Union & Fowler** (1890), 2 Hudson's B. C., 4th ed., 156; **Kellett v. New Mills U. D. C.** (1900), 2 Hudson's B. C., 4th ed., 298; **Foster & Dicks v. Hastings Corp.** (1903), 87 L. T. 736. **Mentd.** **Re Brighton Club & Norfolk Hotel Co.** (1865), 35 Beav. 204.

Time for completion, see Part II., Sect. 3, *ante*.

95. ————An action may be maintained by a railway co. against a contractor, for not doing brickwork of the specified thickness, although certified to have been so done by the co.'s engineers, in collusion with a sub-contractor, but the fraud or neglect of the engineers is material to be considered in regard to the question of damage, though not affecting the right of action against the contractor.—**SOUTH EASTERN RY. CO. v. WARTON** (1861), 2 F. & F. 457, N. P.

96. ——— Architect influenced by building owners.—P. was employed by a rural district council to construct certain works. In the contract it was provided that "the decision of the

—]—**Ross v.** (1895), 4 Exch. C. R. 390.—**CAN.**

PART III. SECT. 3, SUB-SECT. 2. -A.

a. Absence of fraud—Though containing errors.—An architect's final certificate given three years after the completion of the building, though containing errors, was given in good faith:—**Held**: it was binding.—**RICHARDS v. KNIGHT** (1916), 12 Tas. L. R. 99.—**AUS.**

t. ——— Certificate negligently delayed.—Where, under a contract which made the right of the contractors to receive payment for the construction of certain works dependent upon the certificate of an engineer, who was also sole arbitrator of all disputes, the engineer unjustifiably delayed the issue of the certificate for seven months & acted in a shifting & vacillating, though not fraudulent manner, & probably caused heavy loss to the contractors by his mistakes:—**Held**: in the absence of collusion on the part of the corpn., the certificate could not be set aside.—**WALKLEY v. VICTORIA CITY** (1900), 7 B. C. R. 481.—**CAN.**

94 i. When not conclusive—Architect acting fraudulently or in collusion.—To an action for work & labour deft. pleaded the money was alleged to be due under an architect's certificate which had been obtained by the fraud of pltfs. & the collusion of the architect with them. Pltfs. replied it was a term of the contract that the certificate should be final & not be objected to on the ground of fraud or collusion:—**Held**: the replication was bad as setting up a contract void for being against public policy.—**REDMOND v. WYNNE** (1892), 13 N. S. W. L. R. 39.—**AUS.**

94 ii. ————Where a certificate was wilfully unfair & partial in only one particular:—**Held**: not to be conclusive.—**ALLEN v. PIERCE** (1895), 3 Terr. L. R. 319.—**CAN.**

surveyor with respect to the value, amount, state & condition of any part of the works executed, or of any part thereof altered, omitted, or added, & also in respect to any & every question that may arise concerning the construction of this contract, or the plans, drawings, specifications, or bills of quantities, or schedule of prices, or the execution of the works hereby contracted for, or in any wise relating thereto, shall be final & without appeal." Disputes arose, & after protracted negotiations, the surveyor gave his final certificate. P. brought an action against the council, in which he alleged that the surveyor's final certificate "was not honestly made or given in the exercise of, or reliance upon, his own judgment, but was made & given by reason of the interference of & in obedience to the direction and orders of the council:—*Held*: as the council had interfered, though without any fraud on their part, with the surveyor in the exercise of his functions as quasi-arbitrator between the parties, the final certificate was not conclusive & binding on the contractor.—PAGE v. LLANDAFF & DINAS POWIS RURAL DISTRICT COUNCIL (1901), 2 Hudson's B. C., 4th ed., 316.

97. ———.]—A building contract provided that the decision of the architect of the building owners on all matters in relation to the work should be final, & that payments should be made on the certificate of the architect. The architect, under a misapprehension of his position, allowed his judgment to be influenced by the building owners & improperly delayed issuing his certificates in accordance with their instructions. After the completion of the work & the expiration of the period of maintenance the contractor sued the building owners for the final balance alleged to be due under the contract, but the final certificate was not issued until after the commencement of the action:—*Held*: the building owners were precluded from setting up as a defence to the action that the certificate was conclusive as to the amount of the claim.—HICKMAN & Co. v. ROBERTS, [1913] A. C. 229; 82 L. J. K. B. 678; 108 L. T. 436, n.;

a. ——— Continued unreasonable-ness & improper conduct.]—BOTHWELL v. UNION GOVERNMENT (MINISTER OF LANDS) (1917), App. D. 262.—S. AF.

b. How far conclusive—Final evidence of completion.]—Defts. agreed with pltf. to pay him for work to be done by him according to the certificate of the engineer of a certain railway that the work had been fully completed, & not otherwise:—*Held*: pltf. was bound, in the absence of fraud or undue influence, by the certificate of the engineer, & could not dispute the same.—CANTY v. CLARK (1879), 44 U. C. R. 505.—CAN.

c. ———.]—*Held*: upon the construction of the contract, the architect's certificate was conclusive evidence that the work was performed.—BROWN CONSTRUCTION Co. v. BANNATYNE SCHOOL DISTRICT CORPN. (1912), 21 W. L. R. 827; 5 D. L. R. 523.—CAN.

98 i. ——— Final evidence of satisfaction.]—The architect's final certificate bars the contention of the owner of the land that the work is not up to the standard of the specification in cases where the architect is authorised to give such a certificate.—McLEOD v. WILSON (1897), 2 Terr. L. R. 312.—CAN.

99 i. ——— Under-statement of amount of work—Certificate condition precedent.]—The tender for construction of a sidewalk signed by contractors provided that the work should be completed in accordance with the conditions & specifications & payment made on the

engineer's certificate. The payments were to be made at a price per superficial ft. The contractors claimed payment for work done in the vertical surface of the sidewalk where it formed a curb to the highway whereas the engineer only allowed him the superficial horizontal measurement:—*Held*: the engineer properly interpreted the contract & specifications & even if he had been in error as to the mode of measuring the work, there being no fraud the contractor was bound by the certificate.—GUELPH PAVING Co. v. BROCKVILLE TOWN (1904), 4 O. W. R. 483; affd. 5 O. W. R. 626.—CAN.

d. ——— Mistake in measurements—No fraud or collusion.]—Pltf. contracted to build foundations for deft. at a fixed price per cubic yard of concrete, the measurements to be as certified by the honorary architect, whose decision was to be final & binding between the parties. The architect certified for amounts representing a quantity of concrete which deft. alleged to be in excess of that actually put in:—*Held*: in the absence of proof of fraud or collusion, pltf. was entitled to recover the full amount certified, deft.'s remedy, if any, being against the architect.—MILNE v. PADDAY (1914), E. D. L. 277.—S. AF.

e. ——— Sufficiency of proof.]—A contract provided that the work should be conform to the plans & specifications of a certain engineer according to whose measurements during the progress & at the conclusion of the work the payments should be made. The contract also named an arbiter for the

sub nom. ROBERTS v. HICKMAN & Co., 2 Hudson's B. C., 4th ed., 426, H. L.

Annotations:—Consd. Eaglesham v. McMaster, [1920] 2 K. B. 169. Refd. Re Nott & Cardiff Corpn., [1918] 2 K. B. 146. Mentd. Bristol Corpn. v. Aird, [1913] A. C. 241.

Disqualification of engineer or architect from acting as arbitrator, see Part XV., Sect. 4, post.

98. How far conclusive—Final evidence of satisfaction.]—By a building contract, the builder agreed to repair a house according to the plans & specifications, & to the satisfaction of the architect, the work to be done under the architect's directions. By the specification the builder was to allow for the value of the old lead, & he alleged that he made this allowance in his estimate. The architect certified his satisfaction of the completion of the contract. In an action by the builder against the owner of the house for the money agreed to be paid by the latter:—*Held*: no evidence could be received from deft. that the work was not done according to the plans & specifications, & unless pltf. could prove that he had informed deft. or the architect, of his having allowed for the old lead in his estimate, he must deduct the value from the amount of his charge.—HARVEY v. LAWRENCE (1867), 15 L. T. 571.

99. ——— Under-statement of amount of works—Certificate condition precedent.]—The engineer of a railway co. prepared a specification of the works on a proposed railway, & certain contractors fixed prices to the several items in the specification, & offered to construct the railway for the sum total of the prices affixed to the items. A contract under seal was thereupon made between the contractors & the co., by which the contractors agreed to construct & deliver the railway completed by a certain day at a sum equal to the sum total above mentioned. The contract contained provisions making the certificate of the engineer conclusive between the parties, & it was provided that all accounts relating to the contract should be submitted to & settled by the engineer, & that his certificate for the ultimate balance should be final

determination of all disputes. The work being finished, the contractor declined to receive payment of the balance tendered him on the ground that the measurements according to which the balance was calculated were inaccurate. He then raised an action on the contract for the balance of the contract price calculated not according to the measurements of the engineer named in the contract but of one whom he himself had employed. He did not particularise wherein the measurements challenged by him were defective or conclude for a reference to the arbiter nor aver that the points in dispute were not proper matters for the consideration of the arbiter:—*Held*: pltf. had not stated any relevant grounds for throwing aside the measurements of the engineer named in the contract & having the claim estimated in any other manner.—MACDONALD v. MALCOLM (1855), 17 Dunl. (Ct. of 1033.—SCOT.

f. ——— As to amount due.]—During the continuance of the works disputes arose as to the amount due to pltf., although certified by the architect as agreed, & in consequence pltf. refused to continue the work, whereupon defts., after giving due notice, entered upon the premises:—*Held*: in the absence of proof of collusion between the architect & pltf., defts. were bound by the architect's certificate as to the amount due to pltf.—KUPPUSAMI NAIDU v. SMITH & Co. (1895), 1 L. R. 19 Mad. 178.—IND.

g. ———.]—WATTS v. McLEAY (1911), 19 W. L. R. 916.—CAN.

Sect. 3.—Final certificate: Sub-sect. 2, A., B.

and conclusive. The railway was completed & the engineer gave his final certificate as to the balance due to the contractors:—*Held*: although the amount of the works to be executed might have been under-stated in the engineer's specification, the contractors could not in the circumstances maintain any claim against the co. on that ground, & in the absence of fraud on the part of the engineer, & where his certificate had been made a condition precedent to payment, his certificate must be conclusive between the parties.—*SHARPE v. SAN PAULO RY. CO.* (1873), 8 Ch. App. 597; 29 L. T. 9, L. J.J.

Annotations:—*Reid. Re Ford & Remrose* (1902), 18 T. L. R. 443; *Re Nott & Cardiff Corpn.*, [1918] 2 K. B. 146. *Mentd. Re Hohenzollern Act. für Locomotivbau & City of London Contract Corpn.* (1886), 54 L. T. 596; *Meldrum v. Scorer* (1887), 56 L. T. 471.

100. — Based on measurements made by another person.—An architect's certificate as to the builder's rights to payment is conclusive, even if on its face it is based on measurements made by another person for the certifying architect, provided that it is not shown that the architect has acted corruptly or abdicated his duty.—*CLEMENCE v. CLARKE* (1879), 2 Hudson's B. C., 4th ed., 54.

Annotation:—*Mentd. Chambers v. Goldthorpe, Restell v. Nye*, [1901] 1 K. B. 624.

101. Between whom—Building owner & architect.—In a building contract the architect's certificate is final, as between the builder & the building owner, but not as between the building owner & the architect himself.—*ROGERS v. JAMES*

h. — — — — ——*BROWN CONSTRUCTION CO. v. BANNATYNE SCHOOL DISTRICT CORPN.* (1912), 21 W. L. R. 827; 5 D. L. R. 623.—CAN.

k. — — — — ——*ROSS v. REGINA AGRICULTURAL & INDUSTRIAL EXHIBITION ASSOCN.* (1911), 19 W. L. R. 53.—CAN.

l. — — — — ——*GILBERT BROTHERS ENGINEERING CO., LTD. v. R.* (1919), 57 S. C. R. 611.—CAN.

m. — — — — ——*Holding back amount after certificate given.*—*MANDERS v. MOOSE JAW CITY* (1914), 28 W. L. R. 821.—CAN.

n. Between whom — Building owner & contractor—In absence of express provision against.—An architect's certificate under a building contract may be made final & binding on both the owner & contractor, & in that sense conclusive as between them. That result, however, does not follow if the contract itself affords evidence that the certificate is not a final settlement & does not absolve the contractor from responsibility for work badly done or omitted.—*PRICE v. FORBES* (1915), 7 O. W. N. 712; 33 O. L. R. 136; 23 D. L. R. 532.—CAN.

o. — — — — ——*Contract silent as to conclusiveness.*—*Held*: a certificate by the engineer that the work had been performed to his satisfaction would have been binding, & it made no difference that the agreement did not state in words that the certificate should be final & conclusive.—*KNOX v. PATU-TAHI ROAD BOARD* (1892), 11 N. Z. L. R. 496.—N.Z.

102 i. Action for larger amount than certified—Whether maintainable.—Pltf. signed a contract agreeing that no money was to be paid by defts. unless & until an estimate or certificate that the work was satisfactory had been signed by the engineer. The possession of the certificate was a condition precedent to the contractor's right to be paid. The amount claimed was \$4,181, but the certificate only provided for payment of \$1,490.72. This amount

(1891), 56 J. P. 277; 8 T. L. R. 67; 2 Hudson's B. C., 4th ed., 172, C. A.

Annotation:—*Distd. Chambers v. Goldthorpe, Restell v. Nye*, [1901] 1 K. B. 624.

102. Action for larger amount than certified—Injunction to restrain.—Defts. contracted to do work for pltf., which was to be subject to the approval of an architect, & no payment was to be made without his certificate. Defts. demanded a larger sum than was certified by the architect, & brought an action for the amount. Pltf. filed his bill for an injunction to restrain the action:—*Held*: pltf. could as well plead at law as in equity that the architect's certificate was conclusive under the contract, & there was no equity to justify the bill.—*DE WORMS (BARON) v. MELIER* (1873), L. R. 16 Eq. 554.

B. As to Subject Matter.

103. Statement of balance due to contractor—Not necessary.—By a contract for the building of a borough gaol, it was provided that no alterations should be made without the written authority of the architect, by whom the value of such alterations should be ascertained, & that no allowance for alterations should be made, unless the value of same was ascertained at the time the work was done, & entered in a book, such entry to be submitted to & approved of by the architect, that no payments should be made by the contractors, except on the production of a certificate from the architect that a certain amount of work had been done, & that the architect should deliver his certificate thereof at

had been paid:—*Held*: pltf. could not succeed.—*FRY v. INDIAN HEAD TOWN* (1907), 7 W. L. R. 293.—CAN.

102 ii. — — — — ——When certain additions to a contract have been allowed & amounts certified by the engineer to be due for the same, a condition that no sum shall be considered owing to the contractor unless such certificate shall have been given by the engineer, precludes the contractor from recovering more than the amount for which the engineer has certified.—*SMYTH v. R.* (1882), 1 N. Z. L. R. C. A. 80.—N.Z.

102 iii — — — — ——*ARDAGH v. TORONTO CITY* (1886), 12 O. R. 236.—CAN.

p. Dismissal of certifier — General rule.—Where a contractor agrees to erect a house, & the agreement provides that the work is to be done to the satisfaction of an architect named in the agreement, upon whose certificates payments are to be made, & that the architect's certificate shall be conclusive evidence between the parties of the due completion of the work, the contractor, in the absence of fraud, is bound by such certificate, & cannot appoint a fresh architect during the progress of the work.—*BURNS & KENEALY v. FURBY* (1885), 4 N. Z. L. R. 110.—N.Z.

q. — — — — ——A building owner, who has bound himself by contract to pay the contractor for work certified by an architect, cannot on his own initiative dismiss such architect, & thus avoid the consequences of certificates given by him.—*MILNE v. PADDAY* (1914), E. D. L. 277.—S. AF.

r. — — — — ——*Certificate given subsequently.*—*Held*: the architect, having been discharged two days before his certificate was given, was not, under the contract, the person to give a certificate.—*CLARKE v. MURRAY* (1885), 11 V. L. R. 817.—AUS.

s. — — — — ——*Held*: upon the true construction of the contract the final certificate could only be given by

the architect "for the time being" & as the architect had given certificates after his dismissal, they were not binding on the building proprietor.—*HOARE v. MCCARTHY*, [1916] V. L. R. 656.—AUS.

t. — — — — ——A building contract provided that defts. for whom certain work was being done, should appoint an architect or agent, on whose certificate payments should be made, & to whom all disputes should be referred. An architect whose name was submitted to the contractor & approved of by him was appointed, & various sums were paid under his certificate, but before the completion of the work he was dismissed by the employer without the consent of the contractor. The cause of the dismissal was not explained to the ct. On the completion of the work the contractor obtained this architect's certificate for balance due under the contract for work & extras, & sued on it, defts. tendering a quantum meruit:—*Held*: defts. were liable for the amount certified.—*MELVIN v. ST. CYPRIAN'S SOCIETY BUILDING COMMITTEE* (1894), 9 E. D. C. 1.—S. AF.

a. — — — — ——*MURRAY v. COHEN* (1888), 9 N. S. W. Eq. 124.—AUS.

b. Certificates by persons not designated—Departure from agreement.—*SPADAFORA v. GRIFFIN* (1914), 20 B. C. R. 475.—CAN.

c. — — — — ——*Acquiescence.*—*MOORE v. FERGUSSON, MOORE v. FERGUSSON & MITCHELL* (1892), 18 V. L. R. 266.—AUS.

PART III. SECT. 3, SUB-SECT. 2.—B.

d. Deductions from contract price—Error in quantities—Certifiers exceeding jurisdiction.—*Held*: the certificate of the engineers was binding & could not be set aside as regards any matter coming within the jurisdiction of the engineers, but the engineers had no right to deduct any sum from the bulk sum contract price on account of an

the end of every fourteen days, & "that the contractors should be entitled to receive at the end of every fourteen days the amount for which the architect should have given his certificate, the amount of such certificate to be less by certain varying proportions than the value of the work done until 90 per cent. of the whole should be completed, & that no further payments should be made to the contractors until within three calendar months after the architect should have certified the completion of the whole work to his satisfaction, when one half of the remainder should be paid, & the balance at the end of twelve months from the date of the architect's certificate of completion:—*Held*: the architect's certificate of final completion was sufficient, without mentioning the amount remaining due.—*PASHBY v. BIRMINGHAM CORPN.* (1856), 18 C. B. 2; 139 E. R. 1262.

104. Payment for extras—Implied power.]—Where a contract for the erection of works provided that all extras or additions, payment for which the contractor should become entitled to under the contract, should be paid for at the price fixed by the surveyor appointed by the contractor's employer:—*Held*: this provision impliedly gave power to the surveyor to determine what were extras under the contract, & his certificate awarding a certain amount to be due for extras was conclusive.—*RICHARDS v. MAY* (1883), 10 Q. B. D. 400; 52 L. J. Q. B. 272; 31 W. R. 708, D. C.

Extras generally, see Part VI., Sect. 2, Sub-sect. 4, *post*.

C. Effect of Arbitration Clause.

See, generally, Part XV., *post*.

105. Certificate condition precedent.]—Where a contract has provided that the certificate of the engineer or of an arbitrator shall be a condition precedent to payment, the ct. does not obtain jurisdiction because of the power to refer to arbitration.—*SHARPE v. SAN PAULO RY. CO.* (1873), 8 Ch. App. 597; 29 L. T. 9, L. J.

Annotations:—*Reid. Re Hohenzollern Act. für Locomotivebau & City of London Contract Corpn.* (1886), 54 L. T. 596; *Re Nott & Cardiff Corpn.*, [1918] 2 K. B. 146. *Mentd. Meldrum v. Scorer* (1887), 56 L. T. 471; *Re Ford & Beinrose* (1902), 18 T. L. R. 443.

106. Certificate as subject of reference.]—Where, in a building contract, it is stipulated that the certificate of the architect or an award of the referee is to be conclusive, a certificate, if given, cannot be the subject of reference to the referee.—*CLEMENCE v. CLARKE* (1879), 2 Hudson's B. C., 4th ed., 54.

alleged error in the calculation of the quantities, & the certificate should be corrected in that respect.—*PETERS v. QUEBEC HARBOUR COMRS.* (1891), 19 S. C. R. 685.—CAN.

e. Title to goods supplied for building.]—It is no part of a building inspector's duty to inquire as to the title of goods supplied for the building, & where a builder contracts to supply certain goods, & does not, but procures another person to supply them, the owner of the building is not estopped by any certificate under the hand of the inspector from suing on the breach of contract.—*BAUCHOP v. PORT CHALMERS (MAYOR, COUNCILLORS, & BURGESS OF THE BOROUGH)* (1892), 11 N. Z. L. R. 527.—N.Z.

PART III. SECT. 3, SUB-SECT. 2.—C.

1. General rule.]—Under an ordinary building contract, it is only in the event of a dispute between the architect & the contractor as to the work done that occasion arises for going to arbn. In all other events the

Annotation:—*Consd. Chambers v. Goldthorpe, Restell v. Nye*, [1901] 1 K. B. 624.

107. Date of disputes material.]—A building contract provided (clause 20) that the certificate of the architect or an award of a referee was to be conclusive, & (clause 22) that in case any dispute should arise the matter should be referred to arbn. Disputes arose, to the knowledge of the architect, before he gave his final certificate:—*Held*: (1) clause 22 was in the nature of a proviso on clause 20, so that if the conditions contemplated by clause 22 arose before the architect had given his final certificate, his power to give it was taken away; (2) in the above circumstances the jurisdiction of the architect to make a final certificate was ousted, & the dispute fell to be determined by the arbitrator, & the final certificate given was *ultra vires*.—*LLOYD BROTHERS v. MILWARD* (1895), 2 Hudson's B. C., 4th ed., 262, C. A.

Annotations:—*Consd. Chambers v. Goldthorpe, Restell v. Nye*, [1901] 1 K. B. 624. *Distd. Eaglesham v. McMaster*, [1920] 2 K. B. 169.

108. Finality of certificate destroyed.]—In a building contract an architect was nominated who was given a general control over the works, which were to be carried out in accordance with his directions & to his satisfaction. By a clause in the contract he was empowered to order the removal of improper materials, & the re-execution of work not done in accordance with the drawings & the specification. By another clause any defects which might appear within twelve months from the completion of the works, arising, in the opinion of the architect, from materials or workmanship not in accordance with the drawings & specification, were upon the written direction of the architect to be made good by the contractor at his own cost, unless the architect should decide that he ought to be paid for same. A further clause, after providing for payment of the contractor under certificates issued by the architect, declared that "no certificate shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects as provided by this contract." The final clause provided that in case any dispute or difference should arise as to the construction of the contract, or any matter or thing arising therefrom, except certain specified things, notice thereof should forthwith be given, & such dispute or difference should be referred to arbn., & the arbitrator should have power to open up, review, & revise any certificate, opinion, decision, requisition,

no power to reopen the matter.—*GILBERT BROTHERS ENGINEERING CO., LTD. v. R.* (1918), 17 Exch. C. R. 141; 40 D. L. R. 723; *affd.* 57 S. C. R. 611.—CAN.

107 i. Date of disputes material.]—*Held*: whatever might be the effect of the arbn. clause, if a dispute arose after the engineer had made a valuation & certificate as provided for in the contract, there was then no dispute or difference within the clause.—*SWINEY & M'LARNON v. BALLYMENA TOWN COMRS.* (1888), 23 L. R. Ir. 122, 129.—IR.

108 i. Finality of certificate destroyed.]—*Held*: (1) the effect of the arbn. clauses in the contract was to destroy the finality of the architect's certificate upon any matter which was not otherwise distinctly provided for; (2) the matter in dispute not being so provided for, defts. were entitled to plead that the work was not in accordance with the contract & that the final certificate had been wrongly given.—*JOHNS & SON v. WEBSTER & TONKS* (1916), 35 N. Z. L. R. 1020.—N.Z.

certificate is conclusive.—*MURRAY v. COHEN* (1888), 9 N. S. W. Eq. 124.—AUS.

105 i. Certificate condition precedent—Power of certifier's successor to reopen.]—By the contract the contractor was not paid the full amount due him until he had obtained the certificate of the engineer, for the time being, having control of the work, that the work had been completed to his satisfaction. B. was the engineer for the time being when the work was completed. He drew up a document which was intended to be a final certificate. In this certificate a certain claim was neither expressly allowed nor disallowed, but was left for the determination of the Exchequer Ct. under a clause in the contract which provided that all matters of difference between the parties arising out of the contract, the decision whereof was not especially given to the engineer, should be referred to the Exchequer Ct.:—*Held*: as it appeared that B. had intended to give a final certificate, an engineer subsequently appointed had

Sect. 3.—Final certificate: Sub-sect. 2, C. & D.; sub-sects. 3 & 4.]

or notice, save in regard to the matters expressly excepted, & to determine all matters in dispute of which notice should have been given. In an action by the contractor against the building owner to recover sums due on certificates issued by the architect, deft. set up by way of defence & counter-claim that the work done & materials supplied were defective & unsuitable, & not in accordance with the terms of the contract:—

Held: (1) the arbn. clause destroyed the finality of the certificates, & deft. was entitled to set up the defence & counterclaim to the action; (2) (STIRLING, L.J.) the provision, that no certificate should be considered conclusive evidence as to the sufficiency of work or materials to which it referred, was general, & the clause could not be read as applying only to the liability of the contractor to make good defects.—ROBINS v. GODDARD, [1905] 1 K. B. 294; 74 L. J. K. B. 167; 92 L. T. 10; 21 T. L. R. 120, C. A.

Annotation:—Distd. Eaglesham v. McMaster, [1920] 2 K. B. 169.

Architect as arbitrator—Liability of.—See No. 425, *post*.

D. After-discovered Defects.

109. Whether certificate binding.—Where an employer contracted that he should be at liberty within twelve months of the architect's certificate to compel the builder to remedy & put right any work discovered to be unsound:—*Held*: at the end of the twelve months the architect's certificate became final & conclusive, & no action lay against the builder at the expiration of that period on account of unsound work subsequently discovered.—BATEMAN (LORD) v. THOMPSON (1875), 2 Hudson's B. C., 4th ed., 36.

Annotation:—Consd. Dunaberg & Witepsk Ry. Co. v. Hopkins, Gilkes (1877), 36 L. T. 733.

110.—[An English co., which owned a railway in Russia, entered into a contract for the manufacture & delivery to them of rails for their railway. The contract provided that a sample should be sent to the co.'s engineer for approval before the commencement of the work, but it was "to be expressly understood that such approval is not in any way to relieve the contractor from any

of the conditions or stipulations contained in this specification." During the progress of the work tests were to be applied by the engineer at his discretion, & the entire contract was to be executed in every respect to the satisfaction of the engineer, "who shall have the power of rejecting any rails or fishing plates he may disapprove on any ground whatever, & whose decision on any points of doubt or dispute that may arise in reference to this contract shall be final and binding on all parties. The engineer will inspect, either personally or by deputy, every stage of the process of the manufacture at the works. This examination at the works is not in any way to commit the co. to the approval & acceptance of any rails or fishing plates which, when delivered, shall not be strictly in accordance with the drawings & specification." After the rails had been delivered to the co. & paid for by them, & more than half of them laid down in Russia, it was discovered that they were defective. An action having been brought by the co. for breach of contract:—*Held*: it could not be maintained, as the contract showed that the parties intended the final expression of the engineer's satisfaction with the entire contract to be conclusive.—DUNABERG & WITEPSK RY. CO. v. HOPKINS, GILKES & CO., LTD. (1877), 36 L. T. 733.

111. — Mere oversights & casual omissions.—A building contract provided that no final or other certificate should in any circumstances cover or relieve the contractor from his liability for any fraud, default, or wilful deviation from the contract until four years from completion had elapsed. Within four years the employers brought an action, in which they alleged fraud, default, & wilful deviation:—*Held*: default did not include "mere oversights or casual omissions," but referred to intentional breaches of contract.—LONDON SCHOOL BOARD v. WALL (1890), 2 Hudson's B. C., 3rd ed., 165.

Annotation:—Mentd. Dakin v. Lee, [1916] 1 K. B. 566.

112. — Deliberate & substantial variations.—A building contract provided that no final or other certificate should in any circumstances cover or relieve the contractor from his liability for any fraud, default, or wilful deviation from the contract & the works described in the drawings

PART III. SECT. 3, SUB-SECT. 2.—D.

109 i. Whether certificate binding—No direct expression of satisfaction.—Defts. erected a building under a contract, which provided that only the final certificate of the architects or the final payment, were to be conclusive. No payment was to be construed as an acceptance of defective work or materials. Three weeks after erection, the building collapsed. A certificate, not purporting to be a final certificate, certifying that the contractors were entitled to a certain sum & not exonerating the contractors from the terms of the contract, had been issued by the architects:—*Held*: no such direct expression of satisfaction had been made, as would in the circumstances bind plffs.—COCKSHUTT FLOW CO. v. ALBERTA BUILDING CO. (1910), 13 W. L. R. 234; varied 3 Alta. L. R. 503.—CAN.

109 ii. — Payment not to exonerate contractor.—The granting of a certificate does not exonerate the contractor from liability for any defect, attributable to bad material or bad workmanship, where, by the terms of the contract, payment will not so exonerate him.—PRICE v. FORBES (1915), 7 O. W. N. 712; 33 O. L. R. 136; 23 D. L. R. 532.—CAN.

109 iii. — Certificate not made conclusive by contract—Work negligently performed.—SYDNEY MUNICIPAL COUNCIL v. EVERS & KENNEDY (1881), 2 N. S. W. L. R. 151.—AUS.

109 iv. Issued without objection.—A contract for the making of drains to the depth of 3½ ft. contained a stipulation that the work should be done to the satisfaction of an inspector to be appointed by the employer. The inspector failed to inspect the work, but gave certificates that it had been duly executed upon the faith of which the employer paid various instalments of the price. The employer subsequently ascertained that the drains fell far short of the stipulated depth. In an action by the contractor for payment of the remaining instalments:—*Held*: (1) he was not entitled to recover, for he had failed to carry out his part of the contract; (2) the employer was not entitled to implement or damages for the work had proceeded in the sight of his representative without objection.—MULDOON v. PRINGLE (1882), 9 R. (Ct. of Sess.) 915.—SCOT.

109 v. — — — — ——A certificate delivered by an architect for a payment on account of the contract price, & payment thereof pursuant to the contract, at a time when the inadequate

quality of the material & work has not been ascertained, is no ground of estoppel against the owner who sets up his rights of warranty, in defence to an action for the balance of the contract price.—REID v. BIRKS (1910), Q. R. 39 S. C. 133.—CAN.

109 vi. — Issued on reports of supervisor—Appointed by owners.—AYR ROAD TRUSTEES v. ADAMS (1883), 11 R. (Ct. of Sess.) 326.—SCOT.

109 vii. — Limitation clause—Computation of time.—A building contract provided that the work should be done under the superintendence & to the satisfaction of the architect, & payments should be made from time to time on certificates from the architect for work done & completed, the employer being entitled to retain 20 per cent. to be devoted towards making good any defects which might appear within two months of the completion of the building. A final certificate having been given:—*Held*: the two months must be reckoned from the date of the giving of the architect's certificate, & defects complained of after the expiration of two months formed no ground of action by the employer against the contractor.—MC CARTHY v. VISSER (1904), 22 S. C. 122; 15 C. T. R. 72.—S. AF.

& specification, until four years from completion had elapsed:—*Held*: to prove breach of this condition it was necessary to show that deliberate & substantial variations had been made with the object of benefiting the contractor or saving his pocket, i.e., something in the nature of what was popularly known as "scamping the work."—*LONDON SCHOOL BOARD v. JOHNSON* (1891), 2 Hudson's B. C., 4th ed., 176.

Maintenance & defect clauses.]—See Part VII., post.

SUB-SECT. 3.—DISQUALIFICATION OF CERTIFIER.

113. What will not disqualify—Certifier shareholder in company employing.]—A contract between a railway co. & a building contractor stipulated that payments should from time to time, during the progress of the works, be made by the co. to the contractor, such payments to be made on certificates granted by the "principal engineer of the co. or his assistant resident engineer." In case of dispute between the contractor & the assistant resident engineer the decision of "the principal engineer of the co." was to be final, but at the completion of the works, if the contractor & the principal engineer differed the differences between them were to be settled by arbn. After differences had so arisen between the contractor & the co., it was discovered by the former that the principal engineer was a shareholder in the co. On a bill to have accounts taken, one of the grounds for which was this fact, then first discovered:—*Held*: no fraudulent concealment being alleged, it formed no ground for relief, for by contract the contractor had bound himself to submit to the judgment of a particular individual, whose position as principal engineer made him interested for the co.—*RANGER v. GREAT WESTERN RY. CO.* (1854), 5 H. L. Cas. 72; 24 L. T. O. S. 22; 18 Jur. 795; 10 E. R. 824, H. L.; *reversq.* (1843), 3 Ry. & Can. Cas. 298.

Annotations:—Refd. Hill v. South Staffordshire Ry. Co. (1865), 11 Jur. N. S. 192. *Mentd.* Kirk v. Bromley Union Guardians (1846), 11 Jur. 49; Waring v. M. S. & L. Ry. Co. (1849), 7 Hare, 482; South Wales Ry. Co. v. Wythes (1854), 1 K. & J. 186; *Re* London, Birmingham & Buckinghamshire Ry. Co., *Ex p.* Curzon (1857), 6 W. R. 141; Scott v. Liverpool Corpn. (1858), 3 De G. & J. 334; *Re* Royal British Bank (1859), 3 De G. & J. 387; Thornhill v. Neats (1860), 8 C. B. N. S. 831; Pawley v. Turnbull (1861), 3 Giff. 70; New Brunswick & Canada Ry. Co. v. Conybeare (1862), 9 H. L. Cas. 711; Thames Iron Works Co. v. Royal Mail Steam-Packet Co. (1862), 13 C. B. N. S. 358; Wildes v. Russell (1866), Har. & Ruth. 689; Western Bank of Scotland v. Addie, Addie v. Western Bank of Scotland (1867), L. R. 1 Sc. & Div. 145; Phillips v. Eyre (1870), L. R. 6 Q. B. 1; Mackay v. Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394; Stegmann v. O'Connor (1890), 81 L. T. 627; Taff Vale Ry. Co. v. Amalgamated Soc. of Ry. Servants, [1901] A. C. 426; Foster & Dicksee v. Hastings Corpn. (1903), 87 L. T. 736; Lodder v. Slowey, [1904] A. C. 442.

Certifier becoming lessee of railway.—At rent depending on amount certified for.]—Where payments to a contractor are to be certified for by the engineer of a railway co., he is not disqualified from so doing on account of his having become lessee of the railway, at a rent depending on the amount so certified for.—*HILL v. SOUTH STAFFORDSHIRE RY. CO.* (1865), 12 L. T. 63; 11 Jur. N. S. 192, L. JJ.

115. What will disqualify—Assurance by certifier to employer as to price—Inducement to cut

down cost.]—Where a builder by his contract bound himself to abide by the decision & certificates of an architect as to the amounts to be paid for the work, not knowing that the architect had given an assurance to the employer that the cost of the building should not exceed a certain specified amount, although he refused to guarantee that amount:—*Held*: the decision of the architect made under such a bias was not binding, & directions given to ascertain under the authority of the ct. how much remained justly due to pltf.—*KEMP v. ROSE* (1858), 1 Giff. 258; 32 L. T. O. S. 51; 22 J. P. 721; 4 Jur. N. S. 919; 65 E. R. 910.

Annotations:—Refd. Scott v. Liverpool Corpn. (1858), 3 De G. & J. 334; Lariviere v. Morgan (1872), 26 L. T. 339; De Worms v. Mellier (1873), L. R. 16 Eq. 554; Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 520, n. *Mentd.* Edwards v. Aberayron Mutual Ship Insee. Soc. (1876), 1 Q. B. D. 563; Botterill v. Ware Grdns. (1886), 2 T. L. R. 621.

116. — Unfair conduct.]—Bill by a contractor, alleging unfair conduct on the part of the architect, whose decision was by the terms of the contract made final, & who ousted the contractor & finished the buildings. The ct., on proof of such unfair conduct, decreed payment of the balance due to pltf. on the contract, & relieved the contractor from penalties, declared the architect's decision not binding, & ordered both defts., the architect & the contracting party, to pay the costs of the suit.—*PAWLEY v. TURNBULL* (1861), 3 Giff. 70; 4 L. T. 672; 7 Jur. N. S. 792; 66 E. R. 327.

Annotations:—Consd. Lariviere v. Morgan (1872), 26 L. T. 339. *Expld.* Smith v. Howden Union & Fowler (1890), 2 Hudson's B. C., 4th ed., 156. *Refd.* De Worms v. Mellier (1873), L. R. 16 Eq. 554; Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 520, n.; Kellett v. New Mills U. D. C. (1900), 2 Hudson's B. C., 4th ed., 298. *Mentd.* Re Nott & Cardiff Corpn., [1918] 2 K. B. 146.

117. — Agreement obtained by fraud—False certificates.]—A local board contracted with T. that T. should make a reservoir, payment to be by instalments on certificates of an engineer. Some payments were made, when it was discovered that the reservoir did not hold water, & further payment was refused, the board, by way of compromise, agreed to pay £800 in six months, & this contract was assigned by T. to his banker, who sued the board:—*Held*: (1) the board might plead as a defence that T. & the engineer had conspired to give false certificates, & on this being proved the board was not liable; (2) the board need not give notice of their defence till the price was sued for.—*WAKEFIELD & BARNESLEY BANKING CO. v. NORMANTON LOCAL BOARD* (1881), 44 L. T. 697; 45 J. P. 601, C. A.

SUB-SECT. 4.—WHEN DISPENSED WITH.

118. Certificate wrongly withheld—Collusion & fraud—Must be specially pleaded.]—Where a building agreement between pltf. & deft. contained a proviso, that no instalment should be paid unless pltf. delivered to deft. a certificate, signed by the surveyor of deft., that the works were performed according to the specifications:—*Held*: the want of a certificate was a good defence under the general issue to an action for the instalments, & pltf. was not at liberty to prove that it was withheld by collusion with deft.—*MILNER v.*

money which belongs to the contractor, that would at most be *prima facie* evidence of collusion; (2) the facts in this case completely rebutted any such presumption.—*LAWRENCE v. KERN* (1910), 14 W. L. R. 337; 3 Sask. L. R. 253.—CAN.

PART III. SECT. 3, SUB-SECT. 3.

115 i. What will disqualify—Assurance by certifier to employer as to price—Inducement to cut down cost.]—*FRASER v. HAMILTON CORPN.* (1912), 32 N. Z. L. R. 205.—N.Z.

PART III. SECT. 3, SUB-SECT. 4.

k. Certificate wrongly withheld—Collusion & fraud—Evidence of. *Held*: (1) if an architect refuses to certify in pursuance of the contract, & the owners remain passive, & so retain

Sect. 3.—Final certificate : Sub-sect. 4.]

FIELD (1850), 5 Exch. 829; 20 L. J. Ex. 68; 155 E. R. 363.

*Annotations:—*Consd. Stadhard v. Lee (1863), 3 B. & S. 364. *Refd.* Scott v. Avery (1856), 28 L. T. O. S. 207; Scott v. Liverpool Corpn. (1858), 1 Giff. 216.

119. ——— *Action against employees.]—*

A bill filed against a railway co., their secretary & engineer, stated that pltf. contracted with the co. to execute certain works, & that the co. had agreed to pay them in a specified manner, with a proviso that the works should not be considered as executed unless the engineer of the co. should certify to that effect, & that the engineer, upon notice, should proceed to examine the works, & if properly executed, should certify same, & that thereupon pltf. should be entitled to recover; that the works had been completed properly, but that the engineer, acting under the direction of, & in collusion with, the co., refused his certificate. The bill prayed a declaration that such refusal was a fraud upon pltf., & for an account & payment of the sums due to him. All defts. having put in a general demurrer, the decision of the ct. overruling the demurrers, was affirmed.—M'INTOSH v. GREAT WESTERN RY. CO. (1850), 2 Mac. & G. 74; 2 H. & Tw. 250; 19 L. J. Ch. 374; 15 L. T. O. S. 321; 14 Jur. 819; 42 E. R. 29, L. C.

*Annotations:—*Folld. Waring v. M. S. & L. Ry. Co. (1849), 7 Hare, 482. *Consd.* Scott v. Liverpool Corpn. (1858), 3 De G. & J. 334. *Apprvd.* Kellett v. New Mills U. D. C. (1900), 2 Hudson's B. C., 4th ed., 298. *Refd.* Eastern Archipelago Co., McBride v. Lindsay (1852), 19 L. T. O. S. 120; Wadsworth v. Smith (1871), L. R. 6 Q. B. 332. *Mentd.* Bliss v. Smith (1865), 34 Beav. 508; *Re* Brighton Club & Norfolk Hotel Co. (1865), 35 Beav. 204; Edwards v. Aberayron Mutual Ship Insee. Soc. (1876), 1 Q. B. D. 563; L. C. & D. Ry. Co. v. S. E. Ry. Co. (1893), 1 R. 275.

120. ——— *Where a sum of money is agreed to be paid for work & materials upon the certificate of a third person, if such third person in collusion with & by the procurement of the person who has agreed to pay improperly neglects to certify, an action at law may be maintained against the latter for the agreed sum, notwithstanding the certificate was made a condition precedent to the payment of the money.*

A declaration, after setting out a contract by which pltf., a builder, agreed with deft. to do work to the satisfaction of the architect & to receive payment upon the certificate of the architect, no payment to be considered due unless upon production of the architect's certificate, averred performance by pltf. of all things to entitle him to the certificate, & that he had completed the work to the satisfaction of the architect; & alleged as a breach that the architect unfairly & improperly neglected to certify, & so neglected in collusion with deft. & by his procurement, by means of which pltf. had been unable to obtain payment of a balance due to him:—*Held*: the words "collusion" & "procurement" imported fraud, & the declaration disclosed a good cause of action.—BATTERBURY v. VYSE (1863), 2 H. & C. 42; 2 New Rep. 79; 32 L. J. Ex. 177; 8 L. T. 283; 9 Jur. N. S. 754; 11 W. R. 891; 159 E. R. 19.

*Annotations:—*Distd. Wood v. Woad (1874), L. R. 9 Exch. 190. *Consd.* Ludbrook v. Barrett (1877), 36 L. T. 616;

1. ——— *HENDERSON v. NAPIER HARBOUR BOARD, O. B. & F. 94.—N.Z.*

m. ——— *Measure of damages.]—*Where a final certificate has been refused by the engineer, the contractor cannot recover from the employer for matters within the contract, unless it is alleged & proved that the certificate was refused by the engineer in collusion with the employer. In such case, the proper measure of damages is the value of the certificate which the engineer

ought to have given, & under a condition that all measurements are to be made according to the most approved & accurate methods, the contractor is not concluded by the progress measurements on which payments have been made. The employer is liable for damage occasioned by the engineer not employing such methods of measurement.—YOUNG v. BALLARAT, & BALLARAT EAST COMRS., MARTIN v. BOARD OF LAND & WORKS (1879), 5 V. L. R. 503.—AUS.

Stevenson v. Watson (1879), 4 C. P. D. 148. *Mentd.* Tharsis Sulphur & Copper Co. v. Loftus (1872), 21 W. R. 109.

121. ——— *Relief in equity.]—Held*: in building contracts equity interfered where there was collusion between the employer & the architect to injure the contractor.—BLISS v. SMITH (1865), 34 Beav. 508; 55 E. R. 732.

*Annotations:—*Refd. *Re* Brighton Club & Norfolk Hotel Co. (1865), 35 Beav. 204; Smith v. Howden Union & Fowler (1890), 2 Hudson's B. C., 4th ed., 156.

122. ——— *Action against architect.]—*Pltf., who had contracted to do certain repairs to the house of A. to the satisfaction of the architect of A., sued such architect for refusing to certify that the repairs had been done to his satisfaction, & in his statement of claim pltf. stated that deft., with a view of earning his commission, induced pltf. to make a tender for the repairs, & that deft. accepted such tender, & agreed with pltf. that as soon as the work was done in a sound & workmanlike manner, he would certify his satisfaction so as to enable pltf. to recover the price thereof from A. The statement of claim afterwards averred the due execution of the work by pltf., & alleged that though deft. admitted to pltf. he was satisfied with the work, yet he, in collusion with A., & in fraud of pltf., refused to certify that he was satisfied, & falsely pretended that he was dissatisfied, by reason of which, & through such wrongful acts, pltf. was unable to recover the price of the work from A.:—*Held*: the statement of claim disclosed a good cause of action.—LUDBROOK v. BARRETT (1877), 46 L. J. Q. B. 798; 36 L. T. 616; 42 J. P. 23; 25 W. R. 649.

*Annotation:—*Consd. Stevenson v. Watson (1879), 4 C. P. D. 148.

123. ——— *Improper interposition of employer—Architect prevented from certifying.]—*Although the giving of a certificate by the architect be a condition precedent to a builder's right to payment for work done, the builder may nevertheless recover for the work done, if the withholding of the certificate be due to the improper interposition of the employer, who prevented the architect from giving the certificate.—BRUNSDEN v. BERESFORD (1883), 1 Cab. & El. 125, N. P.

124. ——— *Wrongful delay or refusal to certify—Relief in equity.]—*Defts. employed pltf. to fix up two stoves in a church, under an agreement, by which pltf. engaged to complete the work on or before a certain day to the satisfaction of T., a surveyor, & the money was to be paid on a given day "in case the surveyor should certify that same was completed agreeably to the contract." The work was finished according to the contract, but the surveyor refused to certify:—*Held*: pltf.' bill for relief should be dismissed, because pltf. had their remedy at common law, it being a fair & direct issue to try whether the certificate was or was not properly withheld by the surveyor, & the surveyor having no right to refuse the certificate arbitrarily.—MOSER v. ST. MAGNUS & ST. MARGARET (CHURCHWARDENS) (1795), cited in 6 Term Rep. at p. 716; 101 E. R. 788.

123 i. ——— *Improper interposition of employer—Architect prevented from certifying.]—Held*: (1) upon the evidence, the architect having refrained from & refused to certify because he was instructed by defts. & their solrs. not to do so, the necessity for a certificate was dispensed with; (2) the question of the necessity for a final certificate did not arise, because defts. took over the completion of the contract.—WATTS v. MCLEAY (1911), 19 W. L. R. 916.—CAN.

125. Necessity for proof of collusion.]

—By the terms of a contract works were to be done for defts. by plffs. according to certain plans & specifications, & to be paid for by certain instalments "on production by the contractors to defts., or one of them, of the certificate of W., or other the surveyor for the time of defts., that they, the contractors, had duly & efficiently performed & completed such work to his satisfaction." In an action upon this contract, the declaration averred that all things necessary had been done by plffs. to entitle them to have the certificate of the surveyor that the work had been duly & efficiently performed & completed to his satisfaction, but that the surveyor had not given such certificate, but had wrongfully & improperly neglected & refused so to do, etc.:—*Held*: in the absence of collusion, plffs. were not entitled to recover, without producing the surveyor's certificate, nor were defts. responsible for the refusal of the surveyor to give one.—*CLARKE v. WATSON* (1865), 18 C. B. N. S. 278; 5 New Rep. 283; 31 L. J. C. P. 148; 11 L. T. 679; 13 W. R. 345; 144 E. R. 450.

Annotations:—*Consd.* *Re Rio de Janeiro Flour Mills & Granaries & De Morgan, Snell* (1891), 8 T. L. R. 108; *Kellest v. New Mills U. D. C.* (1900), 2 Hudson's B. C., 4th ed., 298; *Re Nott & Cardiff Corpn.*, [1918] 2 K. B. 146; *Eaglesham v. McMaster*, [1920] 2 K. B. 169. *Refd.* *Roberts v. Bury Improvement Comrs.* (1869), 38 L. J. C. P. 367; *Botterill v. Ware Grdns.* (1886), 2 T. L. R. 621; *Smith v. Howden Union & Fowler* (1890), 2 Hudson's B. C., 4th ed., 156. *Mentd.* *Tharsis Sulphur & Copper Co. v. Loftus* (1872), 21 W. R. 109.

126. — Employer taking advantage of wrongful refusal—Recovery without certificate.]—Plff. agreed to do work for defts. to the satisfaction of an engineer, & defts. agreed to pay plff. upon the certificate of the engineer. The engineer never addressed himself to determine & certify, but

n. — *Coercion.*—*TEMI-SKAMING & NORTHERN ONTARIO RY. COMMISSION v. WALLACE* (1906), 37 S. C. R. 696.—CAN.

o. — *Wrongful delay or refusal to certify—Prolonged inaction & default.]*—The architect having neglected to issue the certificate although notified of the completion of the work, as provided for in the contract:—*Held*: although there was no fraud or collusion between deft. & the architect there was such prolonged inaction & default as dispensed with the certificate as a condition precedent to plff.'s right of recovery.—*ALSIP v. ROBINSON* (1911), 18 W. L. R. 39.—CAN.

126 i. — Employer taking advantage of wrongful refusal—Injunction.]—*MAHONEY v. LE RENNETEL* (1892), 13 N. S. W. Eq. 7.—AUS.

q. *Refusal to pay according to agreement—On forfeiture.]*—By the terms of a contract for work & labour defts. were entitled under certain circumstances to take over & complete the work, but had then to pay plff. the actual cost of the work done by him, as certified by defts.' engineer. Defts. became entitled to & did take over, but refused to pay anything more than a sum calculated according to a certain schedule. Plff. sued for recovery of the actual cost of the work done, without having obtained a certificate for the same:—*Held*: defts.' refusal dispensed with the necessity for production of the certificate & entitled plff. to recover upon independent proof of actual cost.—*HILLS v. COLONIAL GOVERNMENT* (1903), 20 S. C. 107; 13 C. T. R. 102.—S. AF.

r. *Wrongful dismissal of contractor—Pleading.]*—*SMITH v. GORDON* (1880), 30 C. P. 553.—CAN.

Forfeiture, generally, see Part X., post.

s. *Failure to appoint certifier.]*—A condition in a building contract provided that before action could be brought by the contractors, they should furnish a certificate signed by the architects of the building owners showing the sum still owing on the contract:—*Held*: as no architect was appointed by the owners, the condition was inoperative.—*DEGAGNE v. CHAVE* (1896), 2 Terr. L. R. 210.—CAN.

t. — *Waiver by conduct.]*—*HOPPER v. MEYER*, [1906] V. L. R. 235.—AUS.

u. — *On resignation of party named.]*—The condition that a railway contractor shall be paid only on a final estimate prepared by the chief engineer of the co. becomes inoperative when the co. neglects to replace the engineer who has resigned, without necessity on the part of the contractor to put the co. in default, *mise en demeure*.—*GREAT NORTHERN CONSTRUCTION CO. v. ROSS* (1915), Q. R. 25 K. B. 385.—CAN.

127 i. Waiver of certificate—Acceptance of work done.]—To an action on a building contract, defts. pleaded no certificate of completion as provided for in the contract had been obtained by plff. Plff. replied that defts. had accepted all the work & had waived their rights as to the production of the certificate:—*Held*: plff. could not recover without the stipulated certificate.—*FERGUSON v. GALT TOWN* (1873), 23 C. P. 66.—CAN.

127 ii. — Appointment of new architect.]—In the absence of the original architect the owner, when the contractor claimed the work was completed, appointed a new architect to inspect the work, who notified the contractor that the material & workmanship was not in accordance with the specifications & ordered him to remedy the defects, which plff. failed to do.

wrongfully refused, or wrongfully & unreasonably delayed, so to determine & certify, & the defts. took advantage of his refusal & delayed payment. Fraud was not alleged:—*Held*: plff. could recover from defts. without a certificate.—*KELLETT v. NEW MILLS URBAN DISTRICT COUNCIL* (1900), 2 Hudson's B. C., 4th ed., 298.

Annotations:—*Consd.* *Re Nott & Cardiff Corpn.*, [1918] 2 K. B. 146. *Refd.* *Jackson v. Romford R. D. C.* (1909), 73 J. P. 248.

127. Waiver of certificate—Acceptance of work done.]—A shipbuilder agreed to build a ship for deft., the work to be approved of by G., & his certificate obtained. The work was to be paid for in instalments as the ship progressed, & the last instalment on the ship being delivered complete. The ship, on being finished, was delivered & accepted by deft., but the certificate of G. was not obtained:—*Held*: the obtaining was not a condition precedent to the payment of the last instalment, & the ship having been delivered, deft. was bound to pay the last instalment.—*TAYLEUR v. BLYTHE* (1856), 27 L. T. O. S. 101.

128. — Alleged oral waiver—Powers of engineer's successor.]—A contract to do work for a local authority stipulated that payment for work done should only be made on the production of a certificate from the engineer appointed under the contract, who was to fix the price of all extra work done under the contract but not included in the specification. The engineer under the contract was "J. M. of J. M. & Sons, or other the engineers of the corpn." While extra work was being done, but before a price had been agreed upon, the engineer named in the contract died, & a member of his firm was appointed to carry out his duties under the contract. The contractor contended that the engineer so appointed had no jurisdiction

In an action to recover the balance of the contract price:—*Held*: by occupying the building deft. had not waived his right to refuse payment until the contractor got the architect's certificate & deft. had the right to appoint the architect after the completion of the building.—*CYR v. O'FLYNN* (1907), 7 W. L. R. 452.—CAN.

v. — *Payment on account—Directions of certifier.]*—*Held*: a payment on account before completion of the work & directions by the certifier to complete the work in places where it had not been done did not constitute a waiver of the necessity for a certificate of approval.—*SCHULTZ v. FABER & CO.* (1912), 21 W. L. R. 163; 4 D. L. R. 707.—CAN.

w. — *By conduct of parties.]*—*GAMBLE v. ARNOLD* (1909), 12 W. L. R. 97.—CAN.

x. — *Work stopped by certifier.]*—Resp. contractors having agreed to do all work necessary to put down a well & erect a pump until a copious supply of water was obtained for applt. council, the works to be completed to the satisfaction of the engineer to the council, & having been directed to stop boring by the engineer, put in a pump & brought an action upon the contract, in which they failed for want of the engineer's certificate. They subsequently offered to do what was necessary under the contract to complete the contract as being at an end. Resps. brought a second action for work & materials:—*Held*: in the circumstances of resps.' subsequent offer & applts.' repudiation, resps. were entitled to judgment.—*ATHLONE (No. 2) RURAL DISTRICT COUNCIL v. CAMPBELL & SON* (1912), 47 I. L. T. 142.—IR.

y. *Undisclosed relations between certifier & employer.]*—The superintendent of certain work was a relative of

Sect. 3.—Final certificate: Sub-sect. 4. Part IV.
Sect. 1.]

to fix the price of the extra work. He also alleged that the condition in the contract as to engineers' certificates had been waived by defts. by an oral agreement with himself:—*Held*: (1) such an oral variation of a contract under seal would be bad, as any variation of such a contract must itself be

under seal; (2) the duly appointed successor to the engineer named in the contract had jurisdiction to determine the price to be paid for work which was begun before his appointment.—*KELLETT v. STOCKPORT CORPN.* (1906), 70 J. P. 154.

Certificates as conditions precedent to payment.]—See, generally, Sect. 1, ante.

Part IV.—Price.

SECT. 1.—IN GENERAL—LUMP SUM.

129. Sum payable on completion—Completion condition precedent—Destruction of subject matter.]

—Where A. contracts to do work & supply materials upon the premises of B. for a specific sum, to be paid on completion of the whole, A. is not entitled to recover anything until the whole work is completed, unless it be shown that the performance of his contract was prevented by the default of B.

Pltfs. contracted to erect certain machinery on deft.'s premises at specific prices for particular portions, & to keep it in repair for two years, the price to be paid upon the completion of the whole. After some portions of the work had been finished, & others were in the course of completion, the premises with all the machinery & materials thereon were destroyed by an accidental fire:—*Held*: both parties were excused from the further performance of the contract, but pltfs. were not entitled to sue in respect of those portions of the work which had been completed, whether the materials used had become the property of deft. or not.—*APPLEBY v. MYERS* (1867), L. R. 2 C. P. 651; 36 L. J. C. P. 331; 16 L. T. 669, Ex. Ch.

& indebted in a large sum to deft., the employer, & pltf., the contractor, did not know this. Disputes having arisen, the superintendent gave to pltf. under deft.'s instructions a certificate that pltf. had furnished all the material according to specifications:—*Held*: the relationships, family & financial, of the superintendent to deft. should have been disclosed to pltf., & in the circumstances pltf. was not bound to obtain a certificate at all.—*LUDLAM v. WILSON* (1901), 21 C. L. T. 554; 2 O. L. R. 549.—*CAN.*

PART IV. SECT. 1.

129 i. *Sum payable on completion—Completion condition precedent.]—A contractor working under plan & specifications & for a fixed price, cannot recover the value thereof until the contract is wholly completed.—DRUMMONDVILLE v. SIMONEAU* (1912), Q. R. 23 K. B. 392.—*CAN.*

129 ii. ———.—]—Under a contract which provided that all the works should be left complete & clear to the satisfaction of the architect & did not contain any provision for payment by instalments:—*Held*: the completion of the works to the satisfaction of the architects was a condition precedent to the builder's right to recover.—*RICHARDSON v. MAHON* (1879), 4 L. R. Ir. 486.—*IR.*

g. ———.— *Entire contract.]—An agreement completely to construct a road of specified length at a certain rate of payment per yard:—Held*: an entire contract, under which the employer was entitled to insist on the due completion of the whole road before he could be compelled to pay any portion of the contract price.—*NAUDE v.*

KENNEDY (1909), T. S. 799; L. L. R. 101.—*S. AF.*

h. ———.—]—Pltf. agreed to build a dwelling house for deft. for a fixed sum, according to a plan & specifications, forming part of the contract:—*Held*: the contract was an entire one & the price was not payable until the work was completed.—*DONALDSON v. COLLINS* (1912), 21 W. L. R. 56; 2 W. W. R. 47; 3 D. L. R. 359.—*CAN.*

k. ———.—]—Where there is a contract to erect a building, according to specifications, for a lump sum, the price is not recoverable until the building is completed in accordance with the specifications, unless deft. has accepted the work with a knowledge of the defects, or has done something from which a new contract to pay for the work can be inferred, or unless the variations from the specifications or omissions in details are so unimportant or trifling as to exclude the general rule, & so entitle pltf. to recover.—*KNOOR v. CLARK* (1914), 27 W. L. R. 753.—*CAN.*

l. ———.—]—*Held*: as the whole of the works had not been completed at the time of the institution of the action, the condition precedent to payment had not been accomplished, & pltf. had no right of action under the contract.—*WHITING v. BLONDIN* (1904), 34 S. C. R. 453; 24 C. L. T. 203.—*CAN.*

m. ———.—]—*ROCHON v. CORBEAU* (1911), 17 R. L. N. S. 358.—*CAN.*

n. ———.— *Retention money.]—A building contractor who agrees for a certain lump sum to provide a building is not entitled to any payment until he has fully performed his contract, & if he abandons his*

Annotations:—Expld. & Dstd. Anderson v. Morice (1876), 1 App. Cas. 713. *Apld. Howell v. Coupland* (1876), 1 Q. B. D. 258. *Consd. O'Neil v. Armstrong, Mitchell*, [1895] 2 Q. B. 70. *Follid. The Madras*, [1898] P. 90. *Consd. Forman Proprietary v. Liddesdale*, [1900] A. C. 190; *Blakeley v. Muller, Holson v. Pattenden*, [1903] 2 K. B. 760, n.; *Elliott v. Crutchley*, [1903] 2 K. B. 476. *Apld. Civil Service Co-Op. Soc. v. General Steam Navigation Co.*, [1903] 2 K. B. 756. *Consd. Dakin v. Lee*, [1916] 1 K. B. 566; *Horlock v. Beal*, [1916] 1 A. C. 486; *Tamplin S. S. Co. v. Anglo-Mexican Petroleum Products Co.*, [1916] 2 A. C. 397. *Apld. Scottish Navigation Co. v. Souter, Admiral Shipping Co. v. Weidner, Hopkins*, [1917] 1 K. B. 222. *Refd. Ford v. Cotesworth* (1870), 10 B. & S. 991, Ex. Ch.; *The Teutonia, Duncan v. Köster* (1872), 26 L. T. 48; *O'Neil v. Armstrong, Mitchell*, [1895] 2 Q. B. 418; *Herne Bay Steamboat Co. v. Hutton* (1903), 88 L. T. 269; *Krell v. Henry*, [1903] 2 K. B. 740; *Chandler v. Webster*, [1904] 1 K. B. 493; *Parkin v. South Hetton Coal Co.* (1907), 97 L. T. 98; *Porter v. Tottenham U. D. C.*, [1914] 1 K. B. 663; *St. Enoch Shipping Co. v. Phosphate Mining Co.* (1915), 21 Com. Cas. 192; *Lloyd Royal Belge Soc. Anon. v. Stathatos* (1917), 33 T. L. R. 390. *Mentd. Stubbs v. Holywell Ry. Co.* (1867), 15 W. R. 869; *Thorn v. London* (1876), 1 App. Cas. 120; *Nickoll & Knight v. Ashton, Edridge*, [1901] 2 K. B. 126; *Clark v. Lindsay* (1903), 88 L. T. 198; *Austin Friars Steam Shipping Co. v. Strack*, [1905] 2 K. B. 315; *Re Hull & Meux* (1905), 92 L. T. 74; *Foster's Agency v. Romaine* (1916), 32 T. L. R. 331; *Lebeaupin v. Crispin*, [1920] 2 K. B. 711.

130. Variations added to or deducted from

contract, with the work unfinished, he is not entitled to any part of the lump sum. But if the building owner agrees to pay a percentage of the value of the work done, the retention money only is subject to the above rule; the contractor cannot claim the retention money until he completes the work, or until it is clear, if the work is finished by some other person, that the contract price has not been exceeded.—*COLONIAL TRUST CORPN., LTD. OF GRAAF-REINET v. SCHOOL BOARD OF PEARSTON* (1916), C. P. D. 275.—*S. AF.*

o. ———.— *Within contract.]—MCKINNELL v. REMBRANDT SCHOOL DISTRICT TRUSTEES* (1913), 25 W. L. R. 272.—*CAN.*

p. ———.—]—*OUTRAM* (1851), 14 Dunl. (Ct. of Sess.) 48.—*SCOT.*

q. ———.— *Substantial completion.]—ADAMS v. MCGREEVY* (1907), 17 Man. L. R. 115.—*CAN.*

r. ———.—]—*Is to be done in a specified manner & to be paid for on completion, & it is done in a different manner, or so defectively as to justify an allowance for the defects, & the party for whom it is done refuses to acquiesce in the variations or defects or to accept the work, but simply takes the position that the workman must perform it according to the express stipulations & perfectly, & interposes no obstacle to this being done, the workman cannot recover anything before this is done.—BRYDON v. LUTES* (1891), 9 Man. L. R. 463.—*CAN.*

s. ———.—]—*DAVIS v. O'BRIEN* (1908), 18 Man. L. R. CAN.

lump sum—Quantities part of contract.]—A co. contracted to furnish stone to L. for certain works for a lump sum. The tender contained the following words: "The bill of quantities to form part of the contract, & all variations to be priced at the rate stated in the bill, & added to, or deducted from, the lump sum, as the case may be." There were variations from the quantities in the bill. L. contended that he was entitled to measure up the whole of the work & pay on that basis:—*Held*: the contract was one for a lump sum, & the variations should be measured & valued, & the amount so arrived at added to, or deducted from, the lump sum, as the case might be.—**LONDON STEAM STONE SAW MILLS v. LORDEN** (1900), 2 Hudson's B. C., 4th ed., 301, D. C.

131. —.]—Where a building contract provides that the work is to be done for a lump sum, "according to the plans, invitation to tender, specification & bills of quantities," the quantities are to be regarded as defining the amount of work included in the price, & if the contractor is required, in order to complete the work, to do more work than is in the quantities, he is entitled to be paid therefor an addition to the contract sum.—**PATMAN & FOTHERINGHAM, LTD. v. PILDITCH** (1904), 2 Hudson's B. C., 4th ed., 368.

Bills of quantities generally, see Part XVII., *post*.

132. Price payable by instalments—Liquidated demand—Summary judgment in respect of each instalment—R. S. C., Ord. 14, r. 1.]—By a contract between plffs. & defts. for the construction of a steamer by the former the price of the steamer was to be £89,800, to be paid by defts. by five instalments, which were respectively to become

due at different stages of the construction of the vessel. By the terms of the contract the hull & materials of the vessel were, upon payment of the first instalment, to become the absolute property of the purchasers, subject only to the builders' lien for any unpaid purchase-money; & in the event of any instalment of the purchase-money remaining unpaid for fourteen days after same was due, the builders were to be entitled to interest thereon at 5 per cent. *per annum* until payment, & in the event of such default, they were to be at liberty to suspend the work, & the time of suspension was to be added to the contract time, or they might complete the vessel at any time after the expiry of fourteen days' notice given to the purchasers, & might sell her after completion, & any loss on such vessel was to fall upon the purchasers, & any balance of the proceeds of such sale which might remain, after satisfying all lawful claims of the builders, was to be paid by the builders to the purchasers. The first instalment of the purchase-money having by the terms of the contract become due & remaining unpaid, plffs. brought an action for same, & applied for leave to sign judgment for the amount so claimed under Ord. 14, r. 1:—*Held*: the case came within the rule, & the leave so applied for might be granted.—**WORKMAN, CLARK & Co., LTD. v. LLOYD BRAZILEÑO**, [1908] 1 K. B. 968; 77 L. J. K. B. 953; 99 L. T. 477; 24 T. L. R. 458; 11 Asp. M. L. C. 126, C. A.

133. Action for price—Form—Contract to build house furnishing timber & labour—Recovery for materials.]—One who contracts to build a house, furnishing both timber and labour, cannot recover for the materials on a count for goods sold & delivered, though, by reason of a deviation from the original plan, the contract is superseded as

t. — — — —.]—**ALBEI ENGINEERING CO. v. BLOW** (1914), 28 W. L. R. 391.—**CAN.**

a. — — — —.]—Although a contractor can claim payment only after completion of his contract, there may be facts & circumstances where that rule cannot be enforced.—**GREAT NORTHERN CONSTRUCTION CO. v. ROSS** (1915), Q. R. 25 K. B. 386.—**CAN.**

b. — — — —.]—*Deductions for defects.*—**FAVREAU v. ROCHON** (1910), Q. R. 38 S. C. 421.—**CAN.**

c. — — — —.]—*Held*: where there is honesty & a *bona fide* intention to complete, there is completion if the contract is completed in all essential & material respects, & there exist only slight imperfections in the work or slight deviations from the specifications, which can be easily cured & corrected at an expense trifling as compared with the amount of the contract price.—**WATTS v. MCLEAY** (1911), 19 W. L. R. 916.—**CAN.**

d. — — — —.]—**CANADIAN WESTERN FOUNDRY & SUPPLY CO., LTD. v. HOOVER**, [1917] 3 W. W. R. 594; 37 D. L. R. 285.—**CAN.**

e. — — — —.]—**HAUMAN v. NORTJE** (1914), App. D. 293.—**S. AF.**

f. — — — —.]—*Waiver.*—**MCDONALD v. SIMONS** (1910), 15 W. L. R. 218.—**CAN.**

g. Price payable by instalments—Destruction of subject-matter.]—Plffs. were prevented from completing their contract to put an elevator into defts.' building by a fire which destroyed the building & the partly-completed elevator. Defts. were not in any way responsible for the fire. The second instalment of the contract price was

to be paid when the "machine" was in place, but the "machine" had not been put in its place, although its parts had been assembled in the building:—*Held*: plffs. could not recover such second instalment or anything further under the contract.—**FENSOM v. BULMAN** (1907), 17 Man. L. R. 307.—**CAN.**

h. — — — —.]—*Whether contract entire.*—A contract by which a building contractor agrees to accept payment for the construction of a building in monthly instalments computed according to the amount of labour expended & material used, & ten per cent. of the value thereof during the period, is not an entire contract & the contractor may sue for the instalments as they accrue due.—**LECKY & Co. v. CARMAN** (1914), 30 W. L. R. 409; 7 W. W. R. 691.—**CAN.**

k. Price fixed by schedule of prices—Whether contract for lump sum.]—

A builder, by offer appended to a schedule, offered to do the mason work of a proposed tenement, "agreeably to plans thereof now shown & to the extent of this schedule," for a certain sum. The schedule, to which this letter was annexed, gave the estimated quantities of work required, & the offeror inserted the rate at which he proposed to do each item, adding a calculation of the cost of each item at that rate, & a summation at the end of the total cost, being the sum in the offer. Full power was reserved to the proprietor to alter the quantity of work required, & the work was to be measured when finished & charged at schedule rates, or others corresponding thereto, in proportion to the lump sum in the letter of offer. The offeror made an under calculation in bringing out the cost of one item:—*Held*: the contract was a contract according to the schedule rates, & not

a contract for a lump sum, & the offeror was not barred by his error from claiming the full sum brought out at his rates.—**JAMIESON v. M'INNES** (1887), 15 R. (Ct. of Sess.) 17; 25 Sc. L. R. 32.—**SCOT.**

l. S. P. WILKIE v. HAMILTON LODGING HOUSE CO. (1902), F. (Ct. of Sess.) 951.—**SCOT.**

m. — — — —.]—*Quantities part of contract.*—The City of V. called for tenders for the construction of certain sewers, setting forth in specifications & bills of quantities the amount & character of the excavations & work to be done, & requiring persons tendering to put their prices against each item in the specifications & bills of quantities, which were to form essential parts of the contract. Plffs. tendered, filling in their prices for each item as required, & offering to do the work for a lump sum, which represented their total. It turned out that the bills of quantities largely overestimated the work. Plffs. obtained the contract & performed the work, & sued to recover the lump sum & extras, less amounts paid them by deft.:—*Held*: the contract was to do the work by quantities at specified prices, & was not controlled by the lump sum mentioned.—**COUGHLAN & MAYO v. WILMOT & VICTORIA CITY CORPN.** (1895), 4 B. C. R. 20.—**CAN.**

n. Where no price fixed—Agreement to pay at market price—How ascertained.]—**MALLOCH v. HODGHTON** (1849), 12 Duil. (Ct. of Sess.) 215.—**SCOT.**

o. Action for price—What plaintiff must show.]—In an action on an agreement to improve a house, under which plff. was to allow defts. the value of fronts taken out of the house, at a fair valuation by disinterested persons

Sect. 1.—In general—lump sum. Sect. 2.]

to the price.—**COTTERELL v. APSEY** (1815), 6 Taunt. 322; 1 Marsh. 581; 128 E. R. 1059.

Annotations :—**Reid**. **Heath v. Freeland** (1836), 5 Dowl. 166; **Clarke v. Bulmer** (1843), 1 Dow. & L. 367.

134. ——— Contract to erect & construct engine.—A. contracted with B. "to build an engine of 100 horse-power for £2,500, to be completed & fixed" by a certain time. The engine was intended for the purpose of pumping a mine, & was composed of various parts, which were made at A.'s factory, & conveyed thence & set up at different times at B.'s colliery, until the engine was completed. A. sued B. for the price, & in an *indebitatus* count claimed £3,000 "for the price & value of a main engine, & other goods sold & delivered" by him to B. :—**Held** : the price agreed on could not be recovered under this count, but the proper form of the count would have been, either for work, labour, & materials, or for erecting & constructing an engine.—**CLARK v. BULMER** (1843), 11 M. & W. 243; 1 Dow. & L. 367; 12 L. J. Ex. 463; 152 E. R. 793.

Annotation :—**Distd.** **Beaumont v. Brengeri** (1847), 5 C. B. 301.

SECT. 2.—QUANTUM MERUIT.

135. General rule.—Where a builder has supplied work & labour for the erection or repair of a house under a lump sum contract, but has departed from the terms of the contract, he is entitled to recover for his services, unless (1) the work that he has done has been of no benefit to the owner; (2) the work he has done is entirely different from the work which he has contracted to do; or (3) he has abandoned the work & left it unfinished.—**DAKIN (H.) & Co., LTD. v. LEE**, [1916] 1 K. B. 566; 84 L. J. K. B. 2031; 113 L. T. 903; 59 Sol. Jo. 650, C. A.

Annotation :—**Distd.** **Vigers v. Cook**, [1919] 2 K. B. 475.

136. Work of no benefit to owner.—Where pltf. declares on a *quantum meruit* for work & labour done & materials found, deft. may reduce the damages, by showing that the work was improperly done, & may entitle himself to a verdict by showing that it was wholly inadequate

chosen by each party :—**Held** : the declaration was bad because it was not shown that any of the work had been performed & because of no averment either that the fronts were valued or that pltf. had appointed an arbitrator & called upon defts. to do the same.—**ELLIOTT v. HEWITT** (1853), 11 U. C. R. 292.—**CAN.**

p. ———.—A declaration on a deed averred that pltf. did all things necessary on his part to entitle him to have the contract performed by defts., & the time for so doing had elapsed. By a clause of the deed defts. agreed to pay pltf. for the work within a time named after the giving of a certificate by defts.' engineer :—**Held** : the general allegation would only cover acts to be done by pltf., & did not sufficiently aver that the engineer had granted the certificates; but this defect was covered by defts. pleading over.—**SHANLY v. MIDLAND Ry. Co.** (1873), 33 U. C. R. 604.—**CAN.**

q. ——— Abandonment of contract—Onus of proof.—**MCKENZIE v. ELLIOTT** (1912), 21 O. W. R. 929; 3 O. W. N. 1083; 2 D. L. R. 899; *affd.*, 4 O. W. N. 1151.—**CAN.**

PART IV. SECT. 2.

r. Liquidated demand.—A claim for work & labour upon a *quantum*

meruit, is "a debt or liquidated demand" in money within G. O. 11, r. 3, & final judgment can be marked on a writ indorsed with such claim.—**STEPHENSON v. WEIR** (1879), 4 L. R. Ir. 369.—**IR.**

136 i. Work of no benefit to owner.—A person employed as an independent contractor to drill a well is entitled, in the absence of an agreed price, to be paid a reasonable price for his work, even though the hole prove dry, unless there was a warrant or conditions as to the finding of water.—**ROBERTSON v. BEADLE**, [1917] 3 W. W. R. 184; 36 D. L. R. 176.—**CAN.**

136 ii. ———.—A contractor undertook to ventilate the employer's rooms; the apparatus put in by him for the purpose was, unknown to the employer, an experiment & proved a total failure :—**Held** : he could not recover the cost of fitting it up.—**FINLAY v. OUTRAM** (1851), 24 Sc. Jur. 10.—**SCOT.**

136 iii. ———.—An agreement provided that applt. should dig for water for resp. where pointed out & should deliver water in pipes at a certain dam, payment to be at £10 per in. of water & thereafter in proportion for every in. of water or part of an in. Applt. delivered $\frac{1}{2}$ of an in. of water :—**Held** : (1) the agreement contemplated that

to answer the purpose for which it was undertaken to be performed.—**FARNSWORTH v. GARRARD** (1807), 1 Camp. 38, N. P.

Annotations :—**Distd.** **Tye v. Gwynne** (1809), 2 Camp. 346. **Consd.** **Bluet v. Osborne** (1816), 1 Stark. 384; **Dakin v. Lee**, [1916] 1 K. B. 566. **Reid**. **Stegmann v. O'Connor** (1899), 80 L. T. 234.

137. ———.—A party contracted to supply & erect a warm air apparatus, for a certain sum. In an action for the price, the defence to which was, that the apparatus did not answer :—**Held** : if the jury thought it was substantial in the main, though not quite so complete as it might be under the contract, & could be made good at a reasonable rate, the proper course would be to find a verdict for pltf., deducting such sum as would enable deft. to do what was requisite.—**CUTLER v. CLOSE** (1832), 5 C. & P. 337, N. P.

Annotation :—**Consd.** **Dakin v. Lee**, [1916] 1 K. B. 566.

———.—In an action on a special contract for work done under the contract, & for work, labour, & materials generally, deft. may give in evidence that the work has been done improperly & not agreeably to the contract, & pltf. in that case will only be entitled to recover the real value of the work done & the material supplied.—**CHAPEL v. HICKES** (1833), 2 Cr. & M. 214; 4 Tyr. 43; 3 L. J. Ex. 38; 149 E. R. 738.

Annotations :—**Folld.** **Baillie v. Kell** (1838), 4 Bing. N. C. 638. **Appld.** **Stegmann v. O'Connor** (1899), 80 L. T. 234 (see 81 L. T. 627, C. A.).

139. ———.—In an action on a contract, & alternatively on a *quantum meruit*, to recover the price of certain specified work, if the contract is not properly carried out, pltf. can only recover the real value of the work done & the materials supplied.—**STEGMANN v. O'CONNOR** (1899), 80 L. T. 234, D. C.; *affd.* 81 L. T. 627, C. A.

Annotation :—**Expld.** **Dakin v. Lee**, [1916] 1 K. B. 566.

140. Work different from that contracted for—Small deviations immaterial.—Small deviations from a plan agreed upon for building :—**Held** : not material, but otherwise, if obstinate or corrupt.—**CRAVEN v. TICKELL** (1789), 1 Ves. 60; 30 E. R. 230, L. C.

Annotations :—**Mentd.** **Arnott v. Redfern** (1826), 3 Bing. 353; L. C. & D. Ry. Co. v. S. E. Ry. Co., [1893] A. C. 429.

——— Deviation from specification.—If a builder undertakes a work of specified dimensions & materials, & deviates from the specification, he

there should be no payment unless at least 1 in. of water was produced; (2) as resp. had not received any benefit from the work done, applt. was not entitled to any payment.—**STEMMER v. ACKERMANN** (1916), C. P. D. 236.—**S. AF.**

141 i. Work different from that contracted for—Deviations from specifications—Acquiescence.—Pltf. contracted to build a bridge for defts. according to specifications for a certain price, but varied from the contract in many particulars, of which defts. were aware, but made payments to pltf. while the work was going on & very shortly before its completion; the bridge was carried away by the ice the spring after it was built :—**Held** : defts.' conduct was evidence of acquiescence in the deviations, & if the bridge was of any value, pltf. was entitled to recover on the common counts.—**FOSSHAY v. BAXTER** (1849), 1 All. 335.—**CAN.**

141 ii. ——— Insufficient evidence.—Where work was not done in strict pursuance of the agreement & specifications & the plans referred to in the contract, & which were part of it, were not put in evidence :—**Held** : pltf. could only recover on a *quantum meruit*, & as there was not sufficient evidence to enable the jury to deter-

cannot recover upon a *quantum valebant*, for the work, labour, & materials.—**ELLIS v. HAMLEN** (1810), 3 Taunt. 52; 128 E. R. 21.

Annotations:—**Distd.** Burn v. Miller (1813), 4 Taunt. 745.
Consd. Dakin v. Lee, [1916] 1 K. B. 566.

142. — Right to agreed price less expenses of completion.—When a tradesman finishes work differing from the specification agreed on, he is not entitled to the actual value of the work, but only to the agreed price, minus such a sum as it would take to complete the work according to the specification.—**THORNTON v. PLACE** (1832), 1 Mood. & R. 218, N. P.

Annotations:—**Distd.** Mondel v. Steel (1841), 8 M. & W. 858. **Consd.** Stegmann v. O'Connor (1899), 80 L. T. 234; Dakin v. Lee, [1916] 1 K. B. 566.

143. — Claim for substituted work.—Where a contract provides for stipulated work at a lump sum, & such work is not done, but its equivalent or better work is effected, no claim for such substituted work can be sustained.—**FORMAN & CO. PROPRIETARY v. THE LIDDESDALE**, [1900] A. C. 190; 69 L. J. P. C. 44; 82 L. T. 331; 9 Asp. M. L. C. 45, P. C.

Annotation:—**Consd.** Dakin v. Lee, [1916] 1 K. B. 566.

144. ——Builders entered into a contract to carry out a large number of alterations & repairs to a house in accordance with specifications for a lump sum of £264. In an action by the builders to recover this sum the official referee found that the builders had failed to complete the contract in

the following particulars: (1) the concrete used to underpin a wall was not in accordance with the specifications, either as to quality or quantity; (2) certain rolled steel joists supplied had not been bolted at the top in accordance with the specifications; (3) solid columns, 4 inches in diameter, had been supplied in place of hollow columns, 5 inches in diameter; & he decided that plffs. were not entitled to be paid anything under the contract:—**Held**: plffs. were entitled to recover the £264, subject to a deduction of the amount necessary to make the work correspond with that contracted to be done, as the defects & omissions in the work amounted only to a negligent performance of the contract, & not to an abandonment of, or failure to complete the contract.—**DAKIN (H.) & CO., LTD. v. LEE**, [1916] 1 K. B. 566; 84 L. J. K. B. 2031; 113 L. T. 903; 59 Sol. Jo. 650, C. A.

Annotation:—**Consd.** Vigers v. Cook, [1910] 2 K. B. 475.

145. Work unfinished.—Where A. undertook, for a specific sum of money, to repair & make perfect a given article, then in a damaged state, & did repair it in part, but did not make it perfect:—**Held**: he could not, in an action of *assumpsit*, recover for the value of the work done & materials found.—**SINCLAIR v. BOWLES** (1829), 9 B. & C. 92; 4 Man. & Ry. K. B. 1; 7 L. J. O. S. K. B. 178; 109 E. R. 35.

Annotations:—**Distd.** Roberts v. Havelock (1832), 3 B. & Ad.

mine how far the contract had been departed from, the verdict for plff. must be set aside.—**FELCH v. RITCHIE** (1882), 3 R. & G. 407.—**CAN.**

141 iii. — Insufficient performance.—Plff. sued defts. to recover from them, under a specially endorsed writ, the balance of an account due under & in pursuance of an agreement, under seal, providing that plff. "was to run according to his best art & skill a tunnel of 200 feet for \$4 per running ft.; that \$150 should be advanced on account of the contract, the balance to be paid on the satisfactory completion of the work." Plff. made five tunnels, none of which were 200 feet in length, but whose total length was alleged by plff. to be 204 feet. Plff. brought his action both on the agreement & for work & labour done:—**Held**: there was not a sufficient performance of the agreement, & as plff. had given no particulars nor any evidence under the claim for work & labour, judgment must be entered for defts.—**LAKIN v. NUTTALL** (1879), 3 S. C. R. 685.—**CAN.**

141 iv. — Material alterations.—**Held**: as the variations from the specifications were not trifling, but most material, & went to the essence of the contract, the contractor was precluded from recovering for the work done.—**BROLEY v. MILLS** (1908), 7 W. L. R. 657.—**CAN.**

141 v. — Right to agreed price less expense of completion.—A. contracted with B. to build a church according to specification. The work did not comply with the specification. In an action by A. for work & labour:—**Held**: he could recover neither the price agreed upon nor the actual value of the work done, but he was entitled to the price agreed on in the specification less the cost of altering the work to make it comply with the specification.—**CLARKE v. LEE** (1893), 3 Terr. L. R. 191.—**CAN.**

141 vi. ——**DODDS v. MORRISON** (1905), 1 W. L. R. 164.—**CAN.**

141 vii. ——**SMITH v. TORONTO GENERAL HOSPITAL TRUSTEES** (1905), 6 O. W. R. 999.—**CAN.**

141 viii. ——**RAMSAY v. BRAND** (1898), 35 Sc. L. R. 927.—**SCOT.**

141 ix. — & damages suffered.—Applts. contracted to supply an engine to resp.'s yacht for \$2,000. The engine was not according to specification, & certain important portions valued by experts at \$225, were omitted. To a suit for the price of the engine resp. pleaded such omissions & set up damages resulting from applts.' delay in completing their contract, which damages were proved at \$750. Pending the proceedings the yacht was seized & sold by resp.'s creditors:—**Held**: as such sale rendered it impossible for applts. to complete their contract, & resp. had profited to the extent of the extra value added to his yacht by their work, applts. must recover for the value of such work, less the omitted portions, & damages suffered by resp.—**CARRIER v. BENDER** (1886), 12 Q. L. R. 19.—**CAN.**

141 x. — Indivisible contract.—Plff. a licensed surveyor, contracted to align the streets of defts. for so much per chain. When the alignment was completed, it was found that a number of the alignment posts were not in their correct positions, & defts. refusing to pay plff. had the whole work done over again by other surveyors:—**Held**: the contract was an indivisible one for specific work, & plff. was not entitled to recover on a *quantum meruit*.—**LUCAS v. DRUMMOYNE BOROUGH** (1895), 16 N. S. W. L. R. 55.—**AUS.**

141 xi. — Divisible contract—Counterclaim for damages.—**RICHER v. WOLSELEY TOWN** (1907), 6 W. L. R. 372.—**CAN.**

a. — Acceptance of work.—**Held**: no implied contract to pay *quantum valebat* could be inferred merely from the taking or retaining possession of the land & the building which had become part of the land.—**MCDONALD v. SIMONS** (1910), 15 W. L. R. 218.—**CAN.**

b. ——Plff. asserting he had completed the work, sued for the balance of the contract price:—

Held: (1) upon the evidence, the work done not being what was specified, plff. could not recover under the contract or on a *quantum meruit*; (2) the mere taking possession of the building, & deft.'s expression of satisfaction, did not constitute an acceptance of the work.—**DONALDSON v. COLLINS** (1912), 21 W. L. R. 56; 2 W. W. R. 47; 3 D. L. R. 352.—**CAN.**

c. ——**COLE v. SMITH** (1909), 13 O. W. R. 774.—**CAN.**

d. ——**OLDERSHAW v. GARNER** (1876), 38 U. C. R. 37.—**CAN.**

e. — Substantial performance.—**GODERICH ENGINE & BICYCLE CO. v. MENZIES** (1907), 9 O. W. R. 1, 398.—**CAN.**

f. — New contract inferred.—**BAKER v. VANLUVEN** (1864), 14 C. P. 214.—**CAN.**

g. — Defective workmanship—Abatement of price.—Plff. sued for work done, & materials supplied in connection with the erection of an addition to a cottage. Deft. relied upon certain defects in the workmanship:—**Held**: the implied contract that the work should be done in a workmanlike manner, was not one going to the essence of the contract, but deft. was entitled to an abatement of price on account of defects.—**MATTINSON v. HEWSON** (1909), 43 N. S. R. 339; 6 E. L. R. 568.—**CAN.**

h. ——**VAN RENSBURG v. STRAUGHAN** (1914), App. D. 317.—**S. AF.**

k. — Novel construction—Vague specifications.—**METALLIC ROOFING CO. v. TORONTO CITY** (1904), 3 O. W. R. 646; on appeal (1905), 6 O. W. R. 656; (1906), 37 S. C. R. 692.—**CAN.**

l. — Wilful departure from contract.—A contractor who knowingly, wilfully & without the consent of the employer departs from the terms of his contract cannot take the benefit of the equitable doctrine that no one shall be unjustly enriched at the expense of another, & is not entitled to recover on a *quantum meruit*.—**BRESLIN v. HITCHINS** (1914), App. D. 312.—**S. AF.**

Sect. 2.—Quantum meruit.]

404. **Consd.** Appleby v. Myers (1866), L. R. 1 C. P. 615. **Refd.** Appleby v. Myers (1867), L. R. 2 C. P. 651; Dakin v. Lee, [1916] 1 K. B. 566. **Mentd.** Poulton v. Lattimore (1829), 7 L. J. O. S. K. B. 225.

146. — No evidence of fresh contract.]—

By a building agreement between A. & B. it was stipulated that A. should complete for a specified price certain works on certain houses of B., the whole to be completed on a specified day, & to be done to the satisfaction of a surveyor named, upon whose approval payment was to be made. A. failed to complete the work. He sued B. on the agreement for the agreed price, & on a common count for a reasonable price according to measure & value. There was evidence, on the trial, that B. had resumed possession of the houses, & was so far enjoying the fruits of A.'s labour. Upon a rule to set aside a non-suit & enter a verdict for pltf.:—**Held:** there was no evidence to go to the jury in support of pltf.'s claim, for he could not recover on the special count, not having fulfilled it, & the mere fact of B.'s taking possession of his own land on which buildings had been erected, or where repairs had been done or alterations made to a building thereon, did not afford

an inference that he had dispensed with the conditions of the special agreement under which the works were done, or of a contract to pay for the work actually done according to measure and value.—**MUNRO v. BUTT** (1858), 8 E. & B. 738; 4 Jur. N. S. 1231; 120 E. R. 275.

Annotations:—Consd. Whitaker v. Dunn (1887), 3 T. L. R. 602. **Appld.** Sumpter v. Hedges, [1898] 1 Q. B. 673. **Refd.** Appleby v. Myers (1867), L. R. 2 C. P. 651.

147. — — —.]—Pltf., a builder, who had contracted to erect certain buildings on deft.'s land for a lump sum, after he had done part of the work, abandoned the contract, & deft. thereupon completed the buildings:—Held: pltf. could not recover from deft. in respect of the work which he had done as upon a *quantum meruit*, there being no evidence of any fresh contract to pay for same.—**SUMPTER v. HEDGES**, [1898] 1 Q. B. 673; 67 L. J. Q. B. 545; 78 L. T. 378; 46 W. R. 454; 42 Sol. Jo. 362, C. A.

Annotations:—Appld. Hart v. Porthgarn Harbour Co., [1903] 1 Ch. 690. **Consd.** Wheeler v. Stratton (1911), 105 L. T. 786; Dakin v. Lee, [1916] 1 K. B. 566.

148. — Destruction of subject matter—Completion condition precedent.]—APPLEBY v. MYERS, No. 129, *ante*.

146 i. Work unfinished—No evidence of fresh contract.]—Held: (1) there had been no act of the defts. showing acceptance, waiver, or prevention; (2) there was no evidence from which there could be implied a new contract to pay for the work as performed, according to value, although not entirely completed.—**MERRIAM v. PUBLIC PARKS BOARD OF PORTAGE LA PRAIRIE**, [1911] 18 W. L. R. 151; *affd.* [1912] 20 W. L. R. 603; 1 W. W. R. 1082; 2 D. L. R. 702.—**CAN.**

146 ii. — — — Acceptance of work.]—Held: (1) although defts. had taken up the work, pltf. could not succeed upon a *quantum meruit* merely because defts. had received the benefit of his part performance unless they had done so under circumstances sufficient to raise an implied contract to pay for the work done notwithstanding the nonperformance of the special contract; (2) there was no evidence of any such implied contract.—**COUGHLAN v. MOLONEY** (1905), 39 I. L. T. 153.—**IR.**

m. — Evidence of fresh contract.]—Upon the evidence:—Held: (1) pltf. had abandoned the work after having done a part of it; (2) there was a fresh contract to pay for the work already done upon which pltf. were entitled to recover on a *quantum meruit*.—**ELFORD & CORNISH v. THOMPSON** (1912), 19 W. L. R. 809; 1 W. W. R. 409; 1 D. L. R. 1; 5 Sask. L. R. 96.—**CAN.**

n. — Completion by employer.]—SIMPSON v. TRIM TOWN COMRS. (1898), 32 I. L. T. 129.—**IR.**

o. — Evidence of fresh contract.]—BAIN & TORREY v. EAGLE (1914), 29 W. L. R. 335.—**CAN.**

p. — Express promise to pay.]—VOGAN v. BARRY (1908), 7 W. L. R. 811.—**CAN.**

q. — When right accrues.]—Where there is default by the builder under a building contract, & the owner completes the work, the right of the builder to recover the difference between the contract price & what it costs to complete the work, accrues, if at all, only when the work has been completed.—BERESFORD v. HALLORAN CONSTRUCTION CO.** (1914), 28 W. L. R. 208.—**CAN.****

arrangement with contractors—Whether increased cost of completion recoverable.]—HAWTHORNS

& CO., LTD. v. WHIMSTER & CO. (1917), 54 Sc. L. R. 547.—**SCOT.**

s. — — — After forfeiture.]—Pltf. entered into a contract with defts. to build a bridge for them. Subsequently he took S. into partnership with him. The work not progressing satisfactorily defts., under the special terms of the contract, took it over & finished the bridge, S. acting as foreman. Defts. accepted the bridge:—Held: pltf. were entitled to an account of what defts. had expended, any balance of the contract price to be paid into ct. for pltf. — **BUCHANAN v. WINNIPEG, STEWART v. WINNIPEG** (1910), 12 W. L. R. 613; *affd.*, 19 W. L. R. 761.—**CAN.**

Forfeiture, generally, see Part X., post.

t. — Owner taking possession.]—Pltf. sued for work & labour done, & materials supplied under a contract to build a house, according to plans & specifications. At the time of action brought, certain things specified in the contract had not been done by pltf., but it appeared that deft. had gone into possession of the house:—Held: pltf. could recover.—**MORRISON v. GROVENER** (1884), 5 N. S. W. L. R. 195.—**AUS.**

a. — Unforeseen physical obstruction.]—Resps. agreed to sink a borehole for applt. on his farm at a spot either to be selected by them or by him & approved of by them. There was no guarantee by resps. that water would be found on such a spot & applt. undertook to pay the cost of the hole on the completion of the work. After sinking for six ins. the drill encountered a hard intrusive dyke through which it could not bore. Applt. was then given the option of having the hole sunk at a spot selected by resps. but to this he would not consent. Resps. thereupon abandoned the work & demanded payment of the sum of £39, the cost of performing such work as had been done:—Held: (1) resps. were bound to sink a borehole at the spot selected by applt. & the refusal of applt. to allow sinking at any other spot was not a breach of contract; (2) resps. had failed to perform their part of such contract & were therefore only entitled to judgment for six shillings in terms of the tender.—**HEAD v. BRITISH SOUTH AFRICA CO.** (1914), 8 S. R. 113.—**S. AF.**

b. — — —.]—Deft. agreed with

pltf. to sink an artesian well in B. for seventy-five cents a ft. After sinking a distance of 160 ft. he met with an impediment, & refused to proceed further:—**Held:** he was entitled to be paid for the work done.—**BARRIE GAS CO. v. SULLIVAN** (1880), 5 A. R. 110.—**CAN.**

c. — Destruction of subject-matter.]—Under the circumstances:—Held: the destruction of the building by fire before the completion of pltf.'s work could not defeat his claim for what he had already done.—**HUBBARD v. WALKER** (1856), 13 U. C. R. 205.—**CAN.**

d. — — —.]—Pltf. contracted under seal to erect a building for deft. according to plans & specifications. Pltf. was to be paid a certain percentage on the value of the work as it progressed, on the certificate of the architect; but the last payment was not to be made until all the claims for extras had been agreed upon. Pltf. proceeded with the building, but before the completion of the building it was destroyed by fire:—Held: that pltf. was entitled to recover the percentage on the value of the work done, though the building was never completed.—**FLOOD v. MORRISSEY** (1880), 20 N. B. R. 5.—**CAN.**

e. — — —.]—A contractor entered into an engagement with a body of road trustees to execute repairs upon certain bridges belonging to the trustees. He had completed the work upon all the bridges but one, & the work on that one was nearly done, when a surface man in the employment of the trustees, without the knowledge or leave of the contractor, removed the wooden supports from the uncompleted bridge, with the result that the bridge fell down & the work bestowed upon it was lost. In an action by the contractor against the road trustees:—Held: pltf. was entitled to payment for the work expended by him upon the unfinished bridge, the accident not having been caused by any fault on his part.—**RICHARDSON v. DUMFRIESSHIRE ROAD TRUSTEES** (1890), 27 Sc. L. R. 650.—**SCOT.**

Completion condition precedent.]—Held: (1) where the contract is to do work for a specific sum, there can be no recovery until the work is completed, unless the failure to do so is caused by deft.'s fault; (2) as pltf. admitted the noncompletion by

149. Work completed after date specified—Acceptance by owner.]—Pltf. contracted to build cottages by Oct. 10; they were not finished till the 15th. Deft. having accepted the cottages:—*Held*: pltf. might recover the value of his work, on a declaration for work & labour & materials.—*LUCAS v. GODWIN* (1837), 3 Bing. N. C. 737; 3 Hodg. 114; 4 Scott, 502; 6 L. J. C. P. 205; 132 E. R. 595.

Annotations:—*Distd. Lamprell v. Billericay Union* (1849), 3 Exch. 283. *Appld. Dakin v. Lee*, [1916] 1 K. B. 566.

Time for completion generally, see Part II., Sect. 3, *ante*.

150. Interference of employer—Contractor prevented from completing.]—Pltf. having agreed

suing on a *quantum meruit*, & there was nothing to show any fault on deft.'s part, there could be no recovery.—*KING v. LOW* (1901), 22 C. L. T. 107; 3 O. L. R. 234.—*CAN.*

148ii. —.—.—.—.—.]—Where there is a contract to do specified work for a fixed sum, with a proviso for payment of proportionate amounts, equal to eighty per cent. of this fixed sum, as the work is done & the balance of twenty per cent. in thirty days after completion & acceptance, completion is a condition precedent to the right to payment, & where the work is not completed there is no right to recover for the portion done as upon a *quantum meruit*.—*SHERLOCK v. POWELL* (1899), 26 A. R. 407.—*CAN.*

iii. —.—.—.—.—.]—*Ci*
KIRK CO. v. MCKITTRICK (1912), 22 W. L. R. 711; 8 D. L. R. 365; 3 W. W. R. 448.—*CAN.*

148iv. —.—.—.—.—.]—E., a builder, contracted with I. & Co., to make certain additions to their store. After much of the material had been brought on to the ground, & some of the work done, the work & material as well as the store, to which the additions were to be made, were destroyed by accidental fire. The fire was caused neither by the carrying out of the work nor by any default on the part of I. & Co. E. brought an action against I. & Co., to recover the value of the work done & material supplied. E. had not at the time of the fire or at the time of bringing the action, or afterwards, obtained any certificate from the architect:—*Held*: E. was not discharged from the necessity of completing his work & obtaining the architect's certificate which was a condition precedent.—*EDWARDS v. IRELAND & CO.* (1892), 11 N. Z. L. R. 80.—*N.Z.*

Certificates, generally, see Part III., *ante*.

148v. —.—.—.—.—.]—Pltf. agreed in writing with defts. to erect a dwelling-house upon their land according to a plan & specifications at a stated contract price. The agreement contained no other provisions. Before pltf. had completed the building according to the plan & specifications it was destroyed by fire:—*Held*: the contract was entire & indivisible, & it not having been shown that it was through default of defts. that the building had not been completed, or that a fresh contract had been entered into for payment for the work actually done, pltf. was not entitled to recover for the work actually done by him before the destruction of the building.—*DUTTON v. BRENN* (1909), 28 N. Z. L. R. 717.—*N.Z.*

g. —.—.—.—.—.]—*Price not ascertainable before completion.*—A workman who undertakes to make repairs to a house & who furnishes materials, although the quantity of the materials, & the price of the work, cannot be ascertained until the work is finished, can claim nothing from the owner of

the house, if it is destroyed, before the completion & delivery of the work, by a fire which is not attributable to the fault of the owner.—*MURPHY v. FORGET* (1901), Q. R. 19 S. C. 135.—*CAN.*

to supply & erect two corrugated iron roofs at a fixed price, supplied & erected the larger of the two roofs, but refused to supply the second roof, until the price of the first one had been paid. Deft. refused to pay until the whole work was done, gave pltf. notice to proceed with the second roof, & on pltf. still refusing to do so, employed another man to supply & erect it. In an action by pltf. for the price of the roof he had erected:—*Held*: as the contract was entire, pltf. would not have been entitled to sue, if deft. had done nothing to alter the position of pltf., but as deft. had not merely taken possession of the property but had completed the second roof & so had made it impossible for pltf. to complete it, pltf. was

ing-house, according to plans provided, except the painting, plumbing, etc., which were to be done by defts. The price was \$2,000 of which \$1,000 was to be paid when the roof was on & the balance on or before Oct. 1910. In Aug. pltf. notified defts. that he was unable to complete his contract, because the plumbing had not been done by defts. & demanded payment of the last instalment:—*Held*: pltf. was entitled to treat the contract as having been repudiated & to take the necessary steps to recover for what he had done under it.—*SIDNEY v. MORGAN* (1910), 16 W. L. R. 123; *sub nom. GIDNEY v. MORGAN*, 16 B. C. R. 18.—*CAN.*

h. —.—.—.—.—.]—*Work done previous to impossibility.*—Pltfs. entered into a contract with defts. to remove a schoolhouse from the site on which it stood to another site within the boundaries of a town district. Pltfs. proceeded to cut the building into four sections. They moved two of the sections on to the new site, but were refused a permit to re-erect the building, on the ground that its timbers were worm-eaten. Pltfs. applied to defts. to obtain the necessary permit & to authorise them to replace the worm-eaten with sound timber, but defts. refused, upon the ground that both these duties were cast upon pltfs. by the contract. During these negotiations the two sections of the building on the new site & a section on the old site collapsed owing to a heavy gale. Pltfs. then after doing some work at the new site abandoned the contract, & sued defts. for the amount of work they had done as on a *quantum meruit*:—*Held*: performance of the contract having been rendered impossible because of the inability to obtain a permit & the subject-matter being destroyed, pltfs. could not recover for work done before the impossibility.—*STAUNTON & KING v. WELLINGTON EDUCATION BOARD* (1909), 28 N. Z. L. R. 449.—*N.Z.*

k. —.—.—.—.—.]—*Owners indemnified by insurance—Whether equivalent to acceptance.*—*FENSOM v. BULMAN* (1907), 17 Man. L. R. 307.—*CAN.*

l. —.—.—.—.—.]—*Abandonment by mutual consent—Impossibility.*—*HARVEY v. HINCHINBROOK DIVISIONAL BOARD*, [1903] S. R. Q. 174.—*AUS.*

m. —.—.—.—.—.]—*Further performance rendered illegal.*—Contractors for the erection of a building for resp. in the city of S. brought an action claiming to have been prevented by resp. from carrying out their contract. The declaration contained the common counts, part of the work having been performed. By the terms of the contract the building, when erected, would not have conformed to the provisions of a bye-law of the city passed two days after the contract was signed:—*Held*: the bye-law made the contract illegal, & pltfs. could not recover.—*SPEARS v. WALKER* (1884), 11 S. C. R. 113.—*CAN.*

n. —.—.—.—.—.]—*McMILLAN v. WALKER* (1881), 21 N. B. R. 31.—*CAN.*

o. —.—.—.—.—.]—*Default of owner.*—Where an owner is bound by the contract to supply the builder with materials, which he fails to do, the builder is justified in leaving the work & suing for the value of that done.—*BURNS v. USSHERWOOD* (1901), 4 Terr. L. R. 389.—*CAN.*

p. —.—.—.—.—.]—Pltf. entered into a contract with defts. to erect a dwell-

ing-house, according to plans provided, except the painting, plumbing, etc., which were to be done by defts. The price was \$2,000 of which \$1,000 was to be paid when the roof was on & the balance on or before Oct. 1910. In Aug. pltf. notified defts. that he was unable to complete his contract, because the plumbing had not been done by defts. & demanded payment of the last instalment:—*Held*: pltf. was entitled to treat the contract as having been repudiated & to take the necessary steps to recover for what he had done under it.—*SIDNEY v. MORGAN* (1910), 16 W. L. R. 123; *sub nom. GIDNEY v. MORGAN*, 16 B. C. R. 18.—*CAN.*

q. —.—.—.—.—.]—*Payments withheld.*—Pltf. agreed to drill an oil or gas well for defts. upon their lands to a depth not less than 1,100 ft. at \$1.00 a ft. & defts. agreed to furnish all casing for the well & pay pltf. 50 cents a ft. "as the work proceeded." At the depth of 890 ft. pltf. asked for more casing & payment of the arrears of 50 cents a ft., & defts. refused until pltf. would put down casing & successfully shut off water. In an action to recover compensation for work done & for damages for nonperformance of the contract:—*Held*: pltf. was at liberty, not being in default himself, to take no further risk & sue upon the implied promise to pay for work already done & for damages already incurred.—*WILLIAMS v. ALPENA OIL & GAS CO.* (1905), 6 O. W. R. 401.—*CAN.*

r. —.—.—.—.—.]—Pltf. agreed with defts. to excavate & curb six water tanks, payment to be made weekly to the extent of fifty per cent. of the value of the work done, on estimates to be made by defts.' engineer. The weekly payments having fallen in arrear, pltf. stopped work, & defts., taking the material & tools left by him, completed it at their own expense:—*Held*: pltf. was not entitled to recover anything, either on a special count on the agreement, or on the common counts, though he might recover damages in trespass or trover for the material & tools used by defts.—*CLARKE v. WINNIPEG, Man. R. temp. Wood 56.*—*CAN.*

s. —.—.—.—.—.]—Where the owner failed to make the builder payments as provided for in the contract:—*Held*: the builder was entitled to abandon the contract & collect for what he had done as a *quantum meruit*.—*CRAGNOLINE v. SOUTHWICK* (1916), 27 O. W. R. 445.—*CAN.*

t. —.—.—.—.—.]—*Completion by owner—Basis of calculation.*—Where a contractor was wrongfully prevented by the other party to the contract from carrying out the work & was held entitled to the difference between the amount he would have received under the entire contract & the amount it would have cost him to complete it, & the work had been completed by the other party:—*Held*: it was not the actual cost incurred by the latter in so

Sect. 2.—Quantum meruit.]

entitled to a *quantum meruit*.—LYSAGHT v. PEARSON (1879), *Times*, March 3rd, C. A.

Annotation.—*Reid*. Sumpter v. Hedges, [1898] 1 Q. B. 673.

151. Wrongful forfeiture—Delay caused by agents of employer.]—Where applts., having guaranteed the due performance of a contract made with a municipal corpn. for the execution of works on its land, agreed on the contractor's default with resp. to complete the execution of the works on the terms of the original contract, & in effect delegated the supervision of the contract & all incidental arrangements to the corpn. & the corpn., according to the findings of the jury, improperly prevented resp. from proceeding with the stipulated expedition & wrongfully seized the works & extruded resp. :—*Held* : applts., having by their conduct constituted the corpn. their agents & the delay being attributable to their acts, could not justify the seizure & re-entry, & resp. was entitled to treat the contract as at an end & sue on a *quantum meruit*.—LODDER v. SLOWEY, [1904] A. C. 442; 73 L. J. P. C. 82; 91 L. T. 211; 53 W. R. 131; 20 T. L. R. 597, P. C.

Annotation.—*Mentd.* Mort's Dock & Engineering Co. v. Wadey (No. 6 of 1902), Mort's Dock & Engineering Co. v. Wadey (No. 43 of 1902), Wadey v. Mort's Dock & Engineering Co. (No. 85 of 1903) (1905), 22 T. L. R. 61.

152. — Default of sub-contractor.]—Pltfs., a firm of engineers, contracted to instal a water-works for defts. in accordance with specifications & bills of quantities. The water was to be raised by a windmill which, according to the contract, was to be of a particular type & was to be supplied by a particular maker. It was alleged that because of the existence of defects in the windmill,

completing it, but the amount which it was estimated pltf. would have expended in carrying out the work, which was the proper basis from which to ascertain the difference between income & cost under the contract.—MCILWEE v. FOLEY, [1918] 1 W. W. R. 222; 24 B. C. R. 532; *subsequent proceedings* (1919), 44 D. L. R. 5.—CAN.

a. — Tender based on fraudulent plans—Saving clause in contract as to inaccuracies.]—A contractor relying on plans exhibited to him by a co. entered into a contract with a co.; it was provided by the contract that the co. were not to be responsible for inaccuracies in the drawings. The plans in fact contained fraudulent misrepresentations. The contract was impossible to be performed, & the contractor became bkpt. The assignees of the bkpt. brought an action for work & labour done by the bkpt. before bkpcy. Defts. pleaded as a defence the contract, to which pltfs. replied fraud :—*Held* : although the plan & drawings were admitted on the record to be a fraudulent deception & misrepresentation, the replication was bad.—BOYLAN v. DUBLIN & BELFAST JUNCTION RY. CO. (1855), 8 Ir. Jur. 19.—IR.

b. — Improper refusal of progress certificate.]—Where an architect improperly refused a progress certificate :—*Held* : the contractors were justified in stopping the work & were entitled to recover the value of work done & material supplied.—ALBERTA BUILDING CO. v. CALGARY CITY (1911), 16 W. L. R. 443.—CAN.

Progress certificates, generally, see Part III., Sect. 2, *ante*.

c. — Mutual appointment of valuer.]—AITKEN v. MALCOLM (1845), 2 U. C. R. 134.—CAN.

151 i. Wrongful forfeiture — Delay

pltfs. had failed to complete their contract, & thereupon defts., in purported exercise of the forfeiture clause in the contract, called upon pltfs. to provide an efficient windmill. Thereupon pltfs., treating the contract as at an end, & wrongfully forfeited by defts., sued as on a *quantum meruit*, for work & labour done :—*Held* : inasmuch as defts. had insisted on a particular windmill being supplied by a particular contractor, pltfs. could not be held responsible for any defects which had made themselves apparent in the mill, & pltfs. were entitled to recover such amount as might be found due by an official referee.—BOWER v. CHAPEL-EN-LE-FRITH RURAL DISTRICT COUNCIL (1910), 75 J. P. 122; 9 L. G. R. 339; *subsequent proceedings* (1911), 9 L. G. R. 663, C. A.

Remedies for wrongful forfeiture generally, see Part X., Sect. 6, *post*.

153. Circumstances contemplated altered—Special conditions inapplicable.]—Where the circumstances contemplated by a building contract for works are so changed as to make the special conditions of the contract inapplicable, the contractor may treat the contract as at an end & recover upon a *quantum meruit*.—BUSH v. WHITEHAVEN PORT & TOWN TRUSTEES (1888), 2 Hudson's B. C., 4th ed., 122, C. A.

Annotations.—*Distd.* Drew-Bear v. St. Pancras Grdns. (1897), Emden's B. C., 4th ed., 681; Jackson v. Romford R. D. C. (1909), 73 J. P. 248. *Consd.* Porter v. Tottenham U. D. C., [1915] 1 K. B. 776. *Mentd.* Naylor, Benzoni v. Krainsche Industrie Gesellschaft, [1918] 1 K. B. 331; Bank Line v. Capel, [1919] A. C. 435.

154. Waiver of special contract—Evidence of intention.]—In certain circumstances, though there has been a special contract, & work has been done under it, not according to the contract, a

not arise where the parties agree that, notwithstanding the changed circumstances, the existing contract shall remain on foot & be carried out, or where they enter into a new express contract.—WEBB v. PEASE FOUNDRY CO. (1914), 7 O. W. N. 212.—CAN.

151 ii. — — —.]—BECK v. YORK (1914), 7 O. W. N. 493.—CAN.

d. — — — Insufficient notice.]—MCMILLAN & FARRELL v. SOUTHERN ALBERTA LAND CO. (1913), 25 W. L. R. 177.—CAN.

Forfeiture, generally, see Part X., *post*.

153 i. Circumstances contemplated altered—Special conditions inapplicable.]—Where the circumstances contemplated by a contract for works are so changed as to make the special conditions of the contract inapplicable, the contractor may treat the contract as at an end, & recover on a *quantum meruit*.—LAN YEONG WOOD v. STANDARD OIL CO. OF NEW YORK (1908), 3 Hong Kong L. R. 53.—HONG KONG.

153 ii. S. P. BOYD v. SOUTH WINNIPEG LTD. (1917), 2 W. W. R. 489.—CAN.

153 iii. — — — When new contract implied.]—Where a building contract is made with reference to certain anticipated circumstances, & where, without any default of either party, it becomes wholly inapplicable to, or impossible of application to any such circumstances, it ceases to have any application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made. In such a case the contract ceases to bind either of the parties, & if nothing is agreed upon to the contrary, & one of the parties proceeds with the performance of the work with the assent of the other, a new contract by the building owner or employer to pay a *quantum meruit* for the work subsequently performed, may be implied. The implication of such a contract does

153 iv. — — —.]—v. SIMONS (1910), 13 W. L. R. 125; 3 Alta. L. R. 49.—CAN.

153 v. — — — Increased cost.]—MCDONELL v. CANADA SOUTHERN RY. CO. (1893), 33 U. C. R. 313.—CAN.

153 vi. — — —.]—SHERLOCK v. TORONTO CITY (1906), 8 O. W. R. 646.—CAN.

e. — Waiver of conditions.]—Suppliants were contractors with the Crown for the widening & deepening of a canal, & by their petition of right contended there were such changes from the plans & specifications & in the manner in which the works were obliged to be executed as made the provisions of their contract inapplicable, & they were, consequently, entitled to recover upon a *quantum meruit*. In order to afford relief, an order in council was passed waiving certain conditions, provisions, & stipulations contained in the contract :—*Held* : (1) there had been no such changes as would entitle the contractors to recover on a *quantum meruit*; (2) there could be no valid waiver whereby a larger sum than the amount stipulated in the contract could be recovered.—PIGGOTT & INGLES v. R. (1907), 38 S. C. R. 501.—CAN.

f. — Notice of change of plans—Provision in contract.]—JALBERT v. CARDINAL (1914), Q. R. 45 S. C. 468; 20 D. L. R. 841.—CAN.

g. — Change in plans—Change profitable to contractor—Acquiescence.]—WESTHOLME LUMBER CO. v. VICTORIA CORPN. (1918), 39 D. L. R. 805.—CAN.

jury or a referee may be justified in inferring an intention to waive the special contract & pay according to value. But there must be some evidence from which such an intention can be inferred.

Circumstances in which :—*Held* : there was no such evidence of intention.—*WHITAKER v. DUNN* (1887), 3 T. L. R. 602, D. C.

Annotation :—*Expld.* *Sumpter v. Hedges*, [1898] 1 Q. B. 673.

155. Work varied & rendered more expensive—Quantum meruit for excess.—Where a builder agrees to erect any building for a particular sum of money, & additions are made, the builder is bound by the contract as far as it can be traced, & entitled to go on a *quantum meruit* for the excess only.—*PEPPER v. BURLAND* (1791), Peake, 139, N. P.

156. — Extras.—An action cannot be brought for a *quantum meruit* for work & labour, while a special contract, under which the work was done, remains open, but for extras it may.—*REES v. LINES* (1837), 8 C. & P. 126; *sub nom.* *LINES v. REES*, 1 Jur. 503, N. P.

157. — — ——By a contract under seal a contractor undertook to execute works for a corpn. at a fixed price. He alleged that the work had been so essentially varied under the orders of the corpn.'s engineer that he was entitled to disregard the fixed price, & claim payment on the basis of the cost of the work, either under an implied new contract, or on the ground that the whole work was "extra work" executed in accordance with the provisions of the contract :—*Held* : so far as variations & extra work had been properly ordered by the engineer, the proper basis of payment was the contract sum, plus any difference in cost due to such variations or extras to be ascertained as provided for by the contract, & the contractor could not reject the contract sum & claim to be paid on the basis of cost & expenses.—*BELL v. BRIDLINGTON CORPN.* (1908), 72 J. P. 453.

158. — — ——Pltf. contracted to carry out sewerage works for defts. In consequence of orders the work was varied & rendered much more expensive. Pltf. claimed to be entitled to payment as on a *quantum meruit* based on the cost & value of the work :—*Held* : he was only entitled to be paid on the basis of the contract price plus extras.—*JACKSON v. ROMFORD RURAL DISTRICT COUNCIL* (1909), 73 J. P. 248.

159. — Articles supplied not within contract.—Pltf. contracted with deft. to build for the Portuguese government a steam vessel of war for £10,400, such price or sum to be inclusive of all charges of every description except as thereafter mentioned; such vessel to be built in a good, substantial, & workmanlike manner, & with good sound materials of all kinds as prescribed by Table A. of Lloyd's registry for ships of the class A 1, thirteen years, & to the satisfaction of Admiral S., & to be delivered at M. on or before Apr. 25, 1859, ready for sea, "finished, fitted, found, & equipped in manner similar in all respects to that which is practised with ships or vessels of

156 i. Work varied & rendered more expensive—Extras.—If additional work done by a contractor, is of the kind contemplated by the contract, the contractor must be paid the contract price, but if the work be not within the contract, the contractor may refuse to go on with the work or claim to be paid on a *quantum meruit*.—*BOYD v. SOUTH WINNIPEG LTD.* (1917), 2 W. W. R. 489.—CAN.

156 ii. — — ——A contract for the construction of an aqueduct, according to a design adopted by the

owner's engineers required the contractors to reinforce one section thereof with steel. After the work had been begun the contractors, owing to the development of certain defects, were ordered by the owner's engineers to reinforce the whole work. In an action for the price of the extra steel on a *quantum meruit* basis :—*Held* : there was an implied agreement to pay for the extra work & material on a *quantum meruit*.—*J. H. TREMBLAY CO., LTD. v. GREATER WINNIPEG WATER DISTRICT*, [1918] 3 W. W. R. 713; *reversd.*, [1919] 1 W. W. R. 1083.—CAN.

the same class in H.M. navy under contracts with the Admiralty, except machinery, which was being manufactured by pltf. under another contract, armament, furniture, stores, plate, linen, glass, crockery, & opticians' instruments." It was agreed "that the purchase-money or sum of £10,400 is inclusive of all charges for the ship or vessel finished & fitted perfectly in every respect, & no charges shall be demanded for extras, but any addition or additions which may be made by order in writing of Admiral S. as an extra or extras shall be paid for at a price to be previously agreed upon in writing" Pltf. claimed the price of certain articles supplied by him when the vessel was nearly completed, at the request of deft.'s solr., & expressly without prejudice to his right to be paid for them if not within the contract, which Admiral S. claimed to be entitled to under the contract, as being necessary to the complete equipment of a vessel of war of her class built under contracts with the Admlty., but which the arbitrator found were not usually furnished under contracts made by the Admlty. with private builders, but were only supplied from the government stores to vessels when going out on active service, such as spare masts & yards, duplicate sails, etc. :—*Held* : these articles not being within the contract, pltf. was entitled to be paid for them as upon a *quantum meruit*.—*RUSSELL v. SA DA BANDEIRA (VISCOUNT)* (1862), 13 C. B. N. S. 149; 32 L. J. C. P. 68; 7 L. T. 804; 9 Jur. N. S. 718; 143 E. R. 59.

Annotations :—*Reid. Roberts v. Bury Improvement Comrs.* (1870), L. R. 5 C. P. 310; *Dodd v. Churton*, [1897] 1 Q. B. 562. *Mentd.* *British Columbia Saw-Mill Co. v. Nettleship* (1868), L. R. 3 C. P. 499; *Tew v. Newbold-on-Avon United District School Board* (1884), Cab. & El. 260; *Yzquierdo v. Clydebank Engineering & Shipbuilding Co.* [1902] A. C. 524; *Re Nott & Cardiff Corpn.*, [1918] 2 K. B. 146.

160. — Work outside contract.—A contract was made for the construction of works including "cast iron outlet pipe to low water," "as described in the specification & conditions & set forth on the drawings." The contractors also agreed to deliver a copy of the priced bill of quantities on which the tender was based. The general plan of the works showed the outlet pipe extending to low water mark, but the section showed it as extending 279 feet further into the sea. The length of pipe in the bill of quantities corresponded with the length of pipe shown in the section, but there was no price fixed in the bill of quantities for under water works. The contractor executed the work according to the section extending to about 279 feet beyond low water mark, & claimed to be paid for the work beyond low water mark at fair & reasonable prices for such work :—*Held* : the work done beyond low water mark was not covered by any price in the contract, & the contractor was entitled to be paid the price he claimed, the liability & not the amount being disputed.—*RE WALTON-ON-THE-NAZE URBAN DISTRICT COUNCIL & MORAN* (1905), 2 Hudson's B. C., 4th ed., 376.

Annotation :—*Distd.* *Jackson v. Romford R. D. C.* (1909), 73 J. P. 248.

156 iii. — — — Pleading.—*ARCHE v. ORILLIA TOWN* (1904), 3 O. W. R. 595, 723.—CAN.

160 i. — Work outside contract—Failure to give facilities.—*SMELLIE v. CALEDONIAN RY. CO.* (1915), 53 Sc. L. R. 336.—SCOT.

k. Oral contract—Work fully performed under.—Under an oral contract, if the entire work & labour to be done has been performed, & accepted, the contractor can recover the value of the work & labour on a *quantum meruit*, although the evidence

Sect. 2.—*Quantum meruit*. Sect. 3. Part

161. Mere acceptance by employer insufficient.]—Pltf., a builder, covenanted by deed with defts., a corpn., to do certain specified work for £5,500, & that if their architects should require any alterations or additions in the progress of the works, the architects should give to pltf. written instructions signed by them, & that he should not be considered as having authority for same without such written instructions. Defts. covenanted to pay pltf. £5,500 & the value of the additional work, if any. The declaration, after stating the deed, averred that pltf. executed all the works to be done for £5,500, that the architects required him to make certain additions by means of written instructions, signed, etc., & that he executed all the additional works, & that defts. took possession of all the works. Breach, non-payment of the £5,500, & of the sum due for the additions:—*Held*: although defts. had accepted the additional works, pltf. was not entitled to be paid on a *quantum meruit*, for defts., being a corpn., were incapable of making a new parol contract of that description.—*LAMPRELL v. BILLERICAY UNION* (1849), 3 Exch. 283; 18 L. J. Ex. 282; 12 L. T. O. S. 533; 13 J. P. 235; 154 E. R. 850.

Annotations:—*Consd.* *Clarke v. Cuckfield Union Grdns.* (1852), 21 L. J. Q. B. 349; *Thames Iron Works & Ship Bldg. Co. v. Royal Mail Steam Packet Co.* (1862), 13 C. B. N. S. 358. *Mentd.* *Diggle v. London & Blackwall Ry. Co.* (1850), 19 L. J. Ex. 308; *Finlay v. Bristol & Exeter Ry. Co.* (1852), 7 Exch. 409; *Lowe v. L. & N. W. Ry. Co.* (1852), 21 L. J. Q. B. 361; *R. v. Greene* (1852), 16 Jur. 663; *Pauling v. L. & N. W. Ry. Co.* (1853), 1 C. L. R. 997; *Henderson v. Australian Royal Mail Steam Navigation Co.* (1855), 5 E. & B. 409; *Northampton Gaslight Co. v. Parnell* (1855), 3 C. L. R. 409; *Smart v. West Ham Union Grdns.* (1855), 10 Exch. 867; *Russell v. Sa Da Bandeira* (1862), 13 C. B. N. S. 149; *Nicholson v. Bradfield Union Grdns.* (1866), 7 B. & S. 774; *Hunt v. Wimbeldon L. B.* (1878), 3 C. P. D. 208; *Lawford v. Billericay R. D. C.*, [1903] 1 K. B. 772.

—*See, further*, Part VI., *post*.

162. Oral agreement as to extension.]—A contractor agreed with an incorporated co. to do certain works, the contract being under seal. In this contract there was a stipulation, that if the co. should think proper at any time to make any addition to the original works, the co. should be at liberty to do so on giving him written instructions for that purpose, signed by the principal or assistant engineer. A verbal arrangement was afterwards made by the principal engineer for the execution of certain extension work allowing for a variance in the prices, but stipulating that with the exception of that variance, all the provisions of the contract should be considered as applicable to the extension work. This work was executed by the contractor under this arrangement:—

may establish, that up to the trial, he insisted on the special contract. It is not necessary that before bringing the action, he should elect to abandon the special contract.—*SAVAGE v. CANNING* (1867), 1 R. 1 C. L. 434.—*IR*.

l. No binding agreement.]—*Held*: pltf.'s tender not being *bond fide*, & the evidence not establishing a binding agreement, pltf. could recover on a *quantum meruit* for the work done.—*DEGAGNE v. CHAVE* (1896), 2 Terr. L. R. 210.—*CAN*.

m. No formal contract.]—A contract with a harbour board, which does not observe the formalities required by Harbours Act, 1878, s. 66, is not binding & an action for work done as upon a *quantum meruit* cannot be maintained under it.—*REYNOLDS v. NELSON HARBOUR BOARD* (1904), 33 N. Z. L. R. 965.—*N.Z.*

See, generally, SHIPPING & NAVIGATION.

n. —.]—*LONGSTAFF v. HAMILTON* (1909), 14 O. W. R. 208.—*CAN*.

o. — Omission to sign specifications—*Certificate condition precedent*.]—Under the circumstances:—*Held*: pltf.'s omission to sign the specifications could not entitle him to set aside the contract as not complete, & to claim for the work done as upon a *quantum meruit*, without the architect's certificates.—*GEARING v. NORDHEIMER* (1876), 40 U. C. R. 21.—*CAN*.

Certificates, generally, see Part III., ante.

p. Contract conditional on passing of bye-law—*Bye-law not passed*.]—*QUAINTANCE v. HOWARD TOWNSHIP* (1889), 18 O. R. 95.—*CAN*.

q. Quantities understated in contract—*Payments made on certificates*.]—*Held*: that a person contracting to complete a building according to plans & specifications at a specified price, &

Held: he could not afterwards reject the terms of the contract, & claim remuneration for the work as upon a *quantum meruit*, nor could he ask in equity for accounts to be taken independently of the contract.—*RANGER v. GREAT WESTERN RY. Co.* (1854), 5 H. L. Cas. 72; 24 L. T. O. S. 22; 18 Jur. 795; 10 E. R. 824, H. L.; *reversq.* (1843), 3 Ry. & Can. Cas. 298.

Annotations:—*Reid*. *Lodder v. Slowey*, [1904] A. C. 442. *Mentd.* *Kirk v. Bromley Union Grdns.* (1846), 11 Jur. 49; *Waring v. M. S. & L. Ry. Co.* (1849), 7 Hare, 482; *South Wales Ry. Co. v. Wythes* (1854), 1 K. & J. 186; *Re London, Birmingham & Buckinghamshire Ry. Co., Ex p. Curzon* (1857), 6 W. R. 141; *Scott v. Liverpool Corpn.* (1858), 3 De G. & J. 334; *Re Royal British Bank* (1859), 3 De G. & J. 387; *Thornhill v. Neats* (1860), 8 C. B. N. S. 831; *Pawley v. Turnbull* (1861), 3 Giff. 70; *New Brunswick & Canada Ry. Co. v. Conybeare* (1862), 9 H. L. Cas. 711; *Thames Iron Works & Ship Bldg. Co. v. Royal Mail Steam Packet Co.* (1862), 13 C. B. N. S. 358; *Hill v. South Staffordshire Ry. Co.* (1865), 11 Jur. N. S. 192; *Wildes v. Russell* (1866), Har. & Ruth. 689; *Western Bank of Scotland v. Addie, Addie v. Western Bank of Scotland* (1867), L. R. 1 Sc. & Div. 145; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1; *Mackay v. Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394; *Stegmann v. O'Connor* (1899), 81 L. T. 627; *Taff Vale Ry. Co. v. Amalgamated Soc. of Ry. Servants*, [1901] A. C. 426; *Foster & Dickson v. Hastings Corpn.* (1903), 87 L. T. 736.

163. Alteration in written contract.]—Pltf. was employed by deft. to erect buildings on deft.'s land upon written conditions, which, after being signed, were kept on deft.'s behalf by his architect. One of the conditions made the architect's certificate a condition precedent to the right to payment. Pltf. having been paid for all the works for which the architect had certified, sued upon a *quantum meruit* in respect of works for which no certificate had been given. Deft., in answer, set up the conditions, in which appeared an erasure in a material part. The jury having found that the erasure was made by the architect after pltf. had signed, pltf. contended that the document was void, & that he might sue on a *quantum meruit*:—*Held*: notwithstanding the erasure, the conditions were either still the governing document, or at least must be looked at to see what were the real terms of the contract, & pltf. could not recover.—*PATTINSON v. LUCKLEY* (1875), L. R. 10 Exch. 330; 44 L. J. Ex. 180; 33 L. T. 360; 24 W. R. 224.

Annotation:—*Mentd.* *Sumpter v. Hedges*, [1898] 1 Q. B. 673.

Building leases.]—*See* LANDLORD AND TENANT.

SECT. 3.—BONUS AND DEDUCTIONS.

164. Contractor prevented from earning bonus—*Damages—Default of employer*.]—B. tendered on Jan. 29, 1903, to do certain alterations to C.'s restaurant for £12,395. At an interview on

to the approval of a particular person, cannot, after he has upon the certificate of such person received the amount contracted for, sue on the original contract, contending that it did not contain the quantities actually required to complete the building; nor can he set aside the contract & sue for work & labour.—*PATTERSON v. GREAT WESTERN RY. CO.* (1859), 9 C. P. 229.—*CAN*.

r. Refusal to sign contract—*After work done*.]—*McWILLIAMS v. JOSEPH*, 1 L. C. L. J. 92.—*CAN*.

PART IV. SECT. 3.

s. When bonus payable—*Ordering of extras*.]—Where the contract provides that a bonus will be paid for every week in which the contract shall be finished within the specified time, the bonus cannot be claimed for such time, as the completion of the original

Feb. 4 between B. & C., the tender was accepted. Simultaneously it was agreed that in consideration of B. undertaking to give possession of the basement & ground floor within nine weeks from the commencement, C. would pay to B. £360 as a bonus. This agreement was confirmed by B. by letter of Feb. 4. B. began to work on Feb. 11, but was at once stopped, as C. had not made arrangements with the occupier of the adjoining house as to interfering with a party-wall. B. was

unable to resume working until Mar. 3 when a party-wall award was made. Possession of the ground floor was given on May 16. C. paid the £12,395, but refused to pay the £360:—*Held*: there was such a prevention by C. of B. earning the £360 as to entitle B. to damages, & as no attempt had been made at the trial to quantify the damages, a judgment giving to B. £360 as damages must be upheld.—*BYWATERS & SONS v. CURNICK & Co.* (1906), 2 Hudson's B. C., 4th ed., 393, C. A.

Part V.—Payment.

See, also, ARBITRATION, Vol. II., p. 513, No. 1518.

165. By instalments—Completion not condition precedent—Independent covenants.]—A. covenants to build a house for B. & finish it on or before a certain day, on consideration of a sum of money, which B. covenants to pay A. by instalments as the building shall proceed. The finishing

the house is not a condition precedent to the paying the money, but the covenants are independent, & A. may maintain an action of debt against B. for the whole sum, though the building be not finished at the time appointed.—*TERRY v. DUNTZE* (1795), 2 Hy. Bl. 389; 126 E. R. 611.

Annotation:—*Consd. Heard v. Wadham* (1801), 1 East, 619.

works has been delayed by the compulsory carrying out of extras & additions.—*WARE v. LYTTLETON HARBOUR BOARD* (1882), 1 N. Z. L. R. 191.—N.Z.

Extras, generally, *see* Part VI., *post*.

PART V.

t. Liability for—House built to order of husband—On wife's land.]—The wife, proprietor of a piece of land upon which a house has been built on a contract made by her husband in his own name with the builders, is responsible for the price of the house, because she consented to the construction & her husband acted as her agent, without declaring it, & even if her husband might not be considered as her agent, she would still be held responsible but only as to the extent of the extra value given to her property by the construction.—*BÉLANGER v. PAQUET* (1884), 11 Q. L. R. 67.—CAN.

a. — Unincorporated religious society.]—The members of the building committee of an unincorporated religious society who attend meetings held in connection with the building of a church, & the progress & character of the work, are liable to the builder notwithstanding that no written contract is entered into, & that the books & accounts of the builder show that he did not know exactly to whom he was to look for payment.—*MCQUARRIE v. CALNEK* (1895), 27 N. S. R. 483.—CAN.

b. — Completion a condition precedent.]—*SIDNEY BOAT & MOTOR MANUFACTURING CO. v. GILLIS* (1909), 44 N. S. R. 152; 7 E. L. R. 518.—CAN.

c. — Owner—Repudiating liability except for certain sums.]—Where the owner of a building notifies suppliers of materials that he will not hold himself responsible for other than certain amounts mentioned, he thereby renders himself liable for such amounts.—*LAPOINTE v. BUREAU* (1916), Q. R. 51 S. C. 402.—CAN.

d. — — Damage before completion caused by owner's delay.]—Pltfs. agreed to build wooden houses for deft. with timber indicated by him, without painting, deft. to advance half the money when the houses were closed in, & if necessary to advance money for the payment of pltfs.' workmen. Considerable delay to pltfs.' work was caused by deft. failing to supply money for pltfs.' workmen; when the houses were finished the painting was not done for some time resulting in the sidings of the houses

warping. In an action by pltfs. for the balance due to them under the contract:—*Held*: pltfs. were entitled to recover as any damage sustained by deft. was due to his delay in advancing the money for the workmen's wages.—*HATER v. BROWN* (1905), 2 W. L. R. 36.—CAN.

e. — — Hindering valuation of work done.]—Where a building contract is so far performed that the parties cannot be restored to their original position, & unsatisfactory work is being done, if the party aggrieved, in the absence of agreement *ad hoc*, interferes with the work so as to make it difficult to determine the value of that already done, he does so at the risk of having to pay the other party more than he has really earned, apart from the question of damages.—*MOORE v. BRITISH COLUMBIA POTTERY CO.* (1890), 2 B. C. R. 45.—CAN.

f. — Contractor—To sub-contractor.]—If a railway co. transfers to its contractor the subsidies from the Govt., it is not responsible for the difference between the contract price for the construction of its line & the amount actually paid by the Govt., unless the contractor proves that, owing to the fault of the co., the subsidies were not paid in full.—*GREAT NORTHERN CONSTRUCTION CO. v. ROSS* (1915), Q. R. 25 K. B. 386.—CAN.

g. Time for—Delivery a condition precedent.]—A. contracted to build a house for B., & to deliver possession thereof when finished, upon which he was to be paid:—*Held*: no action would lie to recover the price until an absolute & unreserved delivery of the house had taken place, & he had no right to withhold the key of the house until he received payment, though B. had not acquired any title to the land on which it was built.—*JOHNSON v. CREW* (1836), 5 O. S. 200.—CAN.

h. By instalments—Completion not condition precedent.]—*Held*: contractors could proceed by action if payment on a monthly progress certificate was withheld & they were not obliged to wait the final completion of the work before suing.—*MURRAY v. R.* (1896), 26 S. C. R. 203.—CAN.

165 i. — — Independent covenants.]—Contractors agreed to remove both spans of a wrecked bridge & put them ashore for the sum of \$25,000, to be paid \$5,000 as soon as one span is removed from the channel & another \$5,000 as soon as one span is put ashore & the balance as soon as the work is completed. If they failed to complete

work in one season they had the right to complete it next season:—*Held*: the contractors having removed one span from the channel & put it ashore were entitled to the two payments of \$5,000 each notwithstanding the whole work was not completed in the second season.—*COLLINS BAY RAFTING & FORWARDING CO. v. NEW YORK & OTTAWA RY. CO.* (1902), 32 S. C. R. 216.—CAN.

k. — — Whether degree of completion must be proportionate to instalments.]—Pltf. agreed to build & finish a steamer for deft., to be completed within three months from Nov. 1, payment to be made in three equal parts once a month from Nov. 1. Deft. refused to pay the second instalment:—*Held*: (1) it was immaterial whether two-thirds of the work had been done when the second instalment became due; (2) deft. could not complain of the quality of the work until the whole was performed.—*WALSH v. KINNEAR* (1876), 14 N. S. W. S. C. R. 434.—AUS.

l. — — & according to contract.]—Pltfs. agreed to build a certain building for deft. according to plans & specifications, for a lump sum, payable in "three equal payments, one to be made when roof is on building, one when plastered, balance when job is completed, thirty days after completion of the building":—*Held*: the right of pltfs. to call for any one of the three payments was conditional upon the work, so far as completed up to the period specified, being completed according to contract.—*MCDONALD v. SIMONS* (1910), 15 W. L. R. 218.—CAN.

m. — — Whether claim to full performance barred.]—Upon a contract to be paid for by instalments:—*Held*: by payment in part defts. were not barred from claiming full performance, & to the satisfaction, etc., as a condition precedent, the contract being in consideration of performance, and not in consideration of the covenant to perform.—*COATSWORTH v. TORONTO CITY* (1860), 10 C. P. 73.—CAN.

n. — — Right to reject for non-compliance with contract.]—A contract for the building of a yacht provided that the property in the yacht was to pass on payment of the first instalment of the price. The purchaser paid the first instalment, but two months afterwards, after having complained on various occasions of the quality of the work being done, rejected the boat as disconform to contract:—*Held*: the property had passed on payment of the first instalment of the price, but

166. On entire satisfaction—Bonâ fide dissatisfaction.]—Pltfs. sued for the balance of money alleged to be due on a contract for the renovation of a theatre. Defts. declined to pay this sum on the ground that it was retention money which, by the terms of the contract, they were not liable to pay until the work had been completed to their entire satisfaction, & that this had not been done. The jury found (*inter alia*) that defts. were honestly & in good faith dissatisfied with the work, the effect of which was not exactly that aimed at, but differed as to whether the dissatisfaction was reasonable or not:—*Held*: a finding as to reasonableness of dissatisfaction was not necessary for defts., & defts. were entitled to be fastidious, so long as they were honest.—**SHOOLBRED (JAMES) & Co. v. WYNDHAM & ALBERRY** (1908), *Times*, Dec. 1st.

See, also, Cases in Part III., ante.

167. Mode of—Bills of exchange—Lien of bill-holders.]—A contract for the building of a ship provided that the purchase-money was to be paid by instalments, partly in cash & partly by means of bills of exchange, to be paid & given at specified stages of the progress of the construction, the balance being paid on completion by a bill. The ship was from the time of paying or giving the first instalment to be the absolute property of the

purchaser to the extent of his advances, subject nevertheless to the builder's lien for any unpaid instalments. Any bills given during construction were to be retired by the purchaser at completion & transfer. As the construction of the ship went on, the vendor drew bills upon the purchaser, which he accepted, for the instalments of purchase-money. After these bills had been negotiated, but before any of them became due, the purchaser took proceedings for liquidation, including his liability on the bills among his debts, & his creditors passed a resolution to accept a composition. The bill-holders refused to accept the amount of composition when tendered. The purchaser shortly after the resolution gave notice to the vendor to rescind the contract. Not long after this the vendor became bkpt., & the ship was completed by his trustee. The bill-holders having claimed a lien on the ship:—*Held*: the principle of *Waring's Case* was not applicable, & the bill-holders had no lien on the ship.—*Re LINDSAY, Ex p. LAMBTON* (1875), 10 Ch. App. 405; 32 L. T. 380; 23 W. R. 602; 2 Asp. M. L. C. 525, L. J.J.

Rule in *Waring's Case* generally, *see* BANKRUPTCY & INSOLVENCY, Vol. V., pp. 711 *et seq.*

168. — Agreement to take shares in consideration of contract—Company wound up before

subject to the condition that the completed work should turn out to be conform to contract; & the yacht had been rejected timeously.—**NELSON v. CHALMERS (W.) & Co., LTD.** (1913), 50 Sc. L. R. 364.—**SCOT.**

o. — Final instalment—Claim to withhold delivery—Payment into court.]—**HEINSTEIN & SONS v. POISON IRON WORKS, LTD.** (1918), 15 O. W. N. 94.—**CAN.**

p. — Evidence of payment by builder.]—A term in a contract provided that the last 25 per cent. of the contract price should be payable on satisfactory evidence that all wages & material had been paid for:—*Held*: pltf. failed as to this, deft. not having waived this term.—**HUNTON v. COLEMAN Co.** (1907), 10 O. W. R. 610.—**CAN.**

q. — Failure to pay "fair" wages.]—Pltfs. contracted to perform certain work for defts., & agreed to pay wages at rates fixed by a fair wage schedule; defts. agreed to pay for the work from time to time the amounts certified to be due by their engineer:—*Held*: defts. could not keep back out of an instalment anything by reason of pltf. failing to pay wages according to the fair wage schedule.—**KELLY v. WINNIPEG CITY** (1908), 18 Man. L. R. 269; 9 W. L. R. 310.—**CAN.**

r. — How calculated.]—A contract for a lump sum provided for payment by the owner to the contractor in instalments of all wages for labour & sums paid for materials upon production of certified accounts, etc., the total amount paid during the progress of the work not to exceed a sum equal to 80 per cent. of the amount of work done & materials furnished on the premises at the contract price:—*Held*: the owner was to make payments for all work certified as actually done & materials as actually supplied, provided that the total of such payments did not exceed 80 per cent. of the total contract price.—**CALGARY MILLING Co., LTD. v. AMERICAN SURETY Co. OF NEW YORK**, [1919] 3 W. W. R. 98; 48 D. L. R. 295.—**CAN.**

s. — Right of set-off—Against damages for non-fulfilment of contract.]—Work was contracted to be done for a price payable by instalments during its progress, & at the sight of an architect, who was appointed arbiter in

case of dispute between employer & contractors; an instalment had been sent, for behoof of a contractor, to the architect, who returned it to the employer, with a request that he would send it direct to the contractor:—*Held*: the employer had no right to retain the instalment so sent in extinction of a claim of damages for non-fulfilment of the work.—**FIELD & ALLAN v. GORDON** (1872), 11 Macph. (Ct. of Sess.) 132.—**SCOT.**

t. On entire satisfaction — Reasonable satisfaction.]—In an action to recover payment for the construction of works, under a contract to execute them to the satisfaction of the employer, pltf. is not entitled to a verdict, unless the jury are satisfied that deft., as a reasonable person, ought to have been satisfied with the way in which they were executed.—**SMITH v. SADLER** (1880), 6 V. L. R. 5.—**AUS.**

a. — Evidence of — Taking possession.]—The taking possession of a building erected on a man's own land, & the using of it, is not of itself a sufficient acceptance of an incomplete or imperfect performance of a contract to erect the building so as to entitle the contractor to recover.—**BROLEY v. MILLA** (1908), 7 W. L. R. 657.—**CAN.**

b. —]—Pltf. agreed to erect a building for deft. upon a lot owned by pltf. & the deft. alleged there was a departure by pltf. from the pattern of the house as agreed upon for which he claimed compensation; nevertheless he went into occupation:—*Held*: this was an acceptance; it was not a case of an owner merely going upon his own land, in which case taking possession would not necessarily imply acceptance.—**MACKISSOCK & THOMAS, LTD. v. BLACK** (1912), 21 W. L. R. 424; 2 W. W. R. 465.—**CAN.**

c. —]—*Held*: the mere taking possession under an *habere* would not *per se* have operated as such an acceptance of the houses as could render the employer liable to pay for work done.—**CORCORAN v. OLLIS** (1861), 13 Ir. Jur. 393.—**IR.**

d. — Accepting delegation of payment.]—He who accepts, in a written document, certain delegations of payment, for work done for him which he declares is satisfactory, cannot afterwards refuse to pay on the ground that the work was ill-performed.
v. AUSTRIAN-HUNGARIAN

SOCIETY (1914), Q. R. 47 S. C. 364.—**CAN.**

e. — — Payment of amount due.]—In the circumstances:—*Held*: payment of the whole amount due under the contract was not conclusive proof that the work had been done to the satisfaction of the owner.—**HOPPER v. MEYER**, [1906] V. L. R. 235.—**AUS.**

See, also, cases in Part VIII., Sect. 3, sub-sect. 4, post.

f. Employer's right to withhold — Until completion—Cost of repairs.]—A contractor bound himself to finish a building in the middle of the summer; without the owner's fault, he delivered only in Nov.:—*Held*: the owner, under the order of the architect, who declared that he could not receive the work on account of the advanced season, had the right to retain in his hands a sufficient sum to the following spring, when the architect would be able to receive the work.

In the spring the work required repairs before being accepted:—*Held*: the proprietor, after having notified the contractor, might have the work done & deduct the cost from the amount he had kept as a guarantee.—**BOISMENU v. CURE ET MARGUILLERS DE L'LEUVRE ET FABRIQUE DE LA PAROISSE DE ST. CUNEGONDE** (1888), M. L. R. 4 S. C. 80.—**CAN.**

g. Mode of — Butter manufactured in dairy plant.]—Pltf. contracted to erect a dairy plant upon deft.'s land, to be paid for out of the proceeds of butter produced by deft.'s cows. By reason of a drought, there was not sufficient feed to enable deft.'s cows to produce butter:—*Held*: notwithstanding the negating of any agreement not embodied in the written contract, the language of that contract properly construed imported a promise by deft. that she would produce sufficient butter for the plant within a reasonable time, & evidence as to the conditions existing at the date of the contract was admissible on this point.—**HART v. MACDONALD** (1910), 10 C. L. R. 417.—**AUS.**

h. — Promissory notes of third party—Whether accepted in satisfaction of claim.]—**ORSINI v. BOTR** (1917), 12 O. W. N. 290.—**CAN.**

k. — Road tolls—C. S. U. C., c. 49, s. 32.]—**THORNTON v. SANDWICH STREET PLANK ROAD Co.** (1866), 25 U. C. R. 591.—**CAN.**

contract given — Liability to contribute.]—S. offered to take shares in a co. in consideration of his being secured a contract for adding to & altering the co.'s premises. The directors passed a resolution to give him the contract, & on the faith of such resolution he sent a formal application for shares without condition, & paid the deposit. The shares were allotted, & notice of the allotment was sent to S., & his name was entered on the register; but the certificates were never delivered nor was S. required to pay any calls. The contract was never given to S. on account of the winding-up of the co.:—*Held*: there was a contract to take shares by S. only on condition of his obtaining the building contract, as that condition had not been fulfilled by the co. nor waived by S., S.'s name must be removed from the list of contributories.—*Re ALPBOROUGH HOTEL CO., SIMPSON'S CASE* (1869), 4 Ch. App. 184; 39 L. J. Ch. 121; 17 W. R. 424, L. JJ.

Annotation:—*Mentd. Re Tavarone Mining Co., Pritchard's Case* (1873), 28 L. T. 625.

See, generally, COMPANIES.

169. Appropriation of—Payments generally on account—Additional work.]—Pltf., a builder, covenanted by deed with defts., a corpn., to do certain specified work for £5,500, & that if their architects should require any alterations or additions in the progress of the works, the architects should give to pltf. written instructions signed by them, & that he should not be considered as having authority for same without such written instructions. Defts. covenanted to pay pltf. £5,500 & the value of the additional work, if any. The declaration, after stating the deed, averred that pltf. executed all the works to be done for £5,500, that the architects required him to make certain additions by means of written instructions, signed, etc., & that he executed all the additional works, & that defts. took possession of all the works. Breach, non-payment of the £5,500, & of the sum due for the additions. Defts., after settling out the deed on oyer, pleaded to the £5,500, payment before action brought. Payments had been made to pltf. to the amount of £6,300. The payments were made generally in respect of the work actually done, without distinguishing the one description from the other:—*Held*: the sums advanced by defts. were to be treated as sums paid on account of whatever amount pltf. might eventually be entitled to recover, viz., £5,500, & pltf. was not at liberty to apply so much of the £6,300 as was necessary in satisfaction of what was due for the additional works, leaving the balance only to be applied in part discharge of the £5,500, the doctrine of the creditor's right of applying indefinite payments to whichever of two debts he might prefer, not applying.—*LAMPRELL v. BILLERICAY UNION* (1849), 3 Exch. 283; 18 L. J. Ex. 282; 12 L. T. O. S. 533; 13 J. P. 235; 154 E. R. 850.

Annotations:—*Consd. Clarke v. Cuckfield Union* (1852),

172 i. Interest—No stipulation in contract.]—Circumstances (*see p. 355, ante*) in which:—*Held*: pltf. were entitled to recover the amount shown in the architect's certificate with interest from the date of the certificate, at 5 per cent.—*BROWN CONSTRUCTION CO. v. BANNATYNE SCHOOL DISTRICT CORPN.* (1912), 21 W. L. R. 827; 5 D. L. R. 623.—*CAN.*

172 ii. — — — 60 *Vict. c. 24, s. 175 (N. B.)*.]—A contract provided for payments to be made monthly as the work progressed according to the estimate of the engineer in charge. The work not completed for more than one year after the date for completion, but the

delay was not the fault of pltf. There was no stipulation in the contract in reference to the payment of interest on any sums due but not paid:—*Held*: pltf. was not entitled to interest, his claim not being for a sum certain payable by virtue of a written instrument at a time certain, within the meaning of s. 175 of 60 V. c. 24 (N.B.).—*MAYES v. CONNOLLY* (1902), 35 N. B. R. 701.—*CAN.*

172 iii. — — — *Except on amount certified by architect.*]—*Held*: as there was no provision in a building contract for the payment of interest except on the amount certified by the architect, interest could not be claimed at law

Bail Ct. Cas. 81. Mentd. Diggle v. London & Blackwall Ry. Co. (1850), 19 L. J. Ex. 308; *Finlay v. Bristol & Exeter Ry. Co.* (1852), 7 Exch. 409; *Lowe v. L. & N. W. Ry. Co.* (1852), 21 L. J. Q. B. 361; *R. v. Greene* (1852), 16 Jur. 863; *Pauling v. L. & N. W. Ry. Co.* (1853), 1

Hain Union Grdns. (1855), 10 Exch. 867; *Russell v. Sa Da Bandeira* (1862), 13 C. B. N. S. 149; *Thames Iron Works & Ship Bldg. Co. v. Royal Mail Steam Packet Co.* (1862), 13 C. B. N. S. 358; *Nicholson v. Bradley Union Grdns.* (1866), 7 B. & S. 774; *Hunt v. Wimbledon L. B.* (1878), 3 C. P. D. 208; *Lawford v. Billericay R. D. C.*, [1903] 1 K. B. 772.

170. — — — Three contracts.]—Pltf. having executed certain work for deft., who had paid for part of it, brought an action for an alleged balance amounting to £103 16s. Deft. had instructed pltf. to execute three separate building contracts. In round figures the first came to £350, the second to £75, & the third to £25. Deft. had drawn cheques, generally in respect of the work as it was done, amounting to £350 at various times prior to the date when the action was commenced, & contended that at that time payment under the second & third contracts, which together came to £103 16s., had not become due. Pltf. appropriated the whole of the £350 received on account of the three contracts generally to the paying off in full of the first contract, certain items of which were disputed:—*Held*: pltf. had acted wrongly in setting aside in payment of a disputed claim money paid to his account generally, & in then bringing his action for the payment of two subsequent contracts which deft. never denied that he would be at a future date liable to pay for in full.—*PERKINS v. COOMBS* (1896), 41 Sol. Jo. 81.

See, further, CONTRACT.

171. Work illegally carried out.]—*Held*: a person who had carried out any building work with the knowledge that it constituted a breach of an order made under Defence of the Realm (Consolidation) Regulations, 1914, reg. 8 E, by the Minister of Munitions, was not entitled to recover payment for such work from the building owner.—*BRIGHTMAN & Co. v. TATE*, [1919] 1 K. B. 463; 88 L. J. K. B. 921; 120 L. T. 512; 35 T. L. R. 209.

Annotations:—*Mentd. Shutler v. Rolfe* (1920), 36 T. L. R. 828; *Whitham & Butterworth v. Lindley* (1920), 37 T. L. R. 75.

For extras.]—*See Part VI., Sect. 2, post.*

Of architect & engineer.]—*See Part XVI., Sect. 3, post.*

172. Interest—No stipulation in contract.]—A contract between a railway co. & a contractor provided that payments should be made monthly, as the works proceeded, on the certificates of the co.'s engineer. There was no stipulation in the contract in reference to the payment of interest to the contractor on any sums due, but not paid to him. The contractor made a demand in writing for a sum as the balance due to him, & claimed interest thereon. His accounts were disputed, but on a bill filed by him against the co., the result showed that he was entitled to a balance less than

where there had been no such certificate.—*Re ELLISDON & EASTEN* (1917), N. Z. L. R. 209.—*N.Z.*

i. — — — How calculated.]—A municipality agreed to pay for works to be constructed by promissory notes payable in two years without interest, the notes to be delivered to the contractor on the completion of the works & to bear a date assumed to be the mean date of completion of the works as carried on in detail. The amount of the notes represented the price of the tender with average interest added, & the municipality reserved the privilege of making payments upon the acceptance of progressive estimates on the

one-half of the sum which he had claimed to be due from the co.:—*Held*: the contractor was not entitled to interest either under the contract, there being no express stipulation on the part of the co. to pay any, or under Civil Procedure Act, 1833 (c. 42), s. 28, the demand in writing for payment

not being of a sum certain payable at a certain time.—*HILL v. SOUTH STAFFORDSHIRE RY. CO.* (1874), L. R. 18 Eq. 154; 43 L. J. Ch. 556.

Annotations:—*Folld. Ward v. Eyre* (1880), 15 Ch. D. 130. *Consd. L. C. & D. Ry. Co. v. S. E. Ry. Co.*, [1892] 1 Ch. 120. *Reid. Geake v. Ross* (1875), 44 L. J. C. P. 315.

Part VI.—Alterations, Additions and Omissions.

SECT. 1.—WHAT ARE EXTRAS.

173. Necessary works—Statutory requirements.]

—Defts. being under contract with the owner to supply & fit up an emigrant ship with everything comprised in the Emigrants Comrs.' schedule, to the entire satisfaction of the surveyor to such Comrs., plths. contracted with defts. to do part of such contract work, viz., "to fit up the between decks of the ship for government emigrants, to provide all materials & labour, viz., all plumbers' & joiners' work, for 15s. per statute adult, the whole to be done to the satisfaction of the Emigration Comrs." Plths. erected many more berths in the vessel than she was measured to carry according to Passengers Act, 1852 (c. 119), & several of the berths had to be taken down, & some of them to be rebuilt & altered, by plths., by the order of the Comrs. By the like order other work, in the nature of ship's fittings, was done by plths., such as making a ventilator, deck lights, & a school-master's cabin, etc.:—*Held*: defts. were only liable to pay plths. at the rate of 15s. per statute adult for the number of berths with which the ship was allowed by the Comrs. to go to sea, & defts. were not responsible for any further sum in respect of the other work done by plths. under the order of the Comrs.—*DOBSON v. HUDSON* (1857), 1 C. B. N. S. 652; 26 L. J. C. P. 153; 28 L. T. O. S. 270; 21 J. P. 358; 3 Jur. N. S. 216; 5 W. R. 308; 140 E. R. 269.

174. — Contract to build house—Flooring & flooring boards.]—*WILLIAMS v. FITZMAURICE*, No. 36, ante.

175. — Work in excess of quantities—Quantities part of contract.]—On a building con-

tract whereby additions & alterations were not to avoid it, but to be allowed for at amounts to be named by the employer's surveyor, the contract being made up of a tender framed on quantities calculated by the surveyor, & specifications referred to them, & signed by the builder alone:—*Held*: the builder having completed the work & claimed payment under the contract, could not claim for work as excess of the "quantities" on which it was based, nor for any additions or alterations beyond the amount allowed by the surveyor.—*COKER v. YOUNG* (1860), 2 F. & F. 98, N. P.

176. — — — — —.]—Where a building contract provides that the work is to be done for a lump sum "according to the plans, invitation to tender, specification & bills of quantities," the quantities are to be regarded as defining the amount of work included in the price, & if the contractor is required, in order to complete the work, to do more work than is in the quantities, he is entitled to be paid therefor an addition to the contract sum.—*PATMAN & FOTHERINGHAM, LTD. v. PILDITCH* (1901), 2 Hudson's B. C. 4th ed. 368.

177. — — — Quantities not part of contract.]—An architect entered into an undertaking with his employer that a house should be erected for a sum not exceeding £15,000, including architect's commission & all expenses, & engaged the services of a builder who, without being informed of the undertaking, gave an estimate based on quantities given him by the architect, & entered into a contract with the employer for the completion of the work from the architect's plans, & under his superintendence, for £13,690. with power for the

works as completed from time to time, without interest or previous notice "en déduisant les intérêts composés au taux de six pour cent par an à échoir après l'époque des paiements et lesquels étaient compris dans le prix de soumission pour la totalité des deux années." The mean date was settled as 15th Dec., 1899, & the notes for the balance due were delivered in 1900:—*Held*: (1) no interest should be allowed prior to 15th Dec., 1899, on payments made before that date; (2) the interest should be calculated on the basis of the price actually mentioned in the contract, & upon the actual amount of the advance payments made.—*VILLE DE MAISONNEUVE v. BANQUE PROVINCIALE* (1903), 33 S. C. R. 418.—CAN.

m. — From date of final certificate.]—In an action for balance of contract price & extra work interest was allowed from the date of the final certificate.—*PETERS v. QUEBEC HARBOUR COMRS.* (1891), 19 S. C. R. 685.—CAN.

n. Right of action for—Whether excluded by clause of reference.]—*Held*: an action raised by a contractor against his employer for payment due under a building contract was not excluded by a clause of reference in the contract, in respect that it was not clear that the

clause of reference gave the arbiter authority to give decree for payment of money.—*TOUGH v. DUMBARTON WATER WORKS COMRS.* (1872), 11 Macph. (Ct. of Sess.) 236.—SCOT.

PART VI. SECT. 1.

o. Necessary work—Contract to construct drain—Alteration of depth.]—Depths required were marked on the profiles forming part of a contract to construct a drain; the engineer, under whose personal direction the work was being done, discovered that the depths were inaccurately given, & directed the drains to be deepened thereby occasioning to the builder considerable work beyond that provided for by the contract. Without the work the drain would have been useless. In an action against defts. to recover the value of such work:—*Held*: work that plth. was bound to perform under the contract itself.—*GREEN v. ORFORD TOWNSHIP* (1888), 16 A. R. 4.—CAN.

p. — Work included in contract.]—Works contained in addenda to specifications before execution of the contract are not extras.—*DIAMOND v. MCANNANY* (1865), 15 C. P. 9.—CAN.

q. — — — Compliance with bye-law.]—Under the specifications in a building contract, the contractor was

bound to provide necessary soil pipes, stacks, etc., necessary to fill all requirements of city bye-laws. The contractor claimed for extras in consequence of having to supply six stacks in lieu of three:—*Held*: the contractor in doing such work was merely doing what he agreed to do under the contract.—*ELFORD & CORNISH v. THOMPSON* (1912), 19 W. L. R. 809; 1 W. W. R. 409; 1 D. L. R. 1; 5 Sask. L. R. 96.—CAN.

r. Contract to build house—Variations of specification—Raising height of wall—"Finishing" storeys.]—*LAWRENCE v. KERN* (1910), 14 W. L. R. 337; 3 Sask. L. R. 253.—CAN.

s. Contract to build walls & foundations—Building chimney—Beam filling.]—Plth. agreed orally to build the walls & foundations of a house for deft., & no proper plans or specifications were prepared. Plth. claimed for extras in respect of an increase in the dimensions of the building, for building a chimney, & doing beam filling:—*Held*: plth. could recover therefor.—*IREDALE v. DREWERY* (1912), 19 W. L. R. 931; 4 D. L. R. 868.—CAN.

t. Variations—Subsequent to contract.]—Where alterations were mutually agreed upon, subsequently to the contract, the builder is entitled to claim for

architect to order extra works. On a suit by the builder claiming to be entitled to be paid by the employer for all quantities executed by him beyond those included in his estimate, & for extra works:—*Held*: pltf. was entitled to an account for what was due to him for any works executed by him under the architect's direction not included in the contract, & for any works so executed under the contract the price for which was not therein included, & for any variations made under the architect's direction of works included in the contract.—*KIMBERLEY v. DICK* (1871), L. R. 13 Eq. 1; 41 L. J. Ch. 38; 25 L. T. 476; 20 W. R. 49.

Annotations:—*Mentd. Lariviere v. Morgan* (1872), 26 L. T. 339; *Sharpe v. San Paulo Ry. Co.* (1872), 8 Ch. App. 605, n.; *Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co.* (1875), 10 Ch. App. 520, n.; *Amos v. Herne Bay Pavilion, Promenade & Pier Co.* (1886), 54 L. T. 264.

.]—N. contracted to construct a railway, including earthworks, for a lump sum. The contract provided that there were to be no extras, while the specification provided that no extras were to be paid for unless ordered in writing by the engineer at the time. The contract incorporated the specification. A bill of quantities was supplied by the railway to the contractor, which contained a note to this effect: "These quantities are not guaranteed as correct, & are furnished merely for the convenience of contractors." By clause 12 of the specification, "the contractor was to satisfy himself of the nature of the soil, of the quantity of materials to be excavated from the cuttings, of all probable contingencies, & generally of all matters which could in any way influence the tender for the contract," & he was to take upon himself all the risk & responsibility of the due & careful execution of the works. Clause 57 of the specification defined "earthworks" as including "all excavations, embankments, & levelling of every description, whatever the materials may be." When the works were completed N. claimed two items, (1) £30,000 for blasting rock in the excavations, & (2) £6,000 for excavations which were in excess of the quantities supplied to him. The matter was referred to arbn., & the arbitrator made his award in the form of a special case, in which he

stated that, as to the first claim, the contractor contended that the word "earthworks" meant soil which could be excavated without blasting, & did not include rock which could only be excavated by that means, & that "whatever the materials may be" in clause 57 had reference to different kinds of soil as distinguished from rock, while the railway contended that the work in question was included in the term "earthworks." As to the second point, the contractor contended that he was entitled under the contract to be paid for excess of quantities in the work done over & above the quantities contained in the bills of quantities & shown on the drawings; the railway contended that the bills of quantities were not incorporated in the contract, & that the co. were not bound by them. The arbitrator asked the opinion of the ct. on the questions whether the contractor was entitled to be paid anything in respect of either of his items of claim. The arbitrator found, as a fact, as to the first item, (1) "soil" in an engineering sense did not include "rock" which had to be blasted; (2) the word "soil" in clause 12 was used in an engineering sense; (3) the contractor had been put to expense by reason of the stuff in the cuttings not being "soil" but "rock"; (4) the intention of the parties to the contract was that the stuff in the cuttings was "soil" in the ordinary sense of the term. As to the second item, he found (1) the tender was based on the bill of quantities; (2) the parties to the contract intended the quantities of work to be done thereunder to be the quantities shown in the bills of quantities & the drawings; (3) the contractor had done a large amount of work in excess of the quantities stated in the bill of quantities & drawings:—*Held*: the contractor was not entitled to be paid under the contract anything in respect of the two items of claim.—*Re NUTTALL & LYNTON & BARNSTAPLE Ry. Co.* (1899), 2 Hudson's B. C. 4th ed. 279, C. A.

179. — Quantities grossly erroneous.]—A builder is bound by his special contract, however improvidently entered into, & he cannot, in the absence of fraud or waiver, sue for extra work on the ground that the quantities are grossly erroneous & misled him.—*SHERREN v. HARRISON* (1860), 2 Hudson's B. C. 4th ed. 5, N. P.

them as extras.—*REID v. McDONALD* (1906), 1 E. L. R. 171.—CAN.

a. — — —.]—Pltf. did work for debts under a contract. There was a dispute as to an item for grading, which included covering the roads with cinders, watering & rolling. The grading was done & the engineer's final certificate was issued. This action was begun to recover an amount for extras: this item was not provided for by the contract, but was ordered by the engineer & the building committee some time after the execution of the contract:—*Held*: the terms of the contract as to payment, measurement & engineer's certificate did not apply to this item; & upon the evidence the extra work was allowed for.—*ROSS v. REGINA AGRICULTURAL & INDUSTRIAL EXHIBITION ASSOCN.* (1911), 19 W. L. R. 53.—CAN.

b. — Agreed to at signing contract.]—Variations orally agreed to at signing the contract are not extras but part of the work which the contractor undertook.—*Re ELLISDON & BASTEN* (1917), N. Z. L. R. 209.—N.Z.

c. Work rendered more expensive—By errors in plan.]—The work contracted for, included the erection of a solid concrete pier to be sunk to the solid rock. The plan showed the rock at a depth of 15 ft., but in fact the rock was at a considerably lower depth.

The increased depth not only added to the expense of the work but also greatly increased its difficulty. The plan did not mislead the contractor as he contracted without reference thereto:—*Held*: the contractor could not recover for extras.—*AMURI COUNTY COUNCIL v. THOMAS* (1891), 9 N. Z. L. R. 664; 10 N. Z. L. R. 430.—N.Z.

d. — By misrepresentation as to quality of work to be done.]—A contractor led into error by verbal misrepresentations as to the quality of work expected to be done upon his contract, was held entitled to recover the increased price of completing the works "according to specifications."—*ROSS v. BARRY* (1891), 19 S. C. R. 360.—CAN.

e. — By delay of owner.]—It was agreed that the contractor would be put in possession of the premises & be furnished with lines & levels by a fixed date. Extra work was entailed by reason of the employer's delay in furnishing lines & levels:—*Held*: the contractor was entitled to recover for the extra work.—*MUNRO v. WESTVILLE TOWN* (1903), 36 N. S. R. 313.—CAN.

f. — Remediable by contractor.]—Pltf. constructed a sewage disposal plant for deft., under a written agreement, & claimed sums as due to him by virtue thereof or arising out

of it. Pltf. said he agreed to do the work for summer prices, & complained that he was obliged to do the work in winter, because deft. delayed to furnish him grades & levels, which were to be given by deft.:—*Held*: pltf. could not recover, for he might have employed an engineer to give him the grades & levels, & charged the expense to deft.—*MANDERS v. MOOSE JAW CITY* (1914), 28 W. L. R. 821.—CAN.

g. Transport of material.]—A party agreed to execute work to conform to specification drawn for execution of the work by an engineer:—*Held*: he had no claim for extra work, in bringing materials from a distance, notwithstanding that he alleged that this was caused by an error in the specification.—*WEATHERSTONE v. ROBERTSON* (1852), 1 Stu. M. & P. 333.—SCOT.

h. — —.]—Parties contracted by way of tender & acceptance for the erection of buildings upon the mutual understanding that the materials for such work were to be transported by water, which was found to be impossible, & the material was transported in another way. On the facts & the terms of the acceptance:—*Held*: the contractor was entitled to recover the additional expense occasioned by it.—*ALLISON v. GREATER WINNIPEG WATER DISTRICT* (1916), 34 W. L. R. 494; 10 W. W. R. 573.—CAN.

Sect. 1.—What are extras. Sect. 2: Sub-sects.

Bills of quantities generally, see Part XVII., Sect. 1, *post*.

180. — Included in certificate as extras—**Certificate conclusive.**—*GOODYEAR v. WEYMOUTH & MELCOMBE REGIS CORPN.*, No. 199, *post*.

Effect & conclusiveness of certificate generally, see Part III., Sect. 3, sub-sect. 2, *ante*; Sect. 2, sub-sect. 4, *post*.

Proof—Necessity for production of contract.—See Nos. 186, 187, *post*.

SECT. 2.—LIABILITY TO PAY FOR ALTERATIONS AND ADDITIONS.

SUB-SECT. 1.—IN GENERAL.

181. **Contract with corporation—No fresh contract under seal for extras.**—*Defts.*, an incorporated co., entered into a contract under seal with A., for the execution of certain works according to the terms of a specification annexed, which also contained provisions for extra work. A. entered upon the work under the superintendence of the co.'s engineer, & also under such superintendence, & with the approbation of the engineer, executed certain extra works, which could not be considered as coming within the contract under seal. A. afterwards made a claim upon the co. to a much larger amount than that specified by the contract, & the directors paid him a large sum, generally on account:—*Held*: as there was not any evidence that the co. had contracted for the extra work under seal, or that they had entered into a contract for same under the terms of their special Act, or of any general Act authorising same, they were not liable to A. for the extra work so performed by him.—*HOMERSHAM v. WOLVERHAMPTON WATERWORKS CO.* (1851), 6 Exch. 137; 6 Ry. & Can. Cas. 790; 20 L. J. Ex. 193; 155 E. R. 486.

Annotations:—*Distd. Lowe v. L. & N. W. Ry. Co.* (1852), 21 L. J. Q. B. 361. *Refd. Clarke v. Cuckfield Union Grdns.* (1852), 21 L. J. Q. B. 349; *Smith v. Hull Glass Co.* (1852), 11 C. B. 897; *Henderson v. Australian Steam Navigation Co.* (1855), 25 L. T. O. S. 234. *Mentd. Pauling v. L. & N. W. Ry. Co.* (1853), 8 Exch. 867; *Re Sea, Fire & Life Assce., Ex p. Greenwood* (1854), 2 W. R. 322; *Re County Palatine Loan & Discount Co., Cartmell's Case* (1874), 31 L. T. 52.

182. — — —.]—On a contract by a board of health to employ *pltf.*, an engineer, about certain works, & pay him £500 during two years, he undertaking to do his best to complete the works within that period:—*Held*: they were not liable for any extra work not contracted for by deed.—*RUTLEDGE v. FARNHAM LOCAL BOARD OF HEALTH* (1861), 2 F. & F. 406, N. P.

183. — — —.]—A builder had entered into a contract with a burial board under the seal of the board for the execution of certain repairs to the buildings at the board's cemetery; the repairs to be done & the terms upon which they were to

be done were specified in the contract. Further repairs were necessary, & were executed by the builder at the instance of the board's surveyor, & approved by him when done:—*Held*: the builder was not entitled to recover in respect of these further repairs, there being no contract under seal as to them.—*STEVENS v. HOUNSLOW BURIAL BOARD* (1889), 61 L. T. 839; 54 J. P. 309; 38 W. R. 236, D. C.

184. — — —.]—By a contract under seal a contractor undertook to execute works for a *corp.* at a fixed price. He alleged that the work had been so essentially varied under the orders of the *corp.*'s engineer that he was entitled to disregard the fixed price, & claim payment on the basis of the cost of the work, either under an implied new contract, or on the ground that the whole work was "extra work" executed in accordance with the contract:—*Held*: (1) on the evidence there had been no essential variation justifying such a contention; (2) even if there had been such a variation he was not entitled to claim *quantum meruit* upon the basis of an implied new contract, because there was no contract under seal as required by Public Health Act, 1875 (c. 55), s. 174.—*BELL v. BRIDLINGTON CORPN.* (1908), 72 J. P. 453.

185. — **No discharge by deed from stipulations in contract.**—A declaration set out articles executed under the seals of *pltf.*s. & *defts.* respectively by which it was agreed that *pltf.*s. should build & complete fit for sea for *defts.* two steam-vessels for a certain stipulated sum each, "such sum to be in full & entire satisfaction & payment for each such vessel, with all her apparatus & conveniences, without any other extra or additional charge, expense, or demand whatsoever"; & it was provided that, "if at any time during the building & completing of the vessels, any alteration or alterations whatsoever in the building, construction, or fitting of either of the vessels, or of her apparatus or conveniences, should be directed to be made by the surveyor or other person lawfully acting in that behalf on the part of *defts.*, such alteration or alterations should not be made by *pltf.*s. unless on the authority of a letter signed by the secretary of *defts.*, stating that the *ct.* of directors had directed such alterations to be made, & specifying the precise amount which *defts.* would allow for same," & that no such alteration should in any other respect affect the provisions of the contract. The declaration then went on to allege that, during the progress of the works, *defts.* required divers alterations to be made in the building & construction of the vessels, & also divers extra works beyond those specified in the agreement & the specification & drawings thereto annexed, which could not be reasonably inferred therefrom as necessary; that *pltf.*s. did accordingly make all the alterations so required as aforesaid to be made, & did all the extra works so ordered by *defts.* as aforesaid, & that *defts.* discharged them from the stipulation in the agreement that such altera-

PART VI. SECT. 2, SUB-SECT. 1.

k. **No provision for extras.**—A builder cannot charge for extras without an agreement between himself & his employer for extras.—*BRINE v. SHEARING* (1906), 2 E. L. R. 44.—CAN.

l. — — —.]—Extras, to a building contract, containing no provision for extras, constitute a cause of action apart from the contract itself, & may be separately sued upon.—*WARNER v. WRIGHT* (1908), E. D. C. 14.—S. AF.

m. **Provision for alterations—Valuation by architect.**—It was stipu-

lated that alterations or additions should be valued by the architect, & the costs added to, or deducted from, the contract price:—*Held*: not an undertaking that the architect should value the alterations & additions when executed.—*DUNCAN v. SHRIGLEY* (1870), 1 V. R. (Law) 139.—AUS.

n. — **Substantial change not authorised.**—A clause providing that the contractor shall, when authorised by the employer & the architect, vary by way of extra or omission from the drawings or specifications, does not authorise the employer substantially

to change the character of work contracted for.—*RAMSAY v. BOARD OF SCHOOL TRUSTEES* (1915), 32 W. L. R. 77; 21 B. C. R. 589.—CAN.

o. **Set-off from claim to extras—Of alterations lessening contract price—& damages for delay in completion—Pleading.**—*MCGINNIS v. YORKVILLE VILLAGE* (1861), 21 U. C. R. 163.—CAN.

p. — **Of costs of completion—& of amount paid.**—In an action by a contractor for work done for *deft.*:—*Held*: *pltf.* was entitled to the contract price, & to payment for extra work, less the amount he had received & the

tions should not be so made unless on the authority of a letter signed by the secretary of defts., stating that the directors had directed such alterations to be made, & specifying the precise amount which defts. would allow for same. Averment, that the alterations amounted to a certain sum, & that defts. refused to pay. Plea, that there was no contract between pltfs. & defts. relating to the alterations other than the deed in the declaration mentioned, & that the alleged discharge was not a discharge by deed. Replication, on equitable grounds, that, after the making of the deed in the plea mentioned, defts. by parol, & without any letter signed by their secretary according to the stipulations of the agreement, required & authorised pltfs. to make the alterations, etc., & pltfs., at the request & by the authority of defts. made the alterations, & defts. afterwards took the vessels, & received & enjoyed, & still kept & enjoyed the benefit of the alterations so made by pltfs., & that, by reason of the premises, pltfs. were in equity discharged by defts. from the stipulations in the declaration mentioned, & that defts. ought not in equity to be allowed to set up the want of a discharge of the stipulations by deed in bar of pltfs.' claim for the cost of the alterations:—*Held*: the replication was bad, inasmuch as it contradicted the declaration, & showed that pltfs.' right, if any, was only an equitable one.—*THAMES IRON WORKS & SHIPBUILDING CO. v. ROYAL MAIL STEAM-PACKET CO.* (1861), 13 C. B. N. S. 358; 31 L. J. C. P. 169; 8 Jur. N. S. 100; 9 W. R. 942; 143 E. R. 142.

Annotation:—*Refd.* Russell v. Sa Da Bandeira (1862), 13 C. B. N. S. 149.

See, further, CONTRACT; CORPORATIONS.

186. Written contract—Production at trial—To prove what were extras.]—Where an action was brought by a builder for the amount of extra work done, there having been a written contract between the parties:—*Held*: pltf. ought to have produced the written contract at the trial, in order that it might appear what was within the contract & what not, but as the objection was not taken by deft. at the trial, the verdict for deft. should be set aside & a new trial ordered, but without costs.—*JONES v. HOWELL* (1835), 4 Dowl. 176.

187. ——— Declaration of deceased contractor.]—In an action by an exor. for work done by testator, it appeared that the claim was for extras & alterations in a machine which had been made by testator for deft. under a written contract which was not produced. The contract price of the machine had been paid, & in order to show that deft. had assented to the alterations, evidence was offered, & received, of a declaration by deceased that deft. had paid him £20 on account:—*Semle*: this declaration was properly received, as being an admission against the interest of the party making it.—*EDIE v. KINGSFORD* (1854), 14 C. B. 759; 23 L. J. C. P. 123; 139 E. R. 311; *sub nom.* *EDYE v. KINGSFORD*, 2 C. L. R. 832.

cost to deft. of completing the work.—*SMITH v. GLINES* (1907), 5 W. L. R. 266.—CAN.

g. Statements as to extras—Contractor failing to deliver.]—Extras, although ordered by the architect, cannot be recovered for if not included in the statement as to extras called for by the contract.—*SMITH v. GORDON* (1880), 30 C. P. 553.—CAN.

r. ———.]—A contract provided that the value of extra work should be submitted every month to the architect:—*Held*: non-compliance with provision did not disentitle the

contractor to recover the value.—*ALBERTA BUILDING CO. v. CALGARY CITY* (1911), 16 W. L. R. 443.—CAN.

PART VI. SECT. 2, SUB-SECT. 2.

189 i. Employer assenting to alterations—Without knowing of increased expenditure involved.]—Before a builder can recover the price of extras not specially contracted for he must prove not only that the extras were executed to the knowledge of the building owner but also that the latter consented to such extras being executed & knew, or must be held to have known, that

See, further, CONTRACT; EVIDENCE.

188. Contract under seal—Allowance for deviations—Additional work ordered—Form of action.]—By articles of agreement under seal, pltf. agreed to build certain houses for deft., at a certain sum, according to a specification, & it was declared that any deviation from the specification should not invalidate the contract, but an allowance should be made accordingly:—*Held*: an action of *assumpsit* could not be maintained for certain additional work & materials, found at deft.'s request in the course of the building, as they were included in the term "deviation," & deft. was liable only in an action of covenant.—*STEEL v. TROUGHTON* (1827), 5 L. J. O. S. K. B. 260.

SUB-SECT. 2.—WHEN EMPLOYER IS NOT LIABLE.

189. Employer assenting to alterations—Without knowing of increased expenditure involved.]—Where work is undertaken on contract at a given price, the employer is not liable to any greater amount by consenting to alterations from the original plan, unless he is either expressly informed, or must necessarily, from the nature of the work, be aware, that the alterations will increase the expense.—*LOVELOCK v. KING* (1831), 1 Mood. & R. 60; *subsequent proceedings* 9 L. J. O. S. K. B. 179, N. P.

Annotation:—*Refd.* Thames Ironworks & Shipbuilding Co. v. Royal Mail Steam-Packet Co. (1861), 13 C. B. N. S. 358.

190. ———.]—In an action by a builder for extras, it appearing that deft. had agreed to some supposed alterations, but not that she understood that they were so, or that they would involve extra expense, the contract providing that the works should be completed to the satisfaction of deft. or her surveyor, & no expressed satisfaction with the completion of the contract being proved, pltf. was nonsuited. It is peculiarly important with respect to such additions to the contract price, that the employer should be satisfied that they are in respect to matters not included in the specification.—*JOHNSON v. WESTON* (1859), 1 F. & F. 693, N. P.

191. Extra work performed after contract determined.]—By a contract entered into with a local board of health for repairs to be done to a town hall, it was provided that if the contractor should from bkpey., insolvency or any cause whatever, be prevented or delayed in proceeding with the works according to the presents, or should not proceed therein to the entire satisfaction of the architect or surveyor of the board, it should be lawful for the local board, after seven days' previous notice signed by their clerk or surveyor of their intention so to do, to employ any other builder, workman, or other person, by contract, measure, & value, day work or otherwise, to proceed with the works, & to complete same, & that on the expiration of the notice the presents should, at the option of the board, become void as to the

additional expense would be incurred thereby.—*DE WATER v. MULLER* (1912), T. P. D. 821.—S. AF.

a. Extra work not indorsed on contract—Indorsement condition precedent.]—A contract provided that if any change in the plans were desired, their value should be agreed upon & indorsed on the contract, otherwise no allowance should be made for the change:—*Held*: the builder could not recover for extra work, because its value had not been agreed upon & indorsed on the contract.—*FLOOD v. MORRISSEY* (1880), 20 N. B. R. 5.—CAN.

Sect. 2.—Liability to pay for alterations and additions:

contractor, but without prejudice to any right of action in the parties of the second part which the contractor might be subject to for any involuntary neglect in not proceeding with the works pursuant to the contract, & the amount then already paid to the contractor by the local board should be considered to be the full value of the works executed by him up to the time when such notice should have expired, & no further claim whatever should be made by the contractor under the presents for contract works or additional works which might be done by him up to that time, & the materials, whether prepared or unprepared, which might be at that time on the premises should become the property of the local board, without any further payment for same:—*Held*: the contractor was not entitled to claim in respect of extra work after the contract had been determined by the board by notice under the contract, in consequence of the dissatisfaction of their surveyor.—*WILKINSON v. LOWNDES* (1860), 24 J. P. 487.

192. Extra work caused by employer exercising statutory powers.]—An Act of Parliament empowered a corpn. to scour an inland harbour, & they did so by taking up the mud in barges, & letting it out at the mouth of the harbour, so as to be carried down the river. They employed pl'ts. to excavate & remove certain estimated quantities of earth, etc., down the river, at certain prices, the contract, not noticing the scouring process, providing only for extra work ordered by their engineer in writing. In consequence of the cleansing process, which was continued while pl'ts. were engaged in their work, the quantity of soil they had to remove was vastly increased by great deposits of mud. They applied for & were refused any additional remuneration, & after their work was completed, sued the corpn. for compensation, but their case, as stated at the trial, did not show that the mode of cleansing adopted by the corpn. was unusual or unreasonable, & on the contrary, it appeared rather to be a proper mode of carrying out the powers of the Act:—*Held*: as it did not appear that the process was unlawful or wrongful, it was no cause of action, & a nonsuit upheld.—*RIGBY v. BRISTOL CORPN.* (1860), 29 L. J. Ex. 359; 25 J. P. 72.

193. Extra work not valued as stipulated—Valuation condition precedent to right to sue.]—A contract for building a steam-vessel contained a provision that the engineer for the time being should have power to direct additions, deductions, alterations, & deviations, to & from the contract

work, & that the value of all such "additions, deductions, alterations, & deviations, should be ascertained, & added to or deducted from the amount of the contract price." In an action brought in respect of certain extra works:—*Held*: the ascertainment of the value of the extra works was a condition precedent to the right of pl'ts. to sue in respect of them.—*WESTWOOD v. SECRETARY OF STATE FOR INDIA IN COUNCIL* (1863), 1 New Rep. 262; 7 L. T. 736; 11 W. R. 261.

Annotations:—*Distd.* *Jones v. St. John's College, Oxford* (1870), L. R. 6 Q. B. 115; *Tew v. Newbold-on-Avon United District School Board* (1884), Cab. & El. 200. *Reid.* *Stadhard v. Lee* (1863), 3 B. & S. 364; *Roberts v. Bury Comrs.* (1870), L. R. 5 C. P. 310; *Dodd v. Churton*, [1897] 1 Q. B. 562.

194. Contract under seal—Verbal promise.]—The engineer of a railway co. prepared a specification of the works on a proposed railway, & certain contractors fixed prices to the several items in the specification, & offered to construct the railway for the sum total of the prices affixed to the items. A contract under seal was thereupon made between the contractors & the co., by which the contractors agreed to construct & deliver the railway at a sum equal to the sum total above mentioned:—*Held*: the contractors could not, on mere verbal promises by the engineer, maintain against the co. a claim to be paid sums beyond the sums specified in the contract under seal.—*SHARPE v. SAN PAULO RY. Co.* (1873), 8 Ch. App. 597; 29 L. T. 9, L.J.J.

Annotations:—*Reid.* *Re Ford & Benrose* (1902), 18 T. L. R. 443; *Re Nott & Cardiff Corpn.*, [1918] 2 K. B. 146. *Mentd.* *Re Hohenzollern Act. fur Locomotivbau & City of London Contract Corpn.* (1886), 54 L. T. 596; *Meldrum v. Scorer* (1887), 56 L. T. 471.

195. Work voluntarily done—Better materials employed than stipulated for.]—Where pl'ts. contracted with the agent of an absent shipowner to effect certain specified repairs, all confined to damage by stranding, & instead of doing the work as stipulated alleged that they had, on the agent's authority, done the equivalent thereto or better, & in the same contract stipulated that they should be paid for repairs due to deterioration at scheduled prices stated by them:—*Held*: (1) it appearing that the agent's authority to their knowledge was limited to the specified repairs, they could not recover on the contract, which was an entire one, & in its entirety had never been performed; (2) the shipowner having taken the ship as repaired & sold it, did not thereby ratify the contract.—*FORMAN & CO. PROPRIETARY v. THE LIDDESDALE*, [1900] A. C. 190; 69 L. J. P. C. 44; 82 L. T. 331; 9 Asp. M. L. C. 45, P. C.

Annotation:—*Distd.* *Dakin v. Lee*, [1916] 1 K. B. 566.

Corporation—No fresh contract for extras under seal.]—See Nos. 181–184, *ante*.

LAWRENCE v. KERN (1910), 14 W. L. R. 337; 3 Sask. L. R. 253.—CAN.

e. Waiver—By provision in contract.]—A contract provided that the contractor should not be entitled, by reason of any change, made in the works, plans or specifications or by reason of the exercise of any power vested in the engineer to claim any sum for extra work:—*Held*: the contractor had, by the contract, waived all claim for payment for any such work.—*JONES v. R.* (1877), 7 S. C. R. 570.—CAN.

f. Non-compliance with condition as to extras.]—*CURLEY v. NEW TORONTO* (1915), 8 O. W. N. 274.—CAN.

g. S. P. GILBERT BROTHERS ENGINEERING CO., LTD. v. R. (1918), 17 Exch. C. R. 141; 40 D. L. R. 723; *affd.*, 57 S. C. R. 611.—CAN.

ground that when he saw the plans he ought not to have started building if he proposed to charge more than in the original estimate.—*SCOTT v. HATTON* (1827), 6 Sh. (Ct. of Sess.) 233.—SCOT.

c. — Not within the contemplation of the contract.]—*Held*: if the extra work sued for was not within the contemplation of the contract, the contractor was entitled to refuse to do it, unless under a new contract, but having gone on without objection, he was precluded from claiming in respect of a resulting loss.—*SLOWRY v. LODDER* (1901), 20 N. Z. L. R. 321.—N.Z.

d. Where statement of extras furnished—& amount paid—Estoppel.]—Pl'tf. furnished a statement of extras, & was paid in accordance therewith:—*Held*: pl'tf. was precluded from insisting upon any claim for extras beyond what were set out in that statement.—

195 i. Works voluntarily done—More expensive character than stipulated for.]—A builder having given a written offer for building a "corner" house, specifying the items of his charge, but not mentioning any additional charge for circular work; built the house, the corner of which was rounded off, without stating that he expected a higher rate for such work:—*Held*: not entitled to double charge, on the

SUB-SECT. 3.—EXTRAS ORDERED BY ARCHITECT.

196. Authority of architect to order deviations—Must be shown by contractor seeking to recover.]—An obligor, who binds himself to perform certain works according to a specification & other detailed & working drawings, to be furnished during the progress of the works, with power for the obligee by his surveyor to direct additions or omissions, must, in a plea of performance, *quoad* such parts in which no orders were given by the surveyor to vary & deviate from the original plan, show an authority in the surveyor to give such directions, or aver that the deviation or variation was an omission or addition.—*R. v. Peto* (1826), 1 Y. & J. 37; 148 E. R. 577. *Annotation:—Mentd. Lord Advocate v. Dunlop* (1842), 9 Cl. & Fin. 173.

197. ———.]—Assumpsit on an agreement to build a house according to certain drawings, plans, & specifications, & to the satisfaction of pltf., & with the best materials, alleging as breaches that deft. did not build the house to the satisfaction of pltf., & that he did not perform the work with the best materials. Plea that deft. deviated from the drawings by the direction of pltf.'s architect:—*Held*: the plea was bad, the architect not being shown to be pltf.'s agent to bind him by any deviation from the drawings.—*COOPER v. LANGDON* (1841), 9 M. & W. 60; 1 Dowl. N. S. 392; 11 L. J. Ex. 222; 152 E. R. 27; *affd.* (1842), 10 M. & W. 785, Ex. Ch.

Annotations:—Mentd. Pearson v. Archbold (1843), 11 M. & W. 477; *Waddle v. Downman* (1844), 12 M. & W. 562; *Muir v. Parrott* (1845), 4 L. T. O. S. 290; *Stonehewer v. Farrar* (1845), 6 Q. B. 730; *Re Smith v. Reece, Re Reece v. Smith* (1850), 14 Jur. 483; *Humphreys v. Pounce* (1852), 7 Exch. 696.

198. ——— Question of fact.]—Where, in the progress of building work done under a contract, some process more expensive than contracted for was ordered by the architect, with the knowledge of the employer, & the builder's sub-contractor was told it was to be paid extra for:—*Held*: there was evidence of a contract to pay him extra for it, & of authority in the architect to make such a

contract with him.—*WALLIS v. ROBINSON* (1862), 3 F. & F. 307, N. P.

SUB-SECT. 4.—EFFECT OF FINAL AND CONCLUSIVE CERTIFICATE.

199. When certificate binding—Contract making decision of certifier final as to extras—Right of employer to question whether extras done or ordered in manner prescribed.]—Defts. engaged pltf. to build a market-house, & the contract & conditions stipulated that no deviations in the way of extras or omissions should be made without the written authority of defts.' architect, & that they should be priced at the contract prices, that no claim should be made for extra or additional work without the production of the written order of the architect, signed when the instructions for them were given, that certain proportionate payments should be made from time to time, on the certificate of the architect that the sum claimed was a proper one, the architect's opinion to be final as to the value, that if any dispute should arise as to the meaning of the specifications or contract, the architect was to define the meaning, & that his decision as to the nature, quality & quantity of the works executed or to be executed should be final, & also his decision as regards the value of the extras & additions, which was to be regulated by the contract price. The architect gave a certificate that a certain sum, which included extras & additions, was proper to be paid:—*Held*: (1) neither party could raise the question of whether or not there was a sufficient order in writing; (2) a pump, drains, etc., though separately ordered, came within the meaning of works connected with the contract, & the architect's decision as to their value was final.—*GOODYEAR v. WEYMOUTH & MELCOMBE REGIS CORPN.* (1865), Har. & Ruth. 67; 35 L. J. C. P. 12.

Annotations:—Expld. & Apld. Laidlaw v. Hastings Pier Co. (1874), 2 Hudson's B. C., 4th ed., 13. *Consd. Dunaberg & Witepsk Ry. Co. v. Hopkins, Gilkes* (1877), 36 L. T. 733.

PART VI. SECT. 2, SUB-SECT. 3.

196 i. Authority of architect to order deviations—Must be shown by contractor seeking to recover.]—An architect instructed to do certain work at a price employed a builder, & without consulting his principal, authorised extra work not covered by the price:—*Held*: he had no authority either as architect or agent even though the work was essential to the stability of building, & the builder's claim must fail.—*HAYWOOD & Co. v. PAULING* (1907), 24 S. C. 142; 17 C. T. R. 169.—S. AF.

k. ——— Order to be given in prescribed manner.]—Held: the engineer cannot bind the employer to pay for extras outside the contract, unless they have been ordered in the manner provided by the contract.—*YOUNG v. BALLARAT & BALLARAT EAST COMRS., MARTIN v. BOARD OF LAND & WORKS* (1879), 5 V. L. R. 503.—AUS.

l. ——— No provision as to payment—Implied rights of contractors.]—A building contract provided that if the architect required additions to the plans & specifications, he should have the right to make such changes. The architect verbally ordered work not resulting from any change in the plans & specifications, but not within the plans & specifications at all:—*Held*: the contractors could recover from the building owners the cost of such extra work, whether as decided by the architect or upon a *quantum meruit*.—*DOMINION PAVING & CONSTRUCTION*

Co. v. TORONTO CITY (1907), 9 O. W. R. 38.—CAN.

m. ——— Custom empowering architect to bind employer.]—A custom empowering an architect to bind his employer for extras, even if proved, would be unreasonable, & could not be upheld. Where upon an emergency it is necessary, in order to complete a work, to do extra work the owner cannot be made liable therefor without his consent.—*HAYWOOD & Co. v. PAULING* (1907), 24 S. C. 142; 17 C. T. R. 169.—S. AF.

n. Onus of proof.]—In an action by a contractor, claiming for extras:—*Held*: the burden of showing that work claimed for as extra was ordered by the architect, was on pltf.—*MUNRO v. WESTVILLE TOWN* (1903), 36 N. S. R. 313.—CAN.

PART VI. SECT. 2, SUB-SECT. 4.

199 i. When certificate binding—Contract making decision of certifier final as to extras.]—It was provided that no extras would be paid for unless previously certified by the engineer. Extra work was included in £475, certified to in a summary certificate signed by the engineer under the head of "Grading." In a document prepared in the office of the employer, & pinned to the summary certificate, but not signed by the engineer, £175 of the £475 was referred to as "extra length" "of swamp" & "ditching." A note was then put on the summary that the amount was to be paid & made right

in the next certificate, & the voucher for payment showed this amount paid as a part of the contract. The amount was never allowed as an extra in any subsequent certificate, & in the final certificate was included in general payments under the contract:—*Held*: the engineer had not recognised & authorised the payment of this item as extra to the contract, & it was not recoverable.—*SMYTH v. R.* (1882), 1 N. Z. L. R. C. A. 80.—N.Z.

199 ii. ———.]—Where the architect has given an effective certificate the builder is entitled to recover for extras both within & without the contract.—*WATTS v. McLEAY* (1911), 19 W. L. R. 916.—CAN.

199 iii. ———.]—Where certificates of the architect are to decide the value of the work added & his decision is to be final, however unbusinesslike the architect may be, so long as he acts honestly, there is no appeal from his decision.—*HAMILTON v. VINEBERG* (1912), 21 O. W. R. 75; 3 O. W. N. 605; 2 D. L. R. 921; 22 O. W. R. 238; 4 D. L. R. 827.—CAN.

199 iv. ——— Estoppel of employer—Order in writing.]—A final certificate cures the want of previous orders in writing for extras & other like conditions which are merely ancillary to the grant of such final certificate, & the result is the same if, under a count for wrongful refusal of the final certificate by the engineer in collusion with deft., the jury find that the works were satisfactorily completed, & that the certificate ought to have been

Sect. 2.—Liability to pay for alterations and additions:
Sub-sect. 4. Sect. 3: Sub-sect. 1.]

Expld. *Brunsdon v. Staines* L. B. (1884), Cab. & El. 272.
Refd. *Bateman v. Thompson* (1875), 2 Hudson's B. C., 4th ed., 36; *Lapthorne v. St. Aubyn* (1885), 1 T. L. R. 279.

200. ————.]—By a building contract it was provided that no extra work should be paid for unless the contractors should produce special & positive written instructions for it, signed by the engineer & countersigned by the chairman of deft. co. The engineer was to furnish monthly certificates of the value of the work executed, including extra work, & the contractors were to be paid 85 per cent. of the amount forthwith, & the balance at the expiration of three calendar months after the certificate of the engineer of the satisfactory completion of the work should have been given, provided that within three months after the giving of such certificate the contractors should have delivered to the engineer a full account of all claims which they might have upon the co., & he should have given a certificate of the correctness of such account. Any disputes or differences arising upon any matter connected with the contract were to be referred to the engineer, whose decision was to be conclusive. The engineer certified for, as extra, work which had not in fact been done at all, & work which, although extra, had not been done on signed & countersigned orders:—**Held:** the last certificate of the engineer precluded defts. from raising the question whether extras had been done or done without countersigned orders.—*LAIDLAW v. HASTINGS PIER CO.* (1874), 2 Hudson's B. C., 4th ed., 13, Ex. Ch.
Annotations:—Folld. *Lapthorne v. St. Aubyn* (1885), Cab. & El. 486. **Refd.** *Jackson v. Romford R. D. C.* (1909), 73 J. P. 248.

201. ————.]—Where a contract for the erection of certain works provided that all extras or additions, payment for which the contractor should become entitled to under the contract, should be paid for at the price fixed by the surveyor appointed by the contractor's employer:—**Held:** this provision impliedly gave power to the surveyor to determine what were extras under the contract, & his certificate awarding a certain amount to be due for extras was conclusive.—*RICHARDS v. MAY* (1883), 10 Q. B. D. 400; 52 L. J. Q. B. 272; 31 W. R. 708, D. C.

202. ————.]—By a building contract it was provided that in all cases where decorations or extras exceeded £10 the order or plan was to be signed by the architect & countersigned by two members of a building committee, & that the decision of the architect with respect to the amount, state, & condition of the works actually executed, & also in respect of any & every question that might arise concerning the construction of the contract or the plans, etc., or in any way relating thereto, should be final and without appeal:—**Held:** the provision in the contract as to extras was not intended to limit the architect's power of decision, inasmuch as the architect had given his

certificate, it was not lawful for defts., whether the architect had in his certificate made a mistake or not, to reopen the certificate to correct alleged mistakes or for the purpose of eliminating any extras not countersigned by two of the building committee.—*LAPTHORNE v. ST. AUBYN* (1885), 1 Cab. & El. 486; 1 T. L. R. 279.

203. ———— **Right of contractor to recover more than amount certified.]**—Where a building contract contained a clause that no extras should be paid for unless ordered in writing, & weekly bills delivered for same, & that had not been done, though extra work had been executed:—**Held:** the fact that the architect's certificate for the final balance awarded a certain sum in respect of extras, did not entitle the builder to recover beyond the certified sum for extras in respect of which written orders had not been given, nor weekly bills delivered.—*BRUNSDON v. STAINES LOCAL BOARD* (1884), 1 Cab. & El. 272.

Orders in writing generally, see Sect. 3, *post*.

204. When employer not bound—Certifier exceeding authority—Certificate given subsequently.]—Where a building contract for work to be done for a co. specified that written directions should be given, for the work so to be done by the contractor, by the engineer of the co., it is not sufficient, to support a claim for such works done without the written authority of the engineer, that the engineer subsequently granted a certificate that such work had been done by virtue of the contract.—*NIXON v. TAFF VALE RY. CO.* (1849), 7 Hare, 136; 12 L. T. O. S. 347; 68 E. R. 55.
Annotation:—Mentd. *Padwick v. Hurst* (1854), 18 Beav. 575.

205. ———— **Although clause making certificate conclusive.]**—A building contract contained the usual clause referring questions which might arise to the architect, & another clause (clause 18) requiring that orders for extras were to be signed by the secretary & treasurer, & countersigned by the architect. The builder having completed the work, the architect issued a final certificate which apparently included certain extras which had not been signed for by the secretary & treasurer:—**Held:** the architect having no power to get rid of clause 18, plffs. were not entitled to recover the cost of extras, although included in the final certificate.—*LORDEN & SON v. PRICE* (1896), *Emden's B. C.*, 4th ed., 664, D. C.

Effect & conclusiveness of certificate generally, see Part III., Sect. 3, sub-sect. 2, *ante*.

SECT. 3.—ORDERS IN WRITING.

SUB-SECT. 1.—IN GENERAL.

206. Whether condition precedent—Additional work done at instance of architect without written orders—Acquiescence of employer.]—In a building contract, entered into with guardians, a clause was inserted, that no deviations or additions should

YOUNG v. BALLARAT & BALLARAT EAST COMRS., MARTIN v. BOARD OF LAND & WORKS (1879), 5 V. L. R. 503.—**AUS.**

v.
 contract provided that the decision of the engineers or engineer should be final as to the value of extra works; & binding & conclusive. In an action for the price of extra works:—**Held:** the engineers having given a certificate for the extra works, defts. were precluded from setting up as defences to the action that the extra works had not been ordered in writing.—*CONNOR v. BELFAST WATER COMRS.* (1871), 1 R. 5 C. L. 55.—**IR.**

q. **Power to change certificate.]**—A certificate once given cannot be changed by the engineer.—*MANDERS v. MOOSE JAW CITY* (1914), W. L. R. 821.—**CAN.**

203 i. ———— **Right of contractor to recover more than amount certified.]**—Where the contract provides that the engineer of the employer shall give a final certificate stating the balance due in respect of extras & omissions & that he shall be the sole arbiter as to prices, such certificate when given cannot be impeached except on the ground of fraud & collusion & the builder can recover only what the certificate states

to be due.—*FORREST v. OHINEMURI COUNTY (CHAIRMAN, COUNCILLORS, & INHABITANTS)* (1909), 29 N. Z. L. R. 401.—**N.Z.**

PART VI. SECT. 3, SUB-SECT. 1.

206 i. Whether condition precedent—Additional work done at instance of architect without written orders.]—Pltf. agreed to build a house for deft. for \$3,250, & that no allowance beyond that sum should be made for extra work or alterations, unless orders therefor in writing should be given by the architect in charge. During progress of the work pltf. made alterations

be paid for, unless same should have been ordered in writing. Additional work, with the guardians' knowledge, was done which had not been ordered in writing, but which had been directed by the architect. The guardians having refused to pay for the extra works, & a bill being filed to obtain payment of the balance, a general demurrer for want of equity was allowed.—**KIRK v. BROMLEY UNION GUARDIANS** (1848), 2 Ph. 640; 11 L. T. O. S. 429; 12 Jur. 85; 41 E. R. 1090.

Annotations:—**Folld.** Jackson v. North Wales Ry. Co. (1848), 1 H. & Tw. 75. **Consd.** Nixon v. Taff Vale Ry. Co. (1848), 7 Hare, 136; Mid. G. W. Ry. of Ireland v. Johnson (1858), 6 H. L. Cas. 798; Russell v. Sa Da Bandeira (1862), 13 C. B. N. S. 149. **Expld.** Crampton v. Varna Ry. Co. (1872), 7 Ch. App. 562. **Refd.** Re Brighton Club & Norfolk Hotel Co. (1865), 35 Beav. 204; Hunt v. Wimbledon L. B. (1878), 3 C. P. D. 208. **Mentd.** Monckton v. A.-G. (1852), 19 L. T. O. S. 278; Padwick v. Hurst (1854), 23 L. J. Ch. 657; Ogden v. Fossick (1862), 4 De G. F. & J. 426.

207. — Additional work done at instance of employer—Without written orders—Implied promise to pay.—A building contract contained a clause providing that no works beyond those included in the contract would be allowed or paid for without an order in writing from the employer & architect. During the progress of the work the employer insisted upon the execution of certain works which he alleged were included in the contract, but the contractor maintained that they were extras, & would be charged as such. No order in writing was given for the execution of those works:—**Held**: an arbitrator was justified in inferring an implied promise in the employer to pay for the works either as included in the contract price or as extras.—**MOLLOY v. LIEBE** (1910), 102 L. T. 616, P. C.

208. — Additional work not within contract.—By a contract for the execution of railway works, after specifying certain works to be done for a gross sum, it was provided that extra works, which the co. or their engineer should, by any writing under his hand, require to be executed, should be deemed to be included in the contract, & should be paid for at a certain rate, & that the contractor should not be entitled to make any claim for any alteration or addition which he might make without such written & signed instructions:—**Held**: a direction for an account of extra works done by pltf. under & by virtue of the contract

did not authorise any account to be taken of works, other than the specified works, done by the contractor, with the privity of the co., without written instructions, but the ct. would give pltf. liberty to bring his action at law against the co., in respect of works done without such instructions, not, however, relieving him against the legal effect of the lapse of time during the proceedings in equity.—**NIXON v. TAFF VALE RY. CO.** (1849), 7 Hare, 136; 12 L. T. O. S. 347; 68 E. R. 55.

Annotation:—**Mentd.** Padwick v. Hurst (1854), 18 Beav. 575.

209. — — — — ——Pltf. contracted with deft. to build for the Portuguese government a steam-vessel of war for £10,400, such price or sum to be inclusive of all charges of every description except as thereafter mentioned, such vessel to be built in a good, substantial, & workmanlike manner, & with good sound materials of all kinds as prescribed by Table A. of Lloyd's registry for ships of the class A. 1, thirteen years, & to the satisfaction of Admiral S., & to be delivered at M. on or before Apr. 25, 1859, ready for sea, "finished, fitted, found & equipped in manner similar in all respects to that which is practised with ships or vessels of the same class in H.M. navy under contracts with the Admlty., except machinery, which was being manufactured by pltf. under another contract, armament, furniture, stores, plate, linen, glass, crockery, & opticians' instruments." It was agreed "that the purchase-money or sum of £10,400 is inclusive of all charges for the ship or vessel finished & fitted perfectly in every respect, & no charges shall be demanded for extras, but any addition or additions which may be made by order in writing of Admiral S. as an extra or extras shall be paid for at a price to be previously agreed upon in writing." In the course of the construction of the vessel, extras & additions to the work to a large aggregate amount were done under the directions, not in writing, of certain officers or servants of the Portuguese government:—**Held**: pltf. was not entitled to recover the price of these.—**RUSSELL v. SA DA BANDEIRA (VISCOUNT)** (1862), 13 C. B. N. S. 149; 32 L. J. C. P. 68; 7 L. T. 804; 9 Jur. N. S. 718; 143 E. R. 59.

Annotations:—**Refd.** Tew v. Newbold-on-Avon United District School Board (1884), Cab. & El. 260. **Mentd.** British

in the building by the verbal directions of the architect. After the building was finished, the architect made a valuation of the additional work & of certain omissions, deducting the latter from the former, & certified the balance to be due to pltf.:—**Held**: unless deft. had dispensed with the proviso about the extra work, or had ordered the work to be done, or authorised the architect so to do, pltf. could not recover.—**SMALL v. McCULLOUGH** (1857), 3 All. 484.—**CAN.**

207 i. — Additional work done at instance of employer—Without written order.—Dft. employed pltf. under a building contract, in which it was stipulated that there should be no charge for extra work, unless specially ordered in writing by the architect employed. Dft. himself requested pltf. to do extra work, & desired pltf.'s men to take their orders from him & not from the architect:—**Held**: pltf. might recover without reference to the contract.—**MELVILLE v. CARPENTER** (1853), 11 U. C. R. 128.—**CAN.**

207 ii. — — — — ——It would be a fraud on the part of a building owner to desire, by his engineer, alterations additions & omissions to be made, then to stand by & see the expenditure going on upon them, & then refuse payment on the ground that the expenditure was incurred without proper written orders

being given.—**BOYD v. SOUTH WINNIPEG, LTD.**, [1917] 2 W. W. R. 489.—**CAN.**

207 iii. — — — — ——Extras were ordered at the instance of the employer personally & the employer was present when the orders for such extras were orally given by the architect to the contractor, & part of the amount claimed for extras was afterwards paid for by the employer upon a certificate of the architect for extras:—**Held**: the employer had waived his right to refuse payment for extras unless ordered in writing.—**MEYER v. GILMER** (1899), 18 N. Z. L. R. 129.—**N.Z.**

a. — Provision for work to be done—When ordered in writing.—Where the contract did not provide that no extra work was to be allowed or paid for unless ordered in writing, but merely that the builder was to execute extra work, directed by the employer or his architect in writing, it was held that orders in writing were not a condition precedent.—**DIAMOND v. MCANNANY** (1865), 16 C. P. 9.—**CAN.**

b. — Extras to be agreed in writing—Payment conditional on production of writing.—Under a building contract, it was agreed that no extras should be permitted or allowed unless agreed upon in writing & that the writing should be produced before

payment therefor. In an action to recover payment for extras:—**Held**: there could be no recovery for extras claimed, no writing therefor having been produced.—**OLDERSHAW v. GARNER** (1876), 38 U. C. R. 37.—**CAN.**

c. — Provision requiring express order—& express agreement for payment—Proof requisite.—Where the contract provided that no extras were to be allowed unless expressly ordered, & payments for same expressly agreed for in writing by the proprietors or architects:—**Held**: a writing must be proved.—**WOOD v. STRINGER** (1890), 20 O. R. 148.—**CAN.**

d. S. P. McLEOD (NORMAN), LTD. v. ORILLIA WATER, LIGHT, & POWER COMMISSION (1919), 17 O. W. N. 124.—**CAN.**

e. — — — — — Architect owner of premises.—A building contract provided that no extras should be charged unless ordered & sanctioned in writing by the architects. The architects were the owners of the building, a fact which the builder knew when he entered into the contract:—**Held**: he was bound by the condition.—**DE WAARD v. KALLENBACH & REYNOLDS** (1907), T. S. 186.—**S. AF.**

f. — Contract with Crown.—The general conditions of a railway contract provided that no extras

Sect. 3.—Orders in writing : Sub-sects. 1 & 2. Part VII.]

Columbia Saw-Mill Co. v. Nettleship (1868), L. R. 3 C. P. 499; Roberts v. Bury Improvement Comrs. (1870), L. R. 5 C. P. 310; Dodd v. Churton, [1897] 1 Q. B. 562; Yzquierdo v. Clydebank Engineering & Shipbuilding Co., [1902] A. C. 524; *Re Nott & Cardiff Corpn.*, [1918] 2 K. B. 146.

210. ——— Plea withdrawn.]—Pltf. contracted to carry out sewerage works for defts. In consequence of orders the work was varied & rendered much more expensive. The engineer had given no final certificate, & many of the extras were not ordered in writing, but defts. had withdrawn their plea of no certificate & pltf. had withdrawn a charge of misconduct:—*Held*: upon that state of the pleadings, the referee could deal with the extras on their merits.—*JACKSON v. ROMFORD RURAL DISTRICT COUNCIL* (1909), 73 J. P. 248.

211. ——— Claim for extras referred to arbitration—Power of arbitrator to dispense with condition.]—A contractor agreed to construct a reservoir for a municipal corp. at a fixed price in accordance with the specification. The work had to be done to the satisfaction of the corp.'s engineer, with such additions, alterations, and variations as might from time to time be directed by the corp. or the engineer as provided by the specification. The specification provided that the corp. were not to become liable for the payment of any charge for additions, alterations, or deviations unless instructions for them were given in writing by the engineer. It also provided that in case any dispute should arise, either during the progress of the works or after the determination of the contract, as to the construction of the contract, or as to any matter or thing arising thereunder, or as to any objection by the contractor to any certificate, finding, decision, requisition, or opinion of the engineer, such dispute was to be referred to the arbn. & final decision of a single arbitrator, & either party might demand an immediate determination of the dispute. Disputes arose during the progress of the works as to requirements by the engineer for executing certain portions of the work in a particular manner & with certain materials. The contractor contended that these requirements were extras, for which he was entitled to be paid in addition to the contract price. The engineer refused to give written orders for these items, on the ground that they were in accordance with the contract. The contractor carried out the work as ordered. On the completion of the contract the matter was referred to arbn. The arbitrator found that the requirements were not in accordance with the contract, that the engineer improperly refused to give orders in writing for same as extras, & that in deciding against the claim of the contractor the engineer did not act fairly or impartially, but had no dis-

honest motive, & he awarded certain sums to be paid to the contractor in respect of these items:—*Held*: upon these findings the arbitrator had power to award that the items in question should be paid for as extras, notwithstanding the absence of any orders in writing by the engineer.—*BRODIE v. CARDIFF CORPN.*, [1919] A. C. 337; 88 L. J. K. B. 609; 120 L. T. 417; 83 J. P. 77; 17 L. G. R. 65, H. L.; *revsq.* S. C. *sub nom.* *Re NOTT & CARDIFF CORPN.*, [1918] 2 K. B. 146, C. A.

212. What amounts to—Orders given before additional work performed—Subsequent letters, certificates & final valuation.]—By agreement under seal, between pltf. of the one part, & defts. guardians of the poor, of the other part, after reciting (*inter alia*) that pltf. had proposed to contract to erect the workhouse at B., & perform all the works particularised in a specification prepared by S. & M., the architects, for £5,500, pltf. in consideration of the payments to be made to him, agreed with defts. that he would, in a workmanlike manner, do all the works mentioned in the specification, at the times therein mentioned, & would completely finish the whole by June 24, 1840, that if the architects should think proper to make any alterations or additions in the progress of the works, they should give to pltf. written instructions for same, signed by them, & pltf. should not be considered as having authority to do such additional works without such written instructions, & in consideration of the premises, defts. agreed with pltf. that they would pay him £5,500. The declaration, after setting out the deed, averred, that pltf., duly & to the satisfaction of the architects, executed all the works contracted to be done for the £5,500, & that, during the progress of the works, the architects required & authorised him to make certain additions thereto, "to wit, by & by means of certain written instructions, to wit, signed by the architects, confirmatory of, & ratifying & establishing, the requisition & authority so given to the pltf.," & that pltf., duly & to the satisfaction of the architects, executed all the additional works so required by them, & that they duly made a valuation thereof, & certified same to defts. The declaration then stated that defts. had taken possession of & accepted all the works as & for work done under & in pursuance of the agreement, & alleged, as a breach, the non-payment, as well of the £5,500 as also of the sum due for additions. Pltf. had proceeded to execute the works, & while they were in progress the architects required him to execute additional works, & during the progress of the works, the architects, from time to time, delivered to pltf. certificates, in the form of letters, signed by them & addressed to the clerk of the board of guardians, stating that the board might safely advance £ . . . to pltf., on account

would be allowed or paid for, which were done without an order from the engineer in writing, nor unless the total payment for such additions should have been previously ascertained & certified by such engineer & unless distinctly authorised by writing under the hand of the Minister for Public Works:—*Held*: conditions precedent.—*SMYTH v. R.* (1882), 1 N. Z. L. R. C. A. 80.—N.Z.

g. ——— Authority of architect—Pleading.]—*WILLIAMS v. CORNWALL PAPER CO.* (1906), 9 O. W. R. 111.—CAN.

h. Whether requisite—Work outside contract.]—Written orders for alterations & extras are not required when they are so many & so great as to be outside the contract altogether & are not such as the contract con-

templated as extras.—*MEYER v. GILMER* (1899), 18 N. Z. L. R. 129.—N.Z.

k. ——— Provision for valuation of additions & omissions—& increase or diminution of contract price.]—The contract provided that a fair & reasonable valuation of work added or omitted should be made by the architect, & that the sum payable should be increased or diminished by such amount, provided that, where the amount was not agreed upon, the contractor should proceed with the work on the written order of the architect, & that the amount payable therefor should be fixed as further provided:—*Held*: alterations only required a written order where the architect & contractor differed as to the valuation.—*MUNRO v. WESTVILLE TOWN* (1903), 36 N. S. R. 313.—CAN.

l. ——— Employer looking on & not objecting.]—It was stipulated with a contractor that no additional work should be done, with a view to extra payment, without a written order from the employer or his surveyor. The employer took great interest in the progress of the work, during the time extra work was being done, without challenging it as unauthorised:—*Held*: employer not liable.—*BROWN v. ROLLO (LORD)* (1832), 10 Sh. (Ct. of Sess.) 687.—SCOT.

m. What amounts to—Architect furnishing plans.]—The furnishing of plans by the architect, showing additional work, is a "written order."—*MUNRO v. WESTVILLE TOWN* (1903), 36 N. S. R. 313.—CAN.

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of works executed, & certificates in this form, to the amount of £5,000, were given. No written directions were given by the architects for the additional works, except that letters were in evidence signed, some by S. & others by M., in which allusion was incidentally made to some of the additional works in progress, & containing suggestions as to the mode of executing them, & save also that, long after the works were complete, the architects, on the application of pltf., made a valuation of the additional works, which they estimated at £3,133, & signed a paper, stating that to be the amount of their valuation:—*Held*: the deed, in requiring written directions, meant written directions before the additional work should be done, in which sense the averment in the declaration was to be understood, & that the certificates, letters, & final valuation of the architects did not amount to such directions.—*LAMPRELL v. BILLERICAY UNION* (1849), 3 Exch. 283; 18 L. J. Ex. 282; 12 L. T. O. S. 533; 13 J. P. 235; 154 E. R. 850.

Annotations:—*Refd.* Thames Iron Works & Ship Bldg. Co. v. Royal Mail Steam-Parcel Co. (1862), 13 C. B. N. S. 358; Lawford v. Billericay R. D. C., [1903] 1 K. B. 772. *Mentd.* Diggle v. London & Blackwall Ry. Co. (1850), 19 L. J. Ex. 308; Clarke v. Cuckfield Union Grdns. (1852), Ball Ct. Cas. 81; Finlay v. Bristol & Exeter Ry. Co. (1852), 7 Exch. 409; Lowe v. L. & N.-W. Ry. Co. (1852), 21 L. J. Q. B. 361; R. v. Greene (1852), 16 Jur. 663; Pauling v. L. & N.-W. Ry. Co. (1853), 1 C. L. R. 997; Henderson v. Australian Royal Mail Steam Navigation Co. (1855), 5 E. & B. 409; Northampton Gaslight Co. v. Parnell (1855), 3 C. L. R. 409; Smart v. West Ham Union Grdns. (1855), 10 Exch. 867; Russell v. Sa Da Bandeira (1862), 13 C. B. N. S. 149; Nicholson v. Bradley Union Grdns. (1866), 7 B. & S. 774; Hunt v. Wimbledon L. B. (1878), 3 C. P. D. 208.

213. — Mere sketches of manner of doing extras—Not signed by architect.—Pltf., a builder, by deed contracted with defts. to build for them a house & premises for a certain sum. The deed provided that “no alterations or additions shall be admitted unless directed by the architect of” defts. “in writing under his hand, & a weekly account of the work done thereunder shall be delivered to the architect or the clerk of the works on every Monday next ensuing the performance of such work, & the delivery of such account shall be a condition precedent to the right of” pltf. “to recover payment for any such addition or alteration.” In an action by pltf. to recover the balance due under the contract, the claim including charges for additions & alterations:—*Held*: mere sketches of the manner in which the extra work was to be done, prepared & furnished to pltf. by defts.’ architect, but not signed by him, were not directions in writing under the hand of the architect, within the contract.—*MYERS v. SARL* (1860), 3 E. & E. 306; 30 L. J. Q. B. 9; 7 Jur. N. S. 97; 9 W. R. 96; 121 E. R. 457.

Annotations:—*Mentd.* Miller v. Tetherington (1861), 6 H. & N. 278; *Re Sutro & Hellbut*, Symons, [1917] 2 K. B. 348.

214. — Oral directions of employer.—On a contract by a builder to do work according to specifications, & to charge for no extras without written orders, the mere oral directions of the employer to do some increased work cannot be given in evidence to sustain a demand for extras, in the absence of any evidence of a new contract.—*FRANKLIN v. DARKE* (1861), 3 F. & F. 65, N. P.; *subsequent proceedings* (1862), 6 L. T. 291.

215. — Progress certificates.—A contract for the construction of large iron buildings for a lump sum, contained a clause that no alterations or additions should be made without a written order from the employers’ engineer, & no allegation by the contractors of knowledge of, or acquiescence in, such alterations or additions on the part of the employers, their engineers or inspectors, should be accepted or available as equivalent to the certificate of the engineer, or as in any way superseding the necessity of such certificate as the sole warrant for such alterations & additions. During the execution of the contract the contractors alleged it was impossible to cast certain iron trough-girders of a specified weight, & subsequently they were allowed to erect girders of a much heavier weight, & the actual weights were entered in the engineer’s certificates issued from time to time authorising interim payments. On the completion of the work the contractor claimed a considerable amount in excess of the contract price for the extra weight of metal supplied:—*Held*: the engineer’s certificates were not written orders, & the claim was excluded by the terms of the contract.—*THARSIS SULPHUR & COPPER CO. v. M’ELROY & SONS* (1878), 3 App. Cas. 1040, II. L.

Effect of final & conclusive certificate on.—See Sect 2, sub-sect. 4, *ante*.

SUB-SECT. 2.—EFFECT OF REFUSAL TO GIVE.

216. Right of contractor to abandon contract.—In the absence of any specific guarantee or definite representations as to the nature of the soil in which the works are to be executed, a contractor is not entitled to abandon the contract because the engineer declines to give written orders entitling to extra payment in consequence of difficulties in executing the works, which had not been foreseen by the contractor.—*BOTTOMS v. YORK CORPN.* (1892), 2 Hudson’s B. C., 4th ed. 208, C. A.

Annotations:—*Refd.* McDonald v. Workington Corpn. (1893), 2 Hudson’s B. C., 4th ed. 228. *Mentd.* *Re Rubel Bronze & Metal Co. & Vos.*, [1918] 1 K. B. 315.

Part VII.—Maintenance and Defect Clauses.

217. Maintenance clause—Liability to reconstruct—Damage by flood.—On a covenant to build a bridge in a substantial manner & to keep it in repair for a certain time, the party is bound to rebuild the bridge, though broken down by an

v. CALGARY CITY (1911), 16 W. L. R. 443.—CAN.

o. — Engineer placing stakes.—The placing of stakes by the engineer or his assistant is not equivalent to written instructions.—*COURTNEY v. PROVINCIAL EXHIBITION COMMISSION* (1906), 41 N. S. R. 71.—CAN.

218 i. — Progress certificates—Ob-
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tained by fraud.—Progress certificates obtained from the architect by fraud are not equivalent to orders in writing.—*A.-G. v. MCLEOD* (1893), 14 N. S. W. L. R. 246.—AUS.

PART VII.

p. Maintenance clause—Absence of
General rule.—Where there is no provision respecting liability for damage

extraordinary flow.—*BRECKNOCK & ABERGAVENNY CANAL NAVIGATION CO. v. PRITCHARD* (1796), 6 Term Rep. 750; 101 E. R. 807.

Annotation:—*Mentd.* *Atkinson v. Ritchie* (1809), 10 East, 530.

occasioned by *vis major*, during the period of construction, & the work has been completed & approved or ought to have been approved by the employer, the loss will fall on him; but the loss or risk is borne by the contractor where the work is not completed or approved.—*BOTHWELL v. UNION GOVERNMENT (MINISTER OF LANDS)* (1917), App. D. 262.—S. AF.

218. Defect clause—Defects due to design—“Appear.”]—*Qu.*: whether the contractor is liable, under a defect clause, for defects consequent on the design, & not on its execution by him.

Construction of the word “appear” in a clause providing for defects appearing within a certain period.—*CUNLIFFE v. HAMPTON WICK LOCAL BOARD* (1893), 9 T. L. R. 378; 2 Hudson’s B. C. 4th ed. 250, 258, D. C.

219. ——— “Emergency defects.”]—By a contract, dated Dec. 31, 1908, A. agreed to construct sewers & manholes in accordance with specifications & bills of quantities, the contract being similar in form to that sanctioned by the Royal Institute of British Architects. A. asserted that he completed the work in accordance with the contract on Jan. 12, 1910, & gave notice to the architect to that effect. On Jan. 15, A. was adjudicated bkpt., & on Feb. 1 pltf. was appointed trustee. On Feb. 5, the architect gave notice of certain defects in the manholes, & called upon pltf. to remedy them by making them watertight. The notice further stated that unless the defects were so made good the cost of making them good would be deducted from the retention money, pursuant to clause 17 of the contract. Pltf. sued for a balance alleged to be due in respect of the agreed price of contract work plus extras, & for a declaration that he was entitled to another sum which would become due as retention money. Defts. alleged that the decision of the architect as to defects was final & binding upon both parties, pursuant to clause 16 which provided for defects during the progress of the work, & that upon the true construction of the contract it was the duty of the contractor to make the manholes of the works watertight, & that he should have selected suitable bricks for the purpose, & they counter-claimed damages:—*Held*: (1) so far as it was necessary to decide it, clause 16 related to emergency defects arising in course of the work as to which the decision of the architect was final & binding; (2) clause 17 referred to defects appearing after completion as to which the parties were entitled to the more deliberate judgment of the architect, which judgment, having regard to a later clause, was subject to an appeal to an arbitrator; (3) the architect having approved a sample of the bricks to be used for the manholes the contractor was not responsible because the manholes were not watertight, & the error was in design not in construction; (4) pltf. was entitled to judgment.—*ADCOCK’S TRUSTEE v. BRIDGE RURAL DISTRICT COUNCIL* (1911), 75 J. P. 241.

b. q. ——— Tender incorporating general conditions.]—The general conditions & specifications provided that the contractor should be bound to maintain the works “up to a period of 6 months, at a price to be tendered for at per month.” The tender was to maintain, in accordance with the specifications & general conditions: included in the schedule to the tender was an item, “Maintenance according to specification, £150.”—*Held*: a tender to maintain the works for 6 months for £150.—*SMYTH v. R.* (1882), 1 N. Z. L. R. C. A. 80.—N.Z.

r. ——— Defects due to design.]—Maintenance clauses need not be construed as imposing an obligation to maintain works inherently defective owing to their original design, where such risk was not contemplated by the parties.—*LAN YEONG WOOD v. STANDARD OIL CO. OF NEW YORK* (1908), 3 Hong Kong L. R. 53.—HONG KONG.

s. Defect clause—Liability to re-

construct—Damage by flood.]—Builders had contracted to secure the work from injury by inclemency of the weather, fire, accident, design, or otherwise, until its acceptance, to keep the foundations dry, & to make good any damage that might occur during progress of the work not due to negligence or lack of judgment of the architects. The building subsided owing to the backing up of water, through a sewer into the basement, which could have been prevented by a back water trap not mentioned in the specifications:—*Held*: under the terms of the contract, the contractors were bound to repair the damage at their own expense, with as little delay as possible.—*GRACE v. OSLER* (1911), 19 W. L. R. 109, 326.—CAN.

t. ——— Liability for reparation of loss.]—*LONDON & LEPRI SHIPING Co. v. DUFFAS & Co.* (1841), 3 Duml. (Ct. of Sess.) 929.—SCOT.

u. ——— Alternative rights of parties—Taking over work.]—Specifica-

220. ——— Power of new surveyor to act on—Completion certified.]—Where the surveyor, who supervised the construction of sewage works, has certified completion, his successor, as surveyor for the time being, can act under the clause for maintenance or repair of defects.—*CUNLIFFE v. HAMPTON WICK LOCAL BOARD* (1893), 9 T. L. R. 378; 2 Hudson’s B. C. 4th ed. 250, 258, D. C.

221. ——— Effect of final certificate on liability under.]—In a building contract an architect was nominated, who was given a general control over the works, which were to be carried out in accordance with his directions & to his satisfaction. By a clause in the contract he was empowered to order the removal of improper materials, & the re-execution of work not done in accordance with the drawings & the specification. By another clause any defects which might appear within twelve months from the completion of the works, arising, in the opinion of the architect, from materials or workmanship not in accordance with the drawings & specification, were upon the written direction of the architect to be made good by the contractor, at his own cost, unless the architect should decide that he ought to be paid for same. A further clause, after providing for payment of the contractor under certificates issued by the architect, declared that “no certificate shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects as provided by this contract.” The final clause provided that in case any dispute or difference should arise as to the construction of the contract, or any matter or thing arising therefrom, except certain specified things, notice thereof should forthwith be given, & such dispute or difference should be referred to arbn., & the arbitrator should have power to open up, review, & revise any certificate, opinion, decision, requisition, or notice, save in regard to the matters expressly excepted, & to determine all matters in dispute of which notice should have been given. In an action by the contractor against the building owner to recover sums due on certificates issued by the architect, deft. set up by way of defence & counterclaim that the work done & materials supplied were defective & unsuitable, & not in accordance with the terms of the contract:—*Held*: (1) as the arbn. clause destroyed the finality of the certificates, deft. was entitled to set up the defence & counterclaim to the action; (2) (*STIRLING, L.J.*), the provision that no certificate should be considered conclusive evidence as

provided that the contractors should first have the right to remedy any work, & should without delay carry out the order of the engineers in that respect; that, should the contractors fail to carry out such orders promptly, the employers might replace defective work or take it over. On the facts:—*Held*: the employers had not taken over the work & the engineers were not authorised so to do.—*MERRIAM v. PUBLIC PARKS BOARD OF PORTAGE LA PRAIRIE*, [1912] 20 W. L. R. 603; 1 W. W. R. 1082.—CAN.

“Omissions & defects.”—Whether restricted to default of contractor.]—The contractor agreed to make good, at his own cost, all omissions & defects appearing or arising subsequent to the final certificate of completion:—*Held*: (1) only liable to make good omissions & defects due to his own default; (2) the agreement was not one for maintenance & repair.—*ROUX v. COLONIAL*

to the sufficiency of work or materials to which it referred was general, & the clause could not be read as applying only to the liability of the contractor to make good defects.—*ROBINS v. GODDARD*, [1905] 1 K. B. 294; 74 L. J. K. B. 167; 92 L. T. 10; 21 T. L. R. 120, C. A.

Annotation :—*Distd. Eaglesham v. McMaster*, [1920] 2 K. B. 169.

See, generally, Part III., Sect. 3, sub-sect. 2, C., *ante*.

222. Notice to remedy defects—Failure to give—Restrictions on liability.—Defts.' predecessors in title obtained an Act for the formation of a road which was to pass under a railway by means of a bridge. By the Act it was provided that the undertakers should not enter upon or interfere with the railway, or execute any work whatsoever under or affecting same, until they should have delivered to the co. plans, drawings & specifications of the works intended to be executed under or affecting the railway & works thereof, such plans, etc., to describe the manner of executing the intended works, & the materials to be used for the purpose, nor until those plans, etc., should have been examined & approved by the engineer of the co.; & that "the same works should be executed & thereafter maintained by the undertakers at their sole expense in all things, according to such approved plans, etc., under the superintendence

& to the reasonable satisfaction of the engineer of the co." It was further provided that the undertakers should from time to time be responsible for & make good to the co. all costs, losses, damages, & expenses which might be occasioned to the co. by reason of the execution or failure of any of the intended works or of any act or omission of the undertakers, etc. The bridge was constructed of brick piers & iron pillars, of iron girders resting upon the piers & pillars, & of timber & woodwork. In the construction of the bridge, the brick & ironwork was done by defts.' predecessors in title under the superintendence of pltfs.' engineer. The timber & woodwork, the superstructure, was done by pltfs.' engineer at the expense of the undertakers & with materials provided by them. The structure was completed in 1864. In 1872 certain repairs became necessary to the superstructure of the bridge, which repairs were executed by pltf. co. who claimed to be reimbursed their outlay in so doing by defts., although defts. had had no notice nor any knowledge or means of ascertaining that the repairs were necessary:—*Held*: pltfs. were not entitled to recover the expenses so incurred.—*LONDON & SOUTH WESTERN RY. CO. v. FLOWER* (1875), 1 C. P. D. 77; 45 L. J. Q. B. 51; 33 L. T. 687.

Annotations :—*Refd. Manchester Bonded Warehouse Co. v. Carr* (1880), 5 C. P. D. 507; *Hugall v. M'Lean* (1885), 53 L. T. 94. *Mentd. Ross v. Price* (1876), 45 L. J. Q. B. 777.

Part VIII.—Breach of the Contract.

SECT. 1.—IN GENERAL.

223. What amounts to—Substitution of materials—Ratification or assent.—On a contract to build for pltfs. a steamboat of iron, the builder, deft., having with their knowledge, substituted in part wood, & the vessel having been received & fitted up by pltfs., & after two trial trips taken to a foreign seaport, & there retained some months, & never returned, but resold at a great loss:—*Held*: it was for the jury whether there had been an assent to the alterations, or a ratification, by retention for an unreasonable time, or an acceptance of the vessel as altered, & if so, pltfs. could not recover damages.—*BLYTH v. SAMUDA* (1861), 2 F. & F. 430, N. P.

224. — Ship built according to contract—

(1901), 18 S. C. 143; 11 C. T. R. 181.

c. — Certificate as to defects—Whether written certificate essential.—Pltfs. agreed to build a house for deft., a portion of their remuneration to be retained by deft. for a month after completion, & until all the defects which the architect should within that period certify to exist should be remedied:—*Held*: the certificate as to defects need not be in writing, that not being expressly required.—*OLDERSHAW v. GARNER* (1876), 38 U. C. R. 37.—*CAN.*

d. — — Whether final.—*HAMILTON v. KRAEMER-IRWIN ROCK ASPHALT & CEMENT PAVING CO.* (1901), 3 O. W. R. 347.—*CAN.*

PART VIII. SECT. 1.

e. What amounts to—Question for
v. HENDERSON (1869),
6 Sc. L. R. 608.—*SCOT.*

223 i. — Substitution of materials.
—A deviation from specification con-

sisted in the use by the builder of milled lime instead of cement mortar as specified in the contract:—*Held*: the builder was in breach of his contract.—*STEEL v. YOUNG*, [1907] S. C. 360.—*SCOT.*

223 ii. — — More expensive material substituted.—In an action for damages for breach of a building contract it is no defence that although certain materials called for in the specification were omitted, in other respects the material supplied was better & more expensive than the contract called for.—*GREENE v. WALSH* (1877), 6 Nfld. L. R. 135.—*NFLD.*

f. — Substantial portion of building not erected.—It was disputed whether certain items, part of a building to be erected, were included in the contract:—*Held*: a substantial portion of the building had not been erected & the contract was unperformed.—*MYERS v. ROOPE* (1911), 17 W. L. R. 501.—*CAN.*

g. — Deviations passed by architect.—A builder contracted to

Subsequent depreciation in value.—Defts., ship-builders, carrying on business near Sunderland, entered into an agreement to build a steamer for pltfs. By the terms of the agreement, the contractors were to keep the vessel insured until delivery to pltfs., & the vessel was to remain at their risk until legally transferred, & the contractors were to do all to make the vessel complete & equal to the best sea-going vessel of her class. The steamer, having received her engines in the Tyne, left the Tyne in charge of a pilot employed by defts. for Sunderland to be completed there for her trial trip & for delivery. When off the Durham coast the vessel went upon some rocks, but was floated off & taken round to the river Wear & docked for repairs, & certain repairs were there

erect a building in accordance with certain plans & in conformity with a detailed estimate of prices. The employers' architect during the course of erection sanctioned deviations from the details set forth in the estimate. As the building proceeded the architect granted the usual certificates:—*Held*: the builder was not in breach.—*FORREST v. SCOTTISH COUNTY INVESTMENT CO., LTD.*, [1916] S. C. (H. L.) 28.—*SCOT.*

h. — Plans not followed.—It was required by specifications that a track should be finished to the required grades in every particular, & that the decision of the engineer on any matter connected with the grading should be final:—*Held*: the construction of the track a foot lower than as shown in the plans was a deviation.—*COURTNEY v. PROVINCIAL EXHIBITION COMMISSION* (1906), 41 N. S. R. 71.—*CAN.*

k. Evidence of—Ship's engine.—In the case of a party having got an article such as the steam-engine of a ship, a certain amount of expenditure

1.]

executed by defts. Pltfs. accepted delivery under an agreement reserving any rights as to compensation which they might possess. The vessel's first voyage was to Havre, where she collided with the dock side & sustained injury, which pltfs. attributed to the previous accident. The vessel having been repaired, pltfs. brought an action in respect of the cost of the depreciation in her reputation & for repairs:—*Held*: there had been a breach of contract, & pltfs. were entitled to such a sum as would make the vessel equal to contract, which they had got, as the market value of the vessel had not been affected.—*SAVARY, YOUNG & Co. v. PRIESTMAN & Co.* (1886), 2 T. L. R. 467, C. A.

— *As to site.*—See Part II., Sect. 2, sub-sect. 2, A, *ante*.

— *As to plans.*—See Part II., Sect. 2, sub-sect. 2, B, *ante*.

— *During performance.*—See Part IX.,

on repairs, when required *de recenti* of the furnishing, will be sufficient to infer & demonstrate the original insufficiency of the work, if the furnisher of the engine cannot show carelessness or unskilfulness in the treatment of the machinery, after it was sent out of his hands, or perils of the sea, to explain the cause of the failure of the machinery.—*NAPIER v. CAMPBELL* (1841), 3 Dunl. (Ct. of Sess.) 879.—*SCOT*.

l. — *Whether default of contractor or employer.*—*SIDNEY BOAT & MOTOR MANUFACTURING Co. v. GILLIS* (1909), 44 N. S. R. 152; 7 E. L. R. 518.—*CAN*.

m. *Time of breach.*—Declaration, that pltf. agreed to sell & deft. to buy certain land & put up a factory thereon, of the dimensions specified, & carry on there the manufacture of plated ware; that pltf. was ready to convey, yet deft. did not pay pltf., nor complete the purchase, but notified pltf. that he abandoned & would not perform the agreement, etc. Plea, on equitable grounds, that deft. made the agreement on behalf of himself & others, who were about to associate themselves as a co. to manufacture plated ware on the lot, & with the intention of procuring the land as a site for their factory in case the co. should decide to erect it thereon; that pltf. knew this when he made the agreement; & before any demand by pltf. for payment, & before any conveyance of the land, deft. & the others decided not to carry on the business, & gave notice thereof to pltf. & that they would not require the land, & that pltf. was released:—*Held*: the declaration was good, & the plea no answer to it.—*DULLEA v. TAYLOR* (1873), 34 U. C. R. 12.—*CAN*.

n. *Work completed at a saving—Claim by contractor for difference.*—A contractor, who abandons the execution of his contract, which is completed at a saving, cannot claim the difference between his contract price & the final cost of the works.—*DUSSAULT & PAGEAU v. R.* (1919), 58 S. C. R. 1; 44 D. L. R. 421.—*CAN*.

o. *Pleading.*—*Held*: on demurrer to the declaration on a special contract by deft. to build a house for pltf., it was unnecessary to set out the specifications in the declaration; but the approbation of the architect should have been averred, or the omission of it sufficiently excused.—*MELVILLE v. CARPENTER* (1853), 11 U. C. R. 130.—*CAN*.

p. —.]—To a declaration alleging that neither the work done nor the materials were to the satisfaction of the architect, defts. pleaded that certain of the work & materials pro-

vided by defts., under the superintendence of pltf., were subsequently disapproved of by the architect:—*Held*: bad.—*MELVILLE v. CARPENTER* (1853), 4 C. P. 159.—*CAN*.

q. —.]—To a summons & plaint setting out certain specific breaches of a building agreement, deft. pleaded, in effect, that everything was done by him according to the terms of the agreement:—*Held*: embarrassing.—*SMYLY v. KELLY* (1860), 12 Ir. Jur. 321.—*IR*.

PART VIII. SECT. 2, SUB-SECT. 1.

r. *Liability for — Defective plans.*—The contractor cannot defend himself in an action against him by the owner of a building constructed contrary to building rules by alleging that the faults of construction arose from defects in the architect's plan, upon which plan the building was constructed, the contractor & the architect being responsible for these defects jointly & severally.—*ROYAL ELECTRIC CO. v. WAND* (1894), Q. R. 6 S. C. 398.—*CAN*.

s. — *Contractor deprived of costs.*—Pltf. sued for damages for the negligent construction of walls erected by deft.; the walls were built in a good & workmanlike manner, but were unable to stand the outward pressure of the roof as constructed; pltf. could not claim to have relied on deft.'s plan, but it probably contributed to the accident:—*Held*: though deft. was entitled to recover balance of the contract price he should be deprived of his costs.—*HAGAR v. HAGAR* (1902), 1 O. W. R. 78.—*CAN*.

t. — *Non-performance — Contract for fixed sum.*—If a person contracts to do work for a fixed sum & fails to perform his contract, he is liable in damages; the fact that he made the offer under an error in calculation will be no excuse to him.—*SEATON BRICK & TILE Co., LTD. v. MITCHELL* (1900), 2 F. (Ct. of Sess.) 550; 37 Sc. L. R. 400.—*SCOT*.

a. — *Departure from specification—Defective work.*—*Held*: (1) deft. was entitled to nominal damages because pltfs. had put in cheaper baths than the specifications called for; (2) deft. was entitled to damages for defective work in several respects.—*ELFORD & CORNISH v. THOMPSON* (1912), 19 W. L. R. 809; 1 W. W. R. 409; 1 D. L. R. 1; 5 Sask. L. R. 96.

Plea of leave & license.—Defts. pleaded that the variations from the plans in the declaration mentioned were made by the leave & license of pltf. & his agent:—*Held*: plea bad; leave & license

— *As to time for completion.*—See Part II., Sect. 3, *ante*.

— *As to maintenance.*—See Part VII., *ante*.

225. *Onus of proof—On plaintiff.*—In *assumpsit*, the declaration stated that deft. agreed to build houses according to a specification. Breach, that he did not build according to the specification. Plea, that deft. did build according to the specification:—*Held*: on this issue pltf. must begin & prove that deft. had not built according to the specification.—*SMITH v. DAVIES* (1836), 7 C. & P. 307, N. P.

SECT. 2.—DAMAGES.

SUB-SECT. 1.—DEFAULT OF CONTRACTOR.

Recovery of liquidated damages.—See Sect. 3, sub-sect. 6, *post*.

cannot be pleaded to a breach of contract.—*LEONARD v. NORTHEY* (1871), 22 C. P. 11.—*CAN*.

c. — *Acceptance.*—Pltf. agreed to erect a building for deft. upon a lot owned by pltf.; there was a departure by pltf. from the pattern of the house as agreed upon for which deft. claimed compensation, but nevertheless went into occupation:—*Held*: an acceptance.—*MACKISSOCK & THOMAS, LTD. v. BLACK* (1912), 21 W. L. R. 424.—*CAN*.

d. — *On declaration on a contract to build a boiler for pltf., alleging partial completion by testator before his death, & a promise by defts. as exors. to complete it.* Plea, as to so much of the declaration as referred to alleged imperfections of material & workmanship, that after the occurrence thereof, & before suit, the boiler was taken by pltf. from defts., as exors., whereby, & by force of the contract set out in the declaration, defts. ceased to be liable in damages in respect of the causes of action to which the plea was pleaded:—*Held*: good.—*LEONARD v. NORTHEY* (1871), 22 C. P. 11.—*CAN*.

e. — *Certain stone supplied by pltf. for a building for which deft. was the contractor, was not in accord with the specifications. Dft. had accepted the material, after it had been worked into proper form & condition, & placed it in position without objection until after the material had lost its character as chattels & had become part of the building. In an action for the price:—Held: pltf. was entitled to recover.*—*GARSON v. WATSON* (1907), 5 W. L. R. 534.—*CAN*.

f. — *Defective work.*—*Held*: deft. was entitled to recover damages for bad workmanship upon his counterclaim, although pltf. was deprived of the balance of the contract price.—*DONALDSON v. COLLINS* (1912), 21 W. L. R. 56; 2 W. W. R. 47; 3 D. L. R. 352.—*CAN*.

g. *S. P. BRAYLEY v. NELSON* (1907), 2 E. L. R. 339.—*CAN*.

h. — *If a contractor's work is not well executed, he is liable in damages towards the proprietor without further protest.*—*CAGNON v. MAHEUX* (1912), Q. R. 24 K. B. 129.—*CAN*.

k. — *A contractor for laying brick upon carpentry erected by another, cannot justify his own unsatisfactory work by complaining of the woodwork. It is his duty to protect the proprietor & to refuse to carry out his contract unless the proprietor assumes the risk.*—*CHEVALIER v. TOMPKINS* (1915), Q. R. 48 S. C. 53.—*CAN*.

PART VIII.—BREACH OF THE CONTRACT.

226. Measure of damages—Loss of profits on another contract.]—In an action by three plffs. for a breach of contract in not completing certain works, whereby they were prevented from fulfilling a contract made by them with another firm

consisting of two of themselves:—*Held*: plffs. were entitled to recover as special damage the loss of profit on their contract although it could not be enforced at law, owing to the community of the parties, & was void by Stat. Frauds.—*WATERS v.*

l. — Work passed by proprietor's inspector.]—In an action by a contractor for payment of an alleged balance of the contract price, the proprietor proved that none of the drains in the whole work had been dug to the depth contracted for:—*Held*: the work having been accepted by the inspector, he was not entitled to repetition or to damages for the insufficient nature of the work.—*MULDOON v. PRINGLE* (1882), 19 Sc. L. R. 668.—*SCOT*.

m. — Defects. counterclaim for damages because a certain building, part of the plant constructed by pltf., fell down, should be dismissed, it being admitted that the design was faulty & all the work & material supplied by pltf. on this building having been inspected & passed by the defts.' inspectors & engineers, the burden of showing that defects in pltf.'s work or material caused the building to fall was on defts. & that onus had not been satisfied.—*MANDERS v. MOOSE JAW CITY* (1914), 28 W. L. R. 821.—*CAN*.

n. — Failure of employer to inspect.]—Resp. constructed a cement tank or reservoir on the applt.'s farm. Applt. did not inspect the work on its completion, but accepted resp.'s statement that it was properly carried out, and paid for it. It was subsequently found to be defective:—*Held*: applt. was entitled in the circumstances to recover damages arising out of the defects in the work.—*HAWKE v. LAGAL* (1913), 16 W. A. L. R. 6.—*AUS*.

o. — Failure to object during progress—Subsequent partial destruction.]—A. contracted to put up the brickwork of certain houses on B.'s ground according to contract & at a specified rate of payment. After the walls were built, but before the roof was on, a severe gale blew down a portion of them. In a question who was liable for the loss:—*Held*: the risk was with the employer, & he was barred from pleading breach of contract by his having failed to object to it during the progress of the work, though he was aware of it.—*M'INTYRE v. CLOW* (1875), 12 Sc. L. R. 196.—*SCOT*.

p. — Failure to complete within specified time.]—Where a contractor fails to complete the work within the specified time, he is answerable in damages.—*DAMPHOUSSE v. VALIQUETTE* (1915), Q. R. 24 K. B. 62.—*CAN*.

q. —]—Held: in the case of the purchase of a vessel paid for by instalments while building, a purchaser was not barred from claiming damages for non-delivery at the date contracted for, by accepting delivery at a later date.—*SUTHERLAND v. MONTROSE SHIPBUILDING CO.* (1860), 22 Dunl. (Ct. of Sess.) 665.—*SCOT*.

r. — Extension of time—Work subsequently accepted—Right of set-off.]—The first count alleged that plffs. agreed to do certain work for deft., to be completed by Nov. 15, 1854, & to be paid for in a certain manner; plffs. commenced the work, & before completing it, by agreement dated Dec. 16, 1854, between plffs. & deft., after reciting the former agreement, which was to remain in force, etc., plffs. promised in all respects to execute the works by certain days therein specified; & if plffs. were not authorised, before Jan. 1 then next, by deft.'s agent to proceed with certain work therein

mentioned, a certain extension of time should be allowed. After the execution of the agreement, & before the time limited, deft. hindered & delayed plffs., etc., by means of which they were put to extra expense, yet they performed the work in accordance with the plans & specifications, etc., & deft. accepted it. A verdict was taken by consent, subject to arbitration. The arbitrators awarded non-performance by plffs. of the work by the time specified:—*Held*: the second contract did not alter or annul the condition precedent to plffs.' right to be paid on the first contract; & the arbitrators having found that plffs. did not complete the work within the time specified, deft. was entitled to a verdict upon the first count; but the subsequent acceptance of the work by deft. entitled plffs. to recover on the common counts.—*BROWN v. WYTHES* (1862), 11 C. P. 561.—*CAN*.

s. — Subsequent agreement to pay daily sum for delay.]—Defts. contracted to instal an elevator by Nov. 1. Some delay took place & on Dec. 3 defts. gave a written guaranty to pay \$15 for each day after the time elevator remained in incomplete running order. It never worked satisfactorily & pltf. acquiesced in another attempt of defts. to make it satisfactory:—*Held*: this was not a novation or an accord & satisfaction; amount paid must be repaid & damages must be assessed.—*PORTER v. PARKIN ELEVATOR CO.* (1909), 13 O. W. R. 1053.—*CAN*.

t. — Failure of employer to deliver material.]—*CURLEY v. NEW TORONTO* (1915), 8 O. W. N. 274.—*CAN*.

u. — Estoppel by conduct of employer.]—*SIDNEY BOAT & MOTOR MANUFACTURING CO. v. GILLIS* (1909), 44 N. S. R. 152; 7 E. L. R. 518.—*CAN*.

w. — "Vices du sol."]—The builder is responsible for the "vices du sol," although he be bound by his contract to follow certain plans & specifications under the direction of an architect employed by the proprietor.—*BROWN v. LAURIE* (1854), 5 L. C. R. 65.—*CAN*.

y. — Adding storey—Defective temporary covering.]—Where a contractor, engaged in adding a storey to a building, undertakes to protect the building by means of a temporary covering, he is answerable for all damages which may ensue by reason of stress of weather, however extraordinary it may be.—*BOIVIN v. L'ACQUET* (1915), Q. R. 25 K. B. 69.—*CAN*.

z. — Defect discovered after payment.]—An engineer furnished new engines & repaired the boiler, etc., of a steam-vessel, & subsequently received payment therefor; on the steam vessel resuming her station the machinery frequently went wrong, & different parts of it failed, occasioning frequent repairs:—*Held*: payment of the price of the engine would not preclude the owners from insisting in their action for damages, if the defects could not have been discovered prior to the payment.—*NAPIER v. CAMPBELL* (1841), 3 Dunl. (Ct. of Sess.) 879.—*SCOT*.

a. — Employer not damnified.]—*Held*: deft.'s counterclaim for damages, being much more than offset by the difference between the value of the building & what he had paid for it, should not be allowed.—

MCDONALD v. SIMONS (1910), 15 W. L. R. 218.—*CAN*.

b. — Negligence of contractor.]—In a contract to build the walls & foundation of a house for deft., a window was misplaced by the negligence of the contractor:—*Held*: deft. was entitled to damages therefor.—*IREDALE v. DREWERY* (1912), 19 W. L. R. 931; 4 D. L. R. 868.—*CAN*.

c. Failure to accept owner's terms for taking over work.]—*Held*: defts. were entitled to recover on a counterclaim for defective materials & construction, pltf. having failed to accept terms upon which defts. offered to take the work off his hands.—*McQUARRIE v. CALNEK* (1895), 27 N. S. R. 483.—*CAN*.

d. — Where delay caused by both parties—Loss caused by contractor's delay only.]—Where the conduct of both parties had contributed to the delay in executing a building contract:—*Held*: plffs. were chargeable only with three months of the total delay, defts. being entitled only to the actual loss & damage occasioned by the three months' delay.—*McLEOD (NORMAN), LTD. v. ORILLIA WATER, LIGHT, & POWER COMMISSION* (1919), 17 O. W. N. 124.—*CAN*.

e. Measure of damages—Difference in value between work contracted for & performed.]—*Held*: the measure of damages was the difference between the value of the work as performed by plffs. & the value it would have had if it had been performed in a proper & workmanlike manner.—*BAIN & TORREY v. EAGLE* (1914), 29 W. L. R. 335.—*CAN*.

f. — Allowance for work executed.]—In an action by resp. for the price of work executed under a building contract, applt., who had completed the work, counterclaimed for damages under a provision in the specification, in respect of delay in completion:—*Held*: in estimating the damage recoverable by applt., resp. was entitled to an allowance of the value of the work actually executed.—*WILLIAMSON v. MURDOCH* (1912), 14 W. A. L. R. 51.—*AUS*.

g. — Excess of cost of completion over contract price.]—Pltf. agreed to do carpentering work in a house being built for deft. for a certain sum. He commenced the work, but left to allow the plasterers to do their work. Pltf. refused to return, on the ground that the plaster was damp, though there was other work inside the house to be done. Dft. employed another to finish the work:—*Held*: deft. was entitled to recover the amount paid to another to finish the work over & above the contract price.—*KLUGMAN v. MITCHELL* (1905), 2 W. L. R. 522.—*CAN*.

h. — Damages to goods through negligence during alterations—Inability to apportion damage suffered.]—*WATTS v. MCKAY* (1911), 19 W. L. R. 916.—*CAN*.

226 i. — Loss of profits.]—Loss of profits may be claimed upon breach of a building contract through failure to complete, on the ground that they may fairly be considered as arising naturally, that is according to the ordinary course of things, from such breach, & if they are also such a loss as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach of it. Deprivation of the use

Sect. 2.—Damages: Sub-sects. 1 & 2.]

TOWERS (1853), 8 Exch. 401; 22 L. J. Ex. 180; 155 E. R. 1404.

*Annotations:—***Reid**, *Hadley v. Baxendale* (1854), 2 C. L. R. 517; **Sineed v. Foord** (1859), 32 L. T. O. S. 314. **Mentd.** *Randall v. Roper* (1858), E. B. & E. 84.

227. — Loss of profitable charter.]—A ship-builder:—*Held*: liable in damages for loss through a profitable charter not being obtained, in consequence of his failing to build & deliver a ship within the time specified in his contract.—**THE STARTLED FAWN, FLETCHER v. TAYLEUR** (1855), 9 L. T. 88, N. P.

of the building may also be compensated for quite aside from the question of profits.—**CANADA FOUNDRY CO., LTD. v. EDMONTON PORTLAND CEMENT CO.**, [1918] 3 W. W. R. 866; 43 D. L. R. 583.—**CAN.**

k. — Loss of rents.]—Deft. agreed with pltf. to exchange five houses, then in course of erection, for certain lands of pltf.'s, the houses to be completed by a certain date:—*Held*: the loss of rents which might have been obtained for the houses if completed at the proper time was a proper measure of damages, the contracting parties having known that the houses were intended to be rented.—**SMITH v. TENNANT** (1890), 20 O. R. 180.—**CAN.**

l. — .]—Pltfs. agreed with deft. to do the plumbing, heating, roofing, etc., for a terrace of six houses in course of erection by deft. The agreement did not state when the work was to be completed:—*Held*: as no time was specified for doing the work, pltfs. could be charged with delay only from the expiration of the time given to them by a notice from deft. to proceed with the work; & as, practically, from that time, deft. took charge of the work himself, pltfs. could not be held responsible for any loss of rentals that resulted.—**ELFORD & CORNISH v. THOMPSON** (1912), 19 W. L. R. 809; 1 W. W. R. 409; 1 D. L. R. 1; 5 Sask. L. R. 96.—**CAN.**

m. — Where liquidated damages provided for.]—The contractor's employment had been terminated under a forfeiture clause in the contract:—*Held*: the employers were not entitled to recover for loss of rents after the building should have been completed, & other items of damage of that class; such matters were covered by the provision in the contract as to liquidated damages for delay in completion.—**GRACE v. OSLER** (1911), 19 W. L. R. 109, 326.—**CAN.**

n. — Loss of trade.]—Pltf. agreed to lath & plaster an extension of deft.'s hotel which was, to his knowledge, urgently required for occupation by visitors, etc., & he well understood that the contract was one where each day was a matter of consideration & where time was a most essential & strict condition. The lath work was promptly completed, but pltf. could not proceed with the plastering because he had not secured the necessary material:—*Held*: deft. was entitled to damages for the loss of trade consequent on the delay.—**VOGAN v. BARRY** (1908), 7 W. L. R. 811.—**CAN.**

o. — Damage to implements.]—Owners entered upon promises in course of erection under a building contract; the buildings collapsed owing to defective construction:—*Held*: they were not entitled to damages for loss of business owing to the delay after the collapse, there being no definite evidence to sustain a claim therefor; nor were they entitled to damages for implements injured in the fall of the building.—**COCKSHUTT PLOW CO. v. ALBERTA BUILDING CO.** (1910), 13 W. L. R. 234.—**CAN.**

& order for removal of material.]—**HELFAND v. SLATKIN** (1914), 26 O. W. R. 731; 6 O. W. N. 707.—**CAN.**

q. — Defective construction of mill.]—*Held*: defts. were entitled to damages suffered by reason of the loss of the use of the mill during the sawing season, but pltf. was not liable for damages not in contemplation of the parties, or not being the immediate result of the breach of contract, such as additional cost of sawing, or logs sold at a loss.—**BRUHM v. FORD** (1900), 33 N. S. R. 323.—**CAN.**

229 i. — Ship improperly repaired—Loss by detention.]—Ship-builders agreed to repair & lengthen a whale ship. The ship was delivered as complete, & thereupon sent to the whale-fishing at D. Straits, but, in consequence of the deficiency of the work, was obliged to return to port, & was there detained for twenty-two days undergoing repairs; having then lost the proper season for the Straits, she was sent to G.:—*Held*: the ship-builders were liable for any loss suffered by the vessel not being able to go to D. Straits, or to reach G. at the proper fishing season.—**STRACHAN & GAVIN v. PATON** (1828), 3 Wils. & S. 19.—**SCOT.**

r. — Ship not repaired—Cost of temporary repairs—Loss of profits—Delay in fostering trade.]—A contractor who undertakes to do certain repairs to a steamboat is responsible for the damages caused resulting from the non-execution of the work & consisting in: the cost of temporary repairs, including the loss sustained by the delay in effecting them; the loss of profit which the boat would have earned if it had been properly repaired; the cost of the work required to put her in good condition. The loss resulting from delay in fostering trade cannot be included in the damages.—**CHATEAUGUAY & BEAUMARNOIS NAVIGATION CO. v. PONTBRIAND CO.** (1909), Q. R. 37 S. C. 392.—**CAN.**

s. — Non-delivery of ship—Loss of season's profits.]—Defts. agreed to build & equip a scow to be delivered on the opening of navigation of the river T. in the spring of 1914. Default in delivery was made:—*Held*: pltfs. were entitled to damages for the non-delivery of the scow for the whole of the season of 1914.—**DONOVAN v. CHATHAM BRIDGE CO.** (1915), 8 O. W. N. 235.—**CAN.**

t. — Ship not built to specification—Deficiency in carrying capacity.]—*Held*: the damage to the purchaser ought to be estimated by deducting from the total price a sum proportional to the difference between the actual & the stipulated capacity.—**WALKER, HENDERSON & CO. v. HUTCHISON** (1885), 22 Sc. L. R. 903.—**SCOT.**

u. — Set-off—Action in rem.]—In an action in rem by the builders of a ship to enforce a mtge. thereon, given to them on account of the contract price for its construction, the owners, for whom the ship was built, may plead as a defence *pro tanto* that the ship was not constructed

228. Average profits of shipowners.]
THE DEERSLAYER, BLYTH v. TAYLEUR (1856), 9 L. T. 88, N. P.

229. — Ship improperly repaired—Loss by detention.]—In an action against defts. for breach of contract in improperly repairing a sea-going steam-vessel, pltfs. claimed damages for the loss sustained by the detention of the vessel by reason of such improper repairs:—*Held*: they were entitled to do so, the detention of the vessel being the probable result of the breach of contract.—**WILSON v. GENERAL IRON SCREW**

according to specifications & claim an abatement of the price in consequence of such default & that the loss in value of the ship, at the time of delivery, attributable to such default, should be deducted from the claim under the mtge.—**BOW McLACHLAN & CO. v. THE CAMOSUN** (1908), 40 S. C. R. 418; *reversd.* [1909] A. C. 597.—**CAN.**

b. — Improper materials used in building church.]—The work in question was the building of a church:—*Held*: a reduction of the contract price by an amount equal to the difference in value between the bad material & that which should have been used was not an adequate measure of the set-off to which the proprietors were entitled.—**WOOD v. STRINGER** (1890), 20 O. R. 148.—**CAN.**

c. — Contract for laying water-pipe.]—A. employed B. to furnish pipes for supplying water to his house. B. supplied poor material & inefficient labour. A. put the matter right & then claimed for removal of the pipes, for repayment of £300 paid on account, £200 for damages:—*Held*: he was entitled to succeed.—**M'DONALD v. MACKIE & CO.** (1831), 5 Wils. & S. 462.—**SCOT.**

d. — Defective ditch.]—Defts. were the owners of mining properties & contracted with pltf. to build a ditch to carry water to defts.' property. He did not fulfil his contract in a proper manner:—*Held*: defts. were entitled to whatever expenses they were put to in getting the ditch into proper working order.—**BANNERMAN v. DETROIT YUKON MINING CO.** (1907), 6 W. L. R. 704.—**CAN.**

e. — Defective oven in bake-house—Injury to adjoining building.]—Deft. contracted with pltf. to erect a building, including a bake-oven, for a stated price. The arch of the oven was so constructed as to be in danger of falling. Pltf. went on using the oven for about six months from its completion, when a fire occurred in the bake-house in which the oven was, injuring the bake-house & the main building adjoining it:—*Held*: pltf. was confined to the damages to the oven itself.—**BAKER v. ATKINS** (1910), 13 W. L. R. 327; 15 B. C. R. 177.—**CAN.**

f. — Defective silo—Duty of employer to minimise loss.]—Pltf. agreed to build a silo for deft.; the work was badly done & deft. claimed for damages sustained through not being provided with a silo for the preservation of a crop of corn which in expectation of its construction he planted & cultivated:—*Held*: the amount awarded deft. should be reduced as he did nothing to minimise his loss by disposing of his corn.—**RICK v. SOCKERT** (1913), 24 O. W. R. 882; 4 O. W. N. 1570; 12 D. L. R. 506.—**CAN.**

g. — Excavation work abandoned—Money expended in completion.]—**PENBERTHY v. CORNER** (1919), 15 O. W. N. 383.—**CAN.**

h. — Delay in erecting elevator.]—An elevator was to have been ready for use by Jan. 23, & was in fact not

COLLIERY CO., LTD. (1877), 47 L. J. Q. B. 239; 37 L. T. 789; 3 Asp. M. L. C. 530.

Annotation:—*Reid*. The *Argentino* (1888), 13 P. D. 191.

230. — Improper materials in building house—Loss by rebuilding—Loss of ground rent.—Deft. supplied pltf. with mortar for some building operations; subsequently the building was condemned by the London County Council, on the ground that the mortar was bad:—*Held*: pltf. was entitled to recover from deft. the cost of pulling

ready until Aug. 6. The elevator was expressly stated to be a passenger elevator; there was no evidence that pltf. knew that it was intended to be used also as an elevator for the carriage of goods:—*Held*: (1) for this period of delay deft. co. were entitled to damages, although the delay for the most part arose through no fault of pltf., but through occurrences which they failed to guard themselves against in their contract; (2) the damages recoverable were such as would naturally result from the breach of the contract, as the ordinary consequence of such breach, or, in the circumstances of the particular case, might reasonably be presumed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it; (3) deft. co. were not entitled to include in their damages the wages of men employed to carry merchandise, the rental of a hoist for the same purpose, & extra light during the hours these men worked; (4) deft. co. were entitled to damages for loss of business & inconvenience, including contingent or speculative damages.—*STEVEN v. PRYCE-JONES, LTD.* (1913), 25 W. L. R. 172.—CAN.

k. Assessment of—By court.—A contract provided for payment of \$20 a day for delay in completion, & that should the contractor be delayed by any cause which he could not reasonably be expected to control, the architect should give the contractor such extension of time as, in his, the architect's, opinion, was fair & just:—*Held*: the architect, by his absolute refusal to deal with the question of damages, which necessarily involved the question of allowances for delays, abdicated his quasi-judicial office: & the ascertainment of the amount of the damages, involving the allowance for delays, was for the ct.—*WATTS v. MCLEAY* (1911), 19 W. L. R. 916.—CAN.

PART VIII. SECT. 2, SUB-SECT. 2.

l. Liability of employer—Crown.—A., the proper officer of a Govt. department, promised to appoint a suitable person to inspect the timber for use under a contract at an agreed place. The inspector was not appointed until a considerable time afterwards, & by reason of such delay the suppliant had to pay a higher rate of freight on the timber than he otherwise would have had to pay, & was compelled to carry on his work in more unfavourable weather & at greater cost, for which he claimed damages:—*Held*: the Crown was not bound under the contract to have the inspection made at any particular place; & in view of Govt. Railways Act, 1881, s. 98, & the express terms of the contract, A. had no power to vary or add to its terms, or to bind the Crown by any new promise.—*MAYES v. R.* (1891), 2 Exch. C. R. 403; 23 S. C. R. 454.—CAN.

m. — — ——A specification provided that the comrs. of a Govt. railway would provide & fix cast iron columns, iron girders, & other iron work required for supporting a roof. The contractor was unable to proceed with the execution of his work, in con-

sequence of the neglect of the comrs. to supply the iron girders, etc., owing to which delay he suffered loss & damage:—*Held*: the delay on the part of the comrs. acting for the Crown to provide & fix the cast iron columns, etc., was a breach of the contract, & the Crown was liable for the damages resulting from such breach.—*ISBESTER v. R.* (1877), 7 S. C. R. 696.—CAN.

n. — — — Company incorporated by statute—Plans to be submitted for approval.—A co. was incorporated by a statute which enacted that before the co. should commence the construction of the works authorised, the plans should be submitted to & approved by the Governor in Council. Plans were submitted, but were not approved. By its petition of right the co. claimed damages against the Crown for breach of contract to approve the plans:—*Held*: there was no contract or undertaking by the Crown that the Governor in Council would approve the plans, & the Crown was not liable.—*LAKE CHAMPLAIN & ST. LAWRENCE SHIP CANAL CO. v. R.* (1917), 16 Exch. C. R. 125; 35 D. L. R. 670; *affd.* 54 S. C. R. 461.—CAN.

o. — — — Abandonment & substitution of work.—The suppliants contracted with the Crown to do certain work on the C. canal, the contract providing that they should provide all labour, plant, etc., for executing & completing all the works set out or referred to it in the specifications, namely, all the dredging of the C. canal on section No. 8. After a portion of the work had been done, the Crown abandoned the scheme of constructing dams contemplated by the contract, & adopted another plan, the work on which was given to other contractors. After it was completed the suppliants filed a petition of right for the profits they could have made had it been given to them:—*Held*: the petition of right was properly dismissed.—*GILBERT BLASTING & DREDGING CO. v. R.* (1902), 23 C. L. T. 59; 33 S. C. R. 21.—CAN.

p. — — — Non-performance causing delay to contractor.—*MCLEOD v. SAULT STE. MARIE PUBLIC SCHOOL BOARD* (1915), 8 O. W. N. 569.—CAN.

q. — — ——Owing to the dilatoriness of the officials of a school board & their architect, a contractor was precluded from completing his contract for the erection of a school within the time stipulated:—*Held*: no damages could be recovered for the delay.—*EDWARDS v. PUBLIC SCHOOL BOARD S. S. OXFORD* (1913), 25 O. W. R. 437; 5 O. W. N. 537.—CAN.

r. — — — Suspension of work by contractor—On non-payment of instalment by employer.—A building contract provided that, should the contractor suffer pecuniary loss by any action of the employer whereby the works should have been suspended, he should be remunerated to the extent of his loss. The contractor having suspended work under the contract owing to the employer's failure to pay moneys certified by the architect to be due:—*Held*: though the contractor had suffered rather from the inaction than from the action of the employer, he could recover.—*PEDERSEN v. HADDOCK* (1917), N. Z. L. R. 684.—N.Z.

down & rebuilding, & also damages for loss of ground rent.—*SMITH v. JOHNSON* (1899), 15 T. L. R. 179; *Emden's B. C.*, 4th ed. 668.

See, generally, DAMAGES.

SUB-SECT. 2.—DEFAULT OF EMPLOYER.

231. Delay in removing obstruction to site—Loss sustained by unreasonable delay.—*LAWSON v. WALLASEY LOCAL BOARD*, No. 30, *ante*.

s. — — — Delay caused by changes in construction—Agreed to by contractor.—Pltf., the contractor, alleged that by reason of certain changes, not included in the contract, he was delayed in the construction work under the contract, & suffered damage & incurred expenses thereby:—*Held*: pltf. was not entitled to damages by reason of the making of changes in the construction work, because he had agreed to make & had stipulated that he should be paid for making the very changes in the construction referred to.—*LAWRENCE v. KERN* (1910), 14 W. L. R. 337; 3 Sask. L. R. 253.—CAN.

t. — — — Duty not to interfere with contractor.—Pltf. entered into a contract with a city corpn. to construct certain sewers. In the course of his work the contents of certain city sewers, which existed in the streets in which pltf. was required to build the sewers he had contracted to construct, the existence of which was not known to & was not disclosed to him, flowed into the trenches dug by him & caused him additional expense in doing the work:—*Held*: pltf. was entitled to damages for the loss sustained.—*BOURQUE v. OTTAWA CITY* (1903), 23 C. L. T. 265; 6 O. L. R. 287; 2 O. W. R. 701.—CAN.

u. — — — Cessation of work ordered by employer's engineer.—Under a condition for payment of damages for suspension of work beyond a certain period, the employer is liable for damages resulting from such suspension though the engineer required it under the form of an "order of works."—*YOUNG v. BALLARAT & BALLARAT EAST COMRS., MARTIN v. BOARD OF LAND & WORKS* (1879), 5 V. L. R. 503.—AUS.

w. When right to damages lost—Delay of party claiming.—Pltf. claimed damages for breach of contract; deft. counterclaimed for like damages:—*Held*: each party was guilty of such delay in performing his part as to disentitle him to damages.—*PAGE v. GREEN* (1903), 2 O. W. R. 137; (1904), 3 O. W. R. 494.—CAN.

y. — — — Laches.—C. entered into a contract with G., the contractor for the construction of the railway, to perform works of construction on a portion of the road, & agreed to keep open at certain times & hours at his own cost & expense the main line for the passage of traffic or express trains run by G. without any charge to the latter; there was a proviso that "any time occupied on the road over & above what may be required by the hours mentioned, or any expense caused thereby shall be paid by the contractor G., on a certificate to that effect signed by the superintendent of the contractor." On action for damages caused by the interruption of the work by the passing of resp.'s trains:—*Held*: it was the duty of pltf. to get the superintendent's certificate within a reasonable time, & not having taken any steps to get it until six years after the superintendent had left deft.'s employment, the failure to produce such certificate was sufficient ground for dismissing pltf.'s action.—*MCCARRON v. MCGREEVY* (1886), 13 S. C. R. 378.—CAN.

Sect. 2.—Damages: Sub-sect. 2. Sect. 3: Sub-sect. 1.]

232. Failure to give possession of site—Summer contract—Increased expenditure.]—B. contracted with a water co., in the month of June, to lay certain conduit pipes, & the co. agreed to be ready at all times to give B. possession of the sites, to enable him to proceed with the construction of the works. By means of the co.'s delay in giving possession of portions of the sites to B., B. was thrown into the winter months, when wages were higher & the works were more difficult to construct:—*Held*: a summer contract having, by implication, been in the contemplation of the parties when the contract was made, B. was entitled to a *quantum meruit*, or damages in respect of the increased expenditure which he was thereby impelled to incur.—*BUSH v. WHITEHAVEN PORT & TOWN TRUSTEES* (1888), 52 J. P. 392;

232 i. Failure to give possession of site—Rise in wages & prices.]—A specification of work to be done provided that the contractors would get possession of the ground immediately after acceptance of tender. By the formal contract the employers reserved the right to appoint the time when the contractors might enter on the lands & proceed with the works, the contractors in the event of the time of entry being postponed being entitled to an extension of time to complete the works.

After the works had been completed the contractors brought an action of damages against the employers averring delay in getting possession & loss owing to the rise in wages, price of materials, etc.:—*Held*: the employers were not bound to give possession either on the date the tender was accepted or when the formal contract was signed & the contractors could not recover.—*MACKAY & SON v. LEVEN POLICE COMRS.* (1893), 20 R. (Ct. of Sess.) 1093.—*SCOT.*

235 i. — & supply details.]—A contract provided that the contractor should be put in possession of the premises, & should be furnished with the lines & levels, by a fixed date, & that he should have no action for damages or otherwise, against deft. by reason of delay:—*Held*: the clause of the contract denying pltf.'s right to an action for damages applied to the giving possession of the premises only, & not to the delay in furnishing lines & levels.—*MUNRO v. WESTVILLE TOWN* (1903), 36 N. S. R. 313.—*CAN.*

a. Delay in supplying materials—Saving clause in contract.]—A contract for the erection of a steel bridge provided that any delay in the delivery of property or buildings to be delivered to the contractor by the employer should not give the contractor a claim to compensation:—*Held*: delay in the delivery of the bridge & the bolts & fittings therefor deliverable by the employer to the contractor was within the clause, & was not a matter for damages.—*FRASER v. HAMILTON CORPN.* (1912), 32 N. Z. L. R. 205.—*N.Z.*

b. Failure to get plans approved.]—Pltf. contracted to build two houses on a piece of land belonging to deft., which he had purchased from the Town Council subject to a condition that only one house should be erected upon it. The Town Council failed to approve the plans, & pltf. sued for damages, assessing his loss at 2½ per cent. on the price for "book-keeping," 2½ per cent. for architect's fees, & 5 per cent. for loss of profit:—*Held*: pltf. was entitled to recover 5 per cent. for loss of profit.—*COOMBS v. MULLER* (1913), E. D. L. 430.—*S. AF.*

c. Measure of damages—Nominal damages only.]—A specification for

tenders provided that not less than 4 trial borings were to be made. Pltf., whose tender was accepted, had made 2 borings, & was prepared to make 2 more according to the specification, when deft. intimated that he considered the contract completed, & refused to authorise any more borings to be made:—*Held*: pltf. could only recover nominal damages.—*WAKEFORD v. RAILWAYS COMR.* (1881), 2 N. S. W. L. R. 258.—*AUS.*

d. — Loss of profits—Extras.]—Where there is a breach of contract, the damages are to be measured, as near as may be, by the profits the contractor would have made by completing the contract in a reasonable time.

A contractor claimed for loss of profits in respect of extras not covered by the contract:—*Held*: inasmuch as it was not possible to say that the engineer would have directed it to be done by him had the work remained in pltf.'s hands, or that he would have fixed a price for it from which a profit would have been derived, it could not be taken into consideration.—*R. v. STEWART* (1902), 32 S. C. R. 483.—*CAN.*

e. — Loss by stoppage of works.]—A contractor entered into a contract with a co. for the construction of a railroad, & for keeping it in repair; he completed the greater portion, when the co. stopped the works:—*Held*: an inquiry should be directed as to the damage sustained by the contractor by reason of the stopping of the works.—*WHITEHEAD v. BUFFALO & LAKE HURON RY. CO.* (1859), 7 Gr. 351; 8 Gr. 157.—*CAN.*

f. — Loss actually sustained.]—A contractor was delayed by the default of the proprietor or his workmen in beginning his work until a date after the termination of the time fixed by the contract:—*Held*: the delay in the after prosecution of the work should not be visited by the imposition of the penalty of so much per day, but should be limited to damages sustained thereby.—*FINDLAY v. STEVENS* (1910), 15 O. W. R. 212; 20 O. L. R. 331.—*CAN.*

g. — As at date of breach.]—Pltf. undertook the erection of a building for deft., deft. was to pay for all labour, material & other charges incidental to the work from time to time as such payments were due & notified by pltf. For this work deft. agreed to pay pltf. a fixed sum of \$15,000 subject to increase or deduction by a sum equal to 20 per cent. of such sum as ultimately was found to be less than or in excess of \$189,000 being the fixed estimated cost of the work. The work was stopped because deft. was unable to furnish the money to carry out his part of the contract. Deft. some time later advertised for tenders to complete the building in a

2 Hudson's B. C. 4th ed. 122, D. C.; *affd.* 2 Hudson's B. C. 4th ed. 130, C. A.

Annotations:—*Distd.* *Drew-Bear v. St. Pancras Grdns.* (1897), Emden's B. C. 4th ed. 681; *Jackson v. Romford R. D. C.* (1909), 73 J. P. 248. *Consd.* *Porter v. Tottenham U. D. C.*, [1915] 1 K. B. 776. *Refd.* *Naylor, Benzon v. Krainische Industrie Gesellschaft*, [1918] 1 K. B. 331. *Mentd.* *Bank Line v. Capel*, [1919] A. C. 435.

233. — Interference by other contractors.]—*DREW-BEAR v. ST. PANCAS GUARDIANS* (1897), Emden's B. C. 4th ed. 681, C. A.

234. — Breach of implied term.]—*FREEMAN & SON v. HENSLEY*, No. 24, *ante*.

235. — Non-supply of drawings, details & information—Extension of time.]—*Re TROLLOPE & SONS & COLLS & SONS, LTD. & SINGER*, No. 32, *ante*.

See, further, Part II., Sect. 2, sub-sect. 2, A, ante.

modified form. Before any new contract was let he received a letter from pltf. protesting against the work being continued under any contract but theirs & warning him that he was not relieved from this contract, but he entered into a new one with other contractors:—*Held*: pltf. were entitled to damages for breach of contract as of the date when the new contract was let by deft. & that, in ascertaining such damages, the total cost of the building as completed under the pltf.'s contract had they resumed work on the date of the breach should be estimated, & to the extent to which that cost should exceed or fall below \$189,000, 20 per cent. thereof should be deducted or added, as the case might be, to the amount to which the pltf. might be found entitled in respect of the \$10,000 (balance of \$15,000, less \$5,000 paid), & in ascertaining the damages payable in respect of this item there should be taken into account the value of the time, labour & expense which the pltf. were saved through being relieved of their obligation to carry out their contract, & any contingencies which might have interfered with their doing so.—*JONES & LITTLE, LTD. v. MACKIE*, [1918] 2 W. W. R. 82.—*CAN.*

h. — Local rule of trade unknown to employer.]—In an action by a builder & contractor for damages, including the fees of an architect employed by him, for breach of contract:—*Held*: pltf. could not avail himself of an alleged local rule of trade that architects must be engaged for buildings of the contemplated value of those to be erected, since it was not shown that deft. knew of the rule or accepted any liability thereunder.—*COOMBS v. MULLER* (1913), E. D. L. 430.—*S. AF.*

k. — Employer taking possession.]—Pltf., a contractor, was compelled to cease work owing to the refusal of deft.'s architect to furnish a progress certificate, & deft. took possession of the works. The architect in refusing the certificate had not performed his duty between the parties, which was of a quasi-judicial nature:—*Held*: pltf. was justified in stopping the work & was entitled to recover the damages sustained by him by reason of deft. having taken possession of & converted to his use the plant, appliances & tools used by pltf. upon or in connection with the work.—*ALBERTA BUILDING CO. v. CALGARY CITY* (1911), 16 W. L. R. 443.—*CAN.*

l. Pleading—Whether damages claimed—Effect of arbitration award.]—Pltf. contracted to do certain work for defts. by a fixed date. After the date for completion a fresh agreement was entered into by which pltf. promised in all respects to execute the

SECT. 3.—PENALTIES AND LIQUIDATED DAMAGES.

SUB-SECT. 1.—IN GENERAL.

See, generally, DAMAGES.

See, also, ARBITRATION, Vol. II., p. 513, No. 1519.

236. Whether liquidated damages or penalty—Bond with penalty to secure payment.]—A contractor undertook to do certain works within a given term, or to pay certain fixed sums:—*Held*: (1) whether these were penalties or unliquidated damages, might properly have been decided in an action at law; (2) the fact that a bond with a penalty had been given to secure the payment of them, was itself strong evidence to show that they were liquidated damages.—*RANGER v. GREAT WESTERN RY. CO.* (1854), 5 H. L. Cas. 72; 24 L. T. O. S. 22; 18 Jur. 795; 10 E. R. 824, H. L.; 37. (1843), 3 Ry. & Can. Cas. 208.

works by certain days therein specified; & if plffs. were not authorised, before the 1st Jan. then next, by deft.'s agent to proceed with certain work therein mentioned, a certain extension of time should be allowed therefor. Averments, that plffs. immediately proceeded to the performance of the contract, & were then prepared to execute & complete it, but were stopped by deft. in the exercise of the power in him vested, whereby plffs. were hindered, etc. Further averment, that after the execution of the agreement, & before the time limited, etc., deft., unnecessarily, wrongfully, & fraudulently hindered & delayed plffs., etc., by means of which plffs. were put to great extra trouble & expense, yet they performed the work in accordance with the plans & specifications, etc., & deft. accepted & received the same from the plffs. & the engineer, etc., wrongfully & fraudulently gave wrong monthly estimates, etc., & deft. wrongfully procured false & untrue final estimates to be given. Averment, that more than ten days before the commencement of the suit the sum of £10,000 was due from deft. to plffs. for work, & £2,500 bonus mentioned in the agreement, whereof deft. had notice, etc. Pleas, never indebted, that deft. did not hinder & delay, & not guilty. A verdict was taken by consent for £8,000 subject to arbitration. The arbitrators awarded non-performance by plffs. of the work by the time specified; that the amount paid by deft. exceeded the amount of the engineer's estimates & bonus of £2,500; & that deft. had not paid the amount due before the commencement of the suit. Upon reference to the ct. by the arbitrators upon the facts:—*Held*: if plffs. were claiming damages because of the wrongful & fraudulent acts, the award had rejected such claims.—*BROWN v. WYTHES* (1861), 11 C. P. 561.—CAN.

PART VIII. SECT. 3, SUB-SECT. 1.

m. Whether enforceable — Though owner not damaged.]—The penalty imposed for non-completion of a building by a certain date is the parties' own assessment of the damages occasioned thereby. Although the owner has suffered no loss he is entitled to enforce the clause, & this is so even where he has given supplementary contracts which have delayed the completion of the work.—*DAMPHOUSSE v. VALIQUETTE* (1915), Q. R. 24 K. B. 62; 24 D. L. R. 219.—CAN.

n. — Sufficiency of breach—Waiver.]—Plffs. contracted with defts. for the construction & working of a tramway. In pursuance of the con-

tract £1,000 was paid to defts., to be declared forfeited by way of liquidated & ascertained damages in case of the non-completion of the contract, or the due observance & performance of any of the covenants. On a Monday, the day after the plans were due to be submitted for approval, defts.' solr. wrote to plffs. reminding them that the plans must be submitted. Plffs. sent the plans by their agent to the next meeting of defts. on the following Tuesday, but defts. refused to receive them:—*Held*: (1) not a breach for which the £1,000 could be forfeited; (2) the breach had been waived.—*COONAN v. BALMAIN BOROUGH* (1890), 11 N. S. W. Eq. 270.—AUS.

o. — Allowance for alterations.]—*REYNOLDS v. STRELITZ* (1901), 3 W. A. L. R. 143.—AUS.

p. — Extension of time granted—Completion after extension.]—A building contract contained a stipulation for payment of penalties by plff., a builder, in case of delay beyond a certain period in completion of the work; deft. at the request of plff. granted additional time:—*Held*: he did not thereby waive his right to penalties for delay beyond such additional time.—*TABRETT v. WAKELY* (1889), 10 N. S. W. L. R. 77.—AUS.

q. — Engineer's certificate a condition precedent.]—*Held*: defts. in an action on a building contract could not succeed on a counterclaim for a penalty for delay without a certificate of the engineer.—*MANDERS v. MOOSE JAW CITY* (1914), 28 W. L. R. 821.—CAN.

r. Implied new contract — Whether liquidated damages clause incorporated.]—Plffs. on 31st May, contracted to complete the iron work upon a building put up for deft., by 1st July, & to pay liquidated damages for every week the work should remain unfinished after that time. Dft. had not the building ready to receive the iron work for nineteen weeks after 1st July, but plffs. did not finish their work for more than seven weeks after they were enabled to begin:—*Held*: such a special provision as that for liquidated damages would not be considered as incorporated in the new contract under which the work was done after 1st July, though plffs. might be liable for the delay in an action for damages.—*HAMILTON v. MOORE* (1873), 33 U. C. R. 520.—CAN.

s. Whether liquidated damages or penalty—Principles of construction.]—In deciding the question whether a sum of money named in a contract as payable in the event of non-completion

*Annotations:—**Raffd. Thornhill v. Neats* (1800), 8 C. B. N. S. 831. *Mentd. Kirk v. Bromley Union Grdns.* (1846), 11 Jur. 49; *Waring v. M. S. & L. Ry.* (1849), 7 Hare, 482; *South Wales Ry. v. Wythes* (1854), 1 K. & J. 186; *Scott v. Liverpool Corpn.* (1858), 3 De G. & J. 334; *Re Royal British Bank* (1859), 3 De G. & J. 387; *Pawley v. Turnbull* (1861), 3 Giff. 70; *New Brunswick & Canada Ry. v. Conybeare* (1862), 9 H. L. Cas. 711; *Thames Iron Works & Ship Building Co. v. Royal Mail Steam Packet Co.* (1862), 13 C. B. N. S. 358; *Hill v. South Staffordshire Ry.* (1865), 12 L. T. 63; *Wildes v. Russell* (1866), Har. & Ruth. 689; *Western Bank of Scotland v. Addie, Addie v. Western Bank of Scotland* (1867), L. R. 1 Sc. & Div. 145; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1; *Mackay v. Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394; *Stegmann v. O'Connor* (1899), 81 L. T. 627; *Taft Vale Ry. v. Amalgamated Soc. of Ry. Servants*, [1901] A. C. 426; *Foster & Dicksee v. Hastings Corpn.* (1903), 87 L. T. 736; *Lodder v. Slowey*, [1904] A. C. 442.

237. — Weekly sum—Liquidated damages.]—Plff., a builder, contracted with deft. to do certain repairs & alterations to a house, to be completed within a specified time, "subject to a penalty of £20 per week that any of the works

within a fixed time of what is to be done under the contract, is a penalty or liquidated damages, the ct. must take into consideration the intention of the parties, as evidenced by their language, & the circumstances of the case taken as a whole & viewed as at the time the contract was made. The words "as liquidated damages & not as a penalty" are not to be left out of account altogether, though they are not conclusive. In many instances liquidated damages are provided for because of the difficulty of proving damage, though actual damage may accrue. Because there are many matters, some very small, which would constitute non-completion, it does not necessarily follow that the sums named as liquidated damages are to be regarded as payable on several events: non-completion is only one single event.—*ST. CATHERINE'S IMPROVEMENT CO. v. RUTHERFORD* (1914), 31 O. L. R. 574; 19 D. L. R. 662; 6 O. W. N. 568.—CAN.

t. — Sum accruing at stated periods—Liquidated damages.]—*Held*: where a sum certain is payable accruing from day to day or from week to week or the like for non-completion to time, it is liquidated damages, & not a penalty.—*GRACE v. OSLER* (1911), 16 W. L. R. 627.—CAN.

237 i. — Weekly sum—Penalty.]—Dft. contracted under seal to do certain work required in the erection of two dwelling houses for plff., & covenanted that the work should be fully completed by a fixed date under a penalty of \$20 a week as liquidated damages for every week beyond the said time the said works should remain incomplete:—*Held*: a penalty.—*ARCHBOLD v. WILSON* (1872), 32 U. C. R. 590.—CAN.

237 ii. — Liquidated damages.]—Dft., a builder, was liable under a bond to a penalty of £10 per week for every week during which, after a day fixed, any materials remained upon the premises, or the work remained incomplete:—*Held*: liquidated damages.—*BONSALL v. BYRNE* (1867), 1 R. 1 C. L. 573; 2 I. L. T. Jo. 6.—IR.

237 iii. — — — — —.]—In a building contract it was stipulated that the builder should pay a penalty of £5 a week for every week after a certain date, during which the works were not completed:—*Held*: the clause was not a penalty clause, but one of liquidate damages.—*JOHNSTON v. ROBERTSON* (1861), 23 Dunl. (Ct. of Sess.) 646; 33 Sc. Jur. 335.—SCOT.

237 iv.

.]—A sum

Sect. 3.—Penalties and liquidated damages: Subsect. 1.]

remained unfinished " after the stipulated periods :—*Held*: the £20 per week was in the nature of liquidated damages, & could be deducted by deft. without proving the loss he had actually sustained by reason of the delay.—*CRUX v. ALDRED* (1866), 14 W. R. 656.

238. ——— ——— ———.]—Applts. contracted to build four ships for a foreign Government, at an agreed price payable in instalments, to be delivered at fixed times. The contracts provided that " the penalty for late delivery shall be at the rate of £500 a week for each vessel." The vessels were not delivered till long after the agreed dates of delivery, & the purchasers brought an action claiming £500 a week for each vessel:—*Held*: these sums were to be regarded as liquidated damages, & not as a penalty.—*CLYDEBANK ENGINEERING & SHIPBUILDING CO. v. YZQUIERDOY-CASTANEDA, DON JOSE RAMOS*, [1905] A. C. 6; 74 L. J. P. C. 1; 91 L. T. 666; 21 T. L. R. 58, H. L.

Annotations:—*Consd.* Public Works Comr. v. Hills, [1906] A. C. 368; Webster v. Bosanquet, [1912] A. C. 394. *Refd.* Diestal v. Stevenson, [1906] 2 K. B. 345; Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co., [1915] A. C. 79. *Mentd.* Kilmer v. British Columbia Orchard Lands, [1913] A. C. 319.

239. ——— Lump sum—Penalty.]—A building contract contained a proviso that in case the contract should not be in all things duly performed by the contractors they should pay £1,000 as liquidated damages:—*Held*: this was a penalty, &

stipulated to be paid *per week* for delay in completion of a building:—*Held*: liquidated damages, not a penalty.—*GILMOUR v. HALL* (1852), 10 U. C. R. 309.—**CAN.**

237 v. ——— ——— ———.]—A contract to do work within a specified time, with a penalty of £4 a week in case of default, as rent of the premises:—*Held*: liquidated damages, not a penalty.—*GASKIN v. WALKES* (1859), 9 C. P. 314.—CAN.****

237 vi. ——— ——— ———.]—Pltfs. agreed to do certain work & to finish it by a specified date, under a forfeiture of \$50, as liquidated damages, for every week the work remained unfinished after that time:—*Held*: liquidated damages, not a penalty.—*HAMILTON v. MOORE* (1872), 33 U. C. R. 100, 520.—CAN.****

239 i. ——— Lump sum—Penalty.]—Pltf. & deft. entered into an agreement, by which deft. was to build for pltf. a mill, & for the true & faithful performance of all & every of the covenants & agreements the parties bound themselves, each unto the other, in the penal sum of \$250, as fixed & settled damages to be paid by the failing party:—*Held*: a penalty.—*BROWN v. TAGGART* (1852), 10 U. C. R. 183.—CAN.****

239 ii. ——— ——— ———.]—Pltfs. covenanted that, if a dam should not be completed before the spring floods of 1910, a bond for \$2,000 given by them should be forfeited:—*Held*: not an assessment by the parties of the damages in case of failure of completion by the day named; but in the nature of a penalty, & debts, upon their counterclaim, could recover only such damages, if any, as they had actually sustained by reason of the non-completion.—*MERRIAM v. PUBLIC PARKS BOARD OF PORTAGE LA PRAIRIE*, [1911] 18 W. L. R. 151; *affd.*, [1912] 20 W. L. R. 603; 1 W. W. R. 1082; 2 D. L. R. 702.—CAN.****

239 iii. ——— ——— ———.]—L. agreed with C. to do certain work, & agreed

not liquidated damages.—*Re NEWMAN, Ex p. CAPPER* (1876), 4 Ch. D. 724; 46 L. J. Bcy. 57; 35 L. T. 718; 25 W. R. 244, C. A.

Annotations:—*Consd.* Wallis v. Smith (1882), 21 Ch. D. 243; Willson v. Love, [1896] 1 Q. B. 626. *Refd.* Catton v. Bennett (1884), 51 L. T. 70. *Mentd.* Elphinstone v. Monkland Iron & Coal Co. (1886), 11 App. Cas. 332.

240. ——— ——— & weekly sums—Liquidated damages.]—A contractor bound himself to pay as liquidated damages in the event of non-completion of sewerage works by a specified date a fixed sum & a further sum every seven days:—*Held*: as the sums were to be paid on a single event only, viz., on the non-completion of works, they were to be regarded as liquidated damages, & not as penalties.—*LAW v. REDDITCH LOCAL BOARD*, [1892] 1 Q. B. 127; 61 L. J. Q. B. 172; 66 L. T. 76; 56 J. P. 292; 8 T. L. R. 90; 36 Sol. Jo. 90, C. A.

Annotations:—*Appld.* Ward v. Monaghan (1895), 39 Sol. Jo. 670. *Consd.* Re White & Arthur (1901), 84 L. T. 594. *Refd.* Stegmann v. O'Connor (1899), 80 L. T. 234.

241. ——— Daily sum—Contract in two separate parts—Delay in respect of each part.]—A contractor agreed with the owner of a house to carry out certain work for an electric light installation in the house, in accordance with a certain specification, for a fixed sum, & consented to pay £5 as liquidated damages for each day exceeding the number of days within which the work had to be completed. By the specification the wiring was to be handed over to the owner of the house in faultless condition within twenty days from the signing of the contract, & the fittings, which the

that if he did not make due progress to the satisfaction of C.'s engineer, or did not work in a manner satisfactory to the latter, then C. was to be entitled to cancel the contract, or C. could take possession of the works & complete them at L.'s expense, & L. was to forfeit a penalty of £500 for such neglect or default. C. alleged non-compliance with the contract by L., & took possession of & was completing the work, & claimed the £500:—*Held*: the clause relating to the £500 was intended as a penal stipulation, & C. could not recover without proof of damage.—*CAPE TOWN COUNCIL v. LINDER*, [1889] 6 S. C. 410.—**S. AF.**

239 iv. ——— ——— ———.]—Where a lump sum is made payable as compensation on the occurrence of one or more of several events, some of which may occasion serious & others less serious damage, the presumption is that the parties intended the sum to be penal.—*LAIRD BROTHERS v. CITY OF DUBLIN STEAM PACKET CO.*, [1899] 34 L. L. T. 9.—IR.****

a. ——— ——— Described as liquidated damages—Disproportionate to damage suffered.]—*Held*: as the large amounts stipulated to be forfeited, exceeding £110,000, were manifestly out of all proportion to the damage suffered or inconvenience undergone by deft., the penalty of forfeiture should not be enforced, notwithstanding that the sums were made payable "as & for liquidated damages."—*HILLS v. COLONIAL GOVERNMENT* (1904), 21 S. C. 59; 2 Buch. A. C. 355.

b. ——— Daily sum—Liquidated damages.]—A contract, which incorporated by reference a specification, was entered into by resp. for a fixed sum. The specification provided that resp. should forfeit £1 per day for each day's delay in completion after a certain time. The contract was not fully carried out, & applt. counterclaimed in respect of delay in completion:—*Held*: (1) applt. was entitled to succeed on the counterclaim for the

recovery of £1 per day in respect of resp.'s default, such sum being in fact liquidated damages; (2) it was immaterial that the penal clause was included in the specifications, & not in the operative portion of the contract.—*WILLIAMSON v. MURDOCH* (1912), 14 W. A. L. R. 54.—**AUS.**

d. ——— ——— ———.]—To an action for the balance due under a building contract, deft. set up that by the contract pltf. was to have the house ready by a named date, under a penalty of \$5 per day, which amount deft. claimed to deduct from the contract price:—*Held*: defence good; the \$5, though called a penalty, was in fact liquidated damages.—*CHATTERTON v. CROTHERS* (1885), 9 O. R. 683.—CAN.****

e. ——— ——— ———.]—Defts. contracted to complete a vessel for pltf. by 1st Aug., & agreed to pay £4 10s. for each day the vessel was detained beyond that date. At the same time they executed a bond & warrant of attorney authorising pltf. to enter judgment against them for £700, conditioned to be void if the vessel was completed in time:—*Held*: the £4 10s. a day were liquidated damages.—*LEFURGY v. MCGREGOR & MCNEILL* (1868), 1 P. E. I. 272.—CAN.****

agreed to build a house for deft. by a day named, & that for each day that should elapse after that day until completion, deft. might deduct \$5 from the contract price:—*Held*: liquidated damages.—*SCOTT v. DENT* (1876), 38 C. R. 30.—CAN.****

—.]—Deft. con-

house owner was to supply, were to be fixed & handed over in similar condition within fourteen days of their delivery by the owner of the house to the contractor:—*Held*: the £5 was agreed upon as liquidated damages for each day's delay in executing each part of the contract, the times limited in the contract being two separate periods, at the expiration of each of which the damages began to accrue.—*STEGMANN v. O'CONNOR* (1899), 81 L. T. 627, C. A.

Annotation:—*Expld.* *Dakin v. Lee*, [1916] 1 K. B. 566.

242. — Described as penalty—Liquidated damages.—By a contract for electric lighting installation it was provided that the work should be "completed in all respects on or before Nov. 26, 1898, subject to a penalty of £15 per day, & the plant by Dec. 10, subject to a penalty of £3 per day for every day the work remains unfinished to the satisfaction of the authorities or engineers":—*Held*: although the word penalty was used, the amounts accrued owing to the default of the contractor were in fact liquidated damages.—*Re WHITE & ARTHUR* (1901), 84 L. T. 594; 17 T. L. R. 461, D. C.

243. — Retention of amount from instalments due—Forfeiture on non-completion—Penalty.—It was provided in a railway construction contract that in the event which happened of non-completion of the line within a specified period *pltf.* should forfeit to *defts.* certain percentages which *defts.* retained out of money payable under that & two other railway contracts as a guarantee fund to answer for defective work & also certain security money lodged with their agent-general "as & for

tracted for the removal before a named day of farm buildings from land in a city to make it attractive to purchasers of building lots & agreed in case of default to pay a sum for each day that any material remained on the premises, as liquidated damages, not as penalty:—*Held*: *pltf.* could recover as liquidated damages.—*St. CATHERINE'S IMPROVEMENT CO. v. RUTHERFORD* (1914), 31 O. L. R. 574; 19 D. L. R. 662; 6 O. W. N. 568.—**CAN.**

h. —.]—The fixing of a definite sum *per diem*, as compensation for delay in the erection of an exhibition building desired to be used for a certain fair, up to a time certain, & of a greater sum if greater delay ensued, showed that the parties looked upon the sum as liquidated damages.—*LUND v. VANCOUVER EXHIBITION ASSOCN.* (1915), 32 W. L. R. 845; 9 W. W. R. 556; 25 D. L. R. 863; 22 B. C. R. 258.—**CAN.**

k. —.]—A clause in a sewer construction contract providing for deduction from amount payable to the contractor of \$25 *per day* for delay in completion as liquidated damages:—*Held*: in the circumstances not a penalty.—*JANSE-MITCHELL CONSTRUCTION CO. v. CALGARY CITY*, [1919] 3 W. W. R. 150; 59 S. C. R. 101; 48 D. L. R. 328.—**CAN.**

l. —.]—In the event of a building not being completed within a stipulated time, P. contracted to pay a certain sum for each day thereafter until the completion as liquidated damages, & not as a penalty. When P. sued for balance of the contract price, the employers set up a counterclaim under the liquidated damages clause:—*Held*: the amount counterclaimed must be considered as liquidated damages, & not as a penalty.—*PEACH & CO. v. JOHANNESBURG JEWISH CONGREGATION* (1894), 1 O. R. 345.—**S. AF.**

m. —.]—A contract for the construction of a bridge, to be completed by a certain date, fixed the

amount of £6 per day for each day by which the completion of the work might be in arrear, as liquidated damages:—*Held*: this amount was *prima facie* not a penalty resulting from the breach of the contract, unless it could be shown to be exorbitant or unconscionable, or that there were other circumstances leading to a different conclusion.—*WARREN v. UNION GOVERNMENT* (1916), T. P. D. 695.—**S. AF.**

n. —.]—*Penalty.*—*Held*: the claim for \$5 a day for delay in the completion of the building was a claim for a penalty & *pltf.* should be relieved therefrom.—*McDONALD v. SIMONS* (1910), 15 W. L. R. 218.—**CAN.**

242 i. —.]—*Described as penalty—Penalty.*—*Pltf.* contracted to complete a work by a specified date; in default of completion "a penalty of \$25 *per day*" would be demanded for each day thereafter:—*Held*: the *ct.* would not construe as liquidated damages what the parties had expressly declared to be a penalty.—*COVERT v. JANZER* (No. 2) (1908), 1 Sask. L. R. 429; 9 W. L. R. 287.—**CAN.**

o. Assessment of.—A contractor threw up the works after the expiration of the contract time, & they were relet, an extension of time being given to the new contractor. On the contract:—*Held*: the first contractor was liable to pay penalties from the date fixed for the completion of the contract to the date he threw it up, the sum required to make up the price to the second contractor, & penalties for the further delay caused by the extension.—*BAYLIS v. WELLINGTON CITY (MAYOR)* (1886), 4 N. Z. L. R. C. A. 84.—**N.Z.**

p. —.]—*JONES v. R.* (1877), 7 S. C. R. 570.—**CAN.**

q. —.]—Upon a contract to do certain work within a specified time, with a penalty of £4 per week in case of default, as rent of the premises:—*Held*: the condition to pay the £4 per week, although not incorporated in

liquidated damages sustained by *defts.* for the non-completion of the line," & that it should be lawful for *defts.* to take possession of the incomplete line & pay the balance due in respect of its "actual cost":—*Held*: *defts.* were not entitled to the retention & security money as liquidated damages, for the total amount thereof was indefinite, & in the case of the retention money depended on the progress of construction, the amount of the percentages, & the quantity of defective work, & it could not be treated as a genuine pre-estimate of loss, but *defts.* were entitled to obtain judgment in reconvention for such damages as it might have actually suffered through *pltf.*'s breach of contract, & deduct same from the funds in question.—*PUBLIC WORKS COMR. v. HILLS*, [1906] A. C. 368; 75 L. J. P. C. 69; 94 L. T. 833, P. C.

Annotation:—*Refd.* *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.*, [1915] A. C. 79.

244. Contract not completed by contractor himself—Liability of surety.—*Resps.* were an assurance co. which guaranteed all loss & damage which *appls.* might sustain through the failure of the contractors to carry out a building contract. The contractors became *bkpt.* & suspended the works, & *appls.* thereupon engaged another firm to complete them, but they were not completed until at least six weeks after the date specified in the original contract. The question being whether *appls.* were entitled to claim as part of their damages a sum of liquidated damages in respect of the non-completion of the contract within the stipulated time:—*Held*: the clause as to

the specifications, formed a covenant on the part of *deft.* to pay that sum for so long as his contract should remain unperformed after the day limited.—*GASKIN v. WALES* (1859), 9 C. P. 314.—**CAN.**

r. —.]—Owners of a building terminated the employment of contractors in circumstances which were held to justify that course:—*Held*: the owners were not entitled to liquidated damages for the period before completion that elapsed after they had terminated *pltf.*'s employment, the contract not providing means, in the event of forfeiture, of fixing a date up to which liquidated damages should run.—*GRACE v. OSLER* (1911), 19 W. L. R. 109, 326.—**CAN.**

s. —.]—*Use & benefit.*—A contract provided that *pltf.* should complete two rooms ready for occupation by Sept. 1, an additional room by Sept. 15, & the whole by Nov. 15, & that the contractors should, for every day after the date fixed for completion that the owners should be delayed solely through the contractors' fault in obtaining any use & benefit of the works, pay to the owners as liquidated damages for such delay at the rate of 6 per cent. *per annum* on the total amount of the contract-price. *Defts.* occupied two of the rooms from Oct. 20.—*Held*: the only delay to be accounted for was from Nov. 15; *defts.* had some use & benefit of the building, & were not entitled to liquidated damages for non-completion on Nov. 15.—*BROWN CONSTRUCTION CO. v. BANNATYNE SCHOOL DISTRICT CORPN.* (1912), 21 W. L. R. 827; 5 D. L. R. 623.—**CAN.**

t. —.]—*Extras ordered after date fixed for completion.*—*Held*: an allowance of \$20 a week for delay in completion should be made only from the time named in the contract for the completion up to Jan. 19, 1904, because the employer ordered extra work to be done which was only begun on that date.—*GREY v. STEPHENS* (1906), 16 Man. L. R. 189.—**CAN.**

Sect. 3.—Penalties and liquidated damages: Sub-sects. 1, 2, 3, 4 & 5.]

liquidated damages applied only where the contractors had themselves completed the contract & did not apply where the control of the contract had passed out of their hands.—**BRITISH GLANZSTOFF MANUFACTURING CO., LTD. v. GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPN., LTD.**, [1913] A. C. 143, H. L.

See, further, Part. XIV., post.

SUB-SECT. 2.—RELEASE BY INTERFERENCE AND PREVENTION.

245. Extension of time—Application by contractor to architect—Waiver of right to object to architect's jurisdiction.]—SATTIN v. POOLE, No. 55, *ante*.

246. No extension of time—Delay in giving possession of site—Default of workmen of both parties.]—HOLME v. GUPPY, No. 56, *ante*.

247. — Agreement to perform additional work—Waiver of time of original contract.]—THORNHILL v. NEATS, No. 49, *ante*.

248. — Delay caused by interference of employer or agents.]—RUSSELL v. SA DA BANDEIRA (VISCOUNT), No. 61, *ante*.

249. — Remedy at law.]—MINTER v. REIGATE URBAN DISTRICT COUNCIL, No. 60, *ante*.

250. — Ordering extras.]—WESTWOOD v. SECRETARY OF STATE FOR INDIA IN COUNCIL, No. 52, *ante*.

251. —]—JONES v. ST. JOHN'S COLLEGE, OXFORD, No. 53, *ante*.

252. —]—TEW v. NEWBOLD-ON-AVON UNITED DISTRICT SCHOOL BOARD, No. 54, *ante*.

PART VIII. SECT. 3, SUB-SECT. 2.

a. No extension of time—Extras.]—Held: the penalty clause in a building contract was set at large by extras having been ordered & the time for completion not having been extended.—**DILON v. JACK** (1903), 23 N. Z. L. R. 547.—N.Z.

b. —]—SCOTT v. BRUNTON (1873), 9 N. S. R. 405.—CAN.

c. — Not ordered as provided by contract.]—The ordering of extras prevents the operation of the penalty clause, although they were not ordered as provided by the contract, & the contractor could not recover payment for them.—BASKETT v. GIBBS BEACH GOLD DREDGING CO., LTD. (1901), 21 N. Z. L. R. 201.—N.Z.

d. — Ordered after time for completion.]—Where extras are ordered which are necessarily mixed up with the rest of the work, the right to deduct penalties is gone as from the time of the order, whether such order is given before or after the time for completion of the contract.—BASKETT v. BENDIGO GOLD DREDGING CO., LTD. (1902), 21 N. Z. L. R. 166.—N.Z.

e. — Onus of proof.]—A builder brought an action against the proprietor of a mansion-house for the balance of the amount averred to be due to him under contract for mason-work in connection with alterations & additions to the mansion-house. The defender claimed to deduct a sum limited to £150, which he alleged was due to him under the contract as penalty for delay in the execution of the work. Extra work had been ordered by the defender partly during the progress of the operations, & partly after the date fixed for completion. The proof did not show clearly what

extras were ordered after that date, how far extras ordered before that date hindered the completion of the work at that date, or how much time was occupied after that date by the execution of extras:]—Held: (1) the fact that some of the extra work had been ordered after the date for completion did not of itself prevent the enforcement of the penalty clause; (2) the onus was upon the pursuer to show that the extra work ordered by the defender had been the cause of the delay in completing the work, & the pursuer had failed to discharge that onus.—**STEEL v. BELL** (1900), 38 Sc. L. R. 217.—SCOT.

f. Failure by contractor to give notice—That works ready for completion by owner.]—Where works for which the owner is responsible can only be done after certain work by the contractor, who has not given notice to the owner, & a delay in completion arises, the contractor is liable for the penalty.—MCLEOD v. WILSON (1897), 2 Terr. L. R. 312.—CAN.

See, further, cases in Part II., Sect. 3, ante.

PART VIII. SECT. 3, SUB-SECT. 3.

g. Deductions from payments due—Failure to deduct from progress certificates.]—JANSE-MITCHELL CONSTRUCTION CO. v. CALGARY CITY, [1919] 3 W. W. R. 150; 59 S. C. R. 101; 48 D. L. R. 328.—CAN.

h. — Subsequent payments after accrual of rights to deduct—Waiver.]—Circumstances in which:]—Held: the acceptance by the purchaser of delivery of a ship after the date stipulated for in the contract, & the payment by him of the last instalment of the price without reservation, did not imply waiver of his right to insist on a clause

253.
No. 51, *ante*.

—.]—DODD v.

SUB-SECT. 3.—RELEASE BY FAILURE TO DEDUCT.

254. Deductions from payments due—Or recovery as payment—Double remedy.]—In a builder's contract it was stipulated that in the event of the work not being completed within a given period, the builder should forfeit & pay to the employer £5 weekly, such penalty to be deducted from the amount which might remain owing on the completion of the work:]—Held:** the employer had a double remedy for the penalty, & might either deduct it or recover it as a payment.—**DUCKWORTH v. ALISON** (1836), 1 M. & W. 412; 2 Gale, 11; Tyr. & Gr. 742; 5 L. J. Ex. 171; 150 E. R. 494.**

Annotation:]—Reid. East Anglian Rys. Co. v. Lythgoe (1851), 10 C. B. 726.

255. — After completion of work—Employer enjoying contractor's work.]—Where a railway co. claimed, in accounts taken against them, to be allowed a large amount for penalties, the ct. disallowed the claim, on the ground that the proper course would have been to deduct them from the amounts certified by the engineer during the progress of the works, & not a long time after the completion of the works, & the co. had been in full & profitable enjoyment of the contractor's labours.—MACKINTOSH v. GREAT WESTERN RY. CO.** (1865), 4 Giff. 683; 11 Jur. N. S. 681; 66 E. R. 881; *sub nom.* **MCINTOSH v. GREAT WESTERN RY. CO.** 6 New Rep. 336; 13 L. T. 84; *subsequent proceedings*, 13 L. T. 155, L. J.J.**

Annotations:]—Mentd. Hill v. South Staffordshire Ry. Co. (1874), L. R. 18 Eq. 154; *L. C. & D. Ry. Co. v. S. E. Ry. Co.*, [1893] A. C. 429.

256. — Subsequent payments after accrual

in the contract entitling him to a specified sum as damages for late delivery.—CASTANEDA v. CLYDEBANK ENGINEERING CO. (1904), 7 F. (Ct. of Sess.) 77; 12 S. L. T. 498; 42 Sc. L. R. 74.—SCOT.

k. —]—A., under a special agreement, contracted with B. to complete a house by a specified date under a daily penalty after that date. A. made default & B. took possession & paid a large portion of the price:]—Held:** the special agreement was annulled by the default of A. & the subsequent conduct of B.—**HAMILTON v. RAYMOND** (1852), 2 C. P. 392.—CAN.**

l. —]—An owner is not estopped from enforcing the penal clause by making payments on account after the completion date.—MCLEOD v. WILSON (1897), 2 Terr. L. R. 312.—CAN.

m. —]—A contract did not authorise employers to deduct sums payable for delay in completion of a building contract:]—Held:** their omission to do so did not prevent them from recovering.—**COCKSHUTT PLOW CO. v. ALBERTA BUILDING CO.** (1910), 13 W. L. R. 234; *affd.*, 3 Alta. L. R. 503.—CAN.**

n. —]—Where a contract provides that a sum of £2 per day may be deducted by the employer from any moneys due to the contractor by way of liquidated damages, & there is no agreement to pay such sum, the employer can only enforce the provisions by deducting penalties as they accrue from sums which from time to time become payable to the contractor. If any money is paid without deducting the penalties accrued, not only is the right to those penalties waived, but the right to deduct penalties is gone altogether.—

of right to deduct—Waiver.]—Pltf. contracted to erect a pier for defts. Payments were to be made on production of the engineer's certificates. Penalties of £20 a week were to be retained by defts. if the work was not completed by Mar. 16, 1871; payments were made by defts. after that date, without retaining any sum for penalties:—*Held*: by so doing, defts. had by their conduct disentitled themselves to insist upon the penalties.—*LAIDLAW v. HASTINGS PIER CO.* (1874), 2 Hudson's B. C., 4th ed., 13, Ex. Ch.
Annotation:—Mentd. *Laphorne v. St. Aubyn* (1885), Cab. & El. 486.

SUB-SECT. 4.—RELEASE BY FORFEITURE.

257. Proviso that forfeiture not to affect liability—Date to which liquidated damages payable expressly fixed.]—By a contract between a waterworks co. & a building contractor for the building of a reservoir, it was agreed that the contractor should be liable to certain penalties, as & for liquidated damages, for each day elapsing between the day which should be fixed for the completion of the works & the day on which the completed works should be delivered to the co. There was also a clause providing that in certain events the co. might terminate the contract so far as respected its performance by the contractor, but without thereby affecting in any other respects his liabilities, & might enter into possession of the works. In pursuance of this last mentioned clause the co. terminated the contract, & entered into possession of the works. Deft., who had been surety for the contractor, then entered into an agreement with the co. to complete the works in accordance with the original contract, upon the express condition that nothing in the agreement should be construed to rescind or vary any term or condition in the original contract, but that everything should stand upon the same footing, both during completion of the works & in finally settling the accounts, as if the later agreement had not been made. Through no delay on the part of deft., but owing solely to the delay of the original

contractor, the works were not completed & delivered until some time after the day fixed for completion. The co. claimed from deft. penalties at the rate agreed upon in the original contract:—*Held*: upon the true construction of the two contracts, deft. was liable to the penalties at the rate agreed upon in the original contract.—*RE YEADON WATERWORKS CO. & WRIGHT* (1895), 72 L. T. 832, C. A.

258. Wrongful forfeiture—Liquidated damages accruing after.]—F. contracted to pull down certain houses for W. within forty-two working days from the time when he should be admitted on the site. He was to be paid £75 for the work, & was to be entitled to have for his own use all materials pulled down. In the event of the work being delayed F. was to pay W. £1 for every working day the work was delayed. The work was in fact delayed, & some time after the expiration of the time limited by the contract for completion of the work W. complained of F.'s delay, when F. said that he could not tell if the work would be completed in four months. A fortnight after that interview W. forcibly took possession of the site, & employed another contractor to complete the work. F. had paid a deposit of £100 to W. for the due fulfilment of the work. F. brought an action to recover the £100 deposit & for damages for breach of contract:—*Held*: (1) W. had no right to determine the contract; (2) W. was not entitled to liquidated damages accruing after the date of his taking possession.—*FELTON v. WHARRIE* (1906), 2 Hudson's B. C., 4th ed., 398, C. A.

Forfeiture generally.]—*See* Part X., *post*.

SUB-SECT. 5.—RELEASE BY CERTIFICATE.

259. Architect's final certificate—Hindrance & exoneration.]—In an action for the balance due under a building contract, not under seal, with a plea of set-off for penalties incurred by reason of delay, & a replication of hindrance, & exoneration on the part of deft., evidence of such hindrance & exoneration admitted, but the certificate of deft.'s

BASKETT v. BENDIGO GOLD DREDGING CO., LTD. (1902), 21 N. Z. L. R. 166.—N.Z.

o. ——— Payment to contractor after assignment.]—G. contracted to build a house for E., the work to be completed by a certain date. G. assigned to W., absolutely, all moneys due & to accrue due to him under the contract, & notice in writing of the assignment was given to E. The greater part of the contract moneys was paid to W., from time to time, about half of the amounts received being paid by W. to G. to enable him to carry on. The work was delayed greatly beyond the contract time. E. paid a sum to G. direct, on condition that he paid it to his workmen, which he did. After completion, E. agreed with G. to waive the time penalties if G. accepted a sum certified by the architect in full, & gave him a discharge; & E. at the same time paid a further sum to G. direct, on condition that he paid it to his workmen, which he did. In an action by W. against E. to recover the amount of the two sums which E. had paid to G. direct:—*Held*: (1) the condition that G. should give him a discharge, upon which E. had agreed to waive the penalties, being one which was not & could not be performed, the waiver never took place; (2) it was not open to W. to say that E. had elected to abandon his right to deduct the penalties by payments to G. which he (W.) repudi-

ated.—*WHITE v. ENSOR* (1892), 11 N. Z. L. R. 586.—N.Z.

PART VIII. SECT. 3, SUB-SECT. 4.

p. Taking possession.]—An owner is not estopped from enforcing the penal clause by taking possession or insuring.—*MCLEOD v. WILSON* (1897), 2 Terr. L. R. 312.—CAN.

q. ———.]—*Held*: it was not an acceptance of the work for defts. to take possession under a provision of the contract enabling them to do so in the event of the contract not being completed within the time specified.—*COURTNEY v. PROVINCIAL EXHIBITION COMMISSION* (1906), 41 N. S. R. 71.—CAN.

r. ———.]—*Held*: once the owner has seen fit to take possession of a building, although this may have no bearing on the question of completion or non-completion, it prevents the owner from claiming so-called liquidated damages for non-completion.—*WATTS v. MCLEAY* (1911), 19 W. L. R. 916.—CAN.

s. ——— & doing work—Part payment.]—A., under a special agreement, contracted with B. to finish a house on or before a specified date, under a penalty of \$5 a day after that date, etc. A. made default, & B. took possession of the buildings, did work on them towards their completion, & paid a large portion of the price:—*Held*: the

special agreement was annulled by the default of A. & the subsequent conduct of B.—*HAMILTON v. RAYMOND* (1852), 2 C. P. 392.—CAN.

See, also, cases in Part V., ante.

PART VIII. SECT. 3, SUB-SECT. 5.

t. Architect's final certificate—Whether employer precluded from claiming liquidated damages.]—*Held*: the building owner was not precluded by the fact of the architect having given a final certificate to the contractor in which no regard was had to the claim for liquidated damages for delay, from raising a claim against him for liquidated damages for delay.—*HENDRICKS & SOEKER v. ATKINS*, [1903] 20 S. C. 310; 13 C. T. R. 517.—S. AF.

u. ——— Penalties not within engineer's jurisdiction.]—An engineer by his final certificate awarded a sum in respect of extra works, but in that certificate did not refer to or make any deduction in respect of penalties for non-completion within the contract time. In an action for recovery of portion of the contract price, the contractor pleaded that by reason of the certificate, defts. were estopped from claiming penalties:—*Held*: the jurisdiction of the engineer did not extend to his determining whether the penalty clause in the contract was or was not excluded by the order for & execution of extras.—*GALLIVAN v. KILLARNEY*

Sect. 3.—Penalties and liquidated damages: Sub-sects. 5 & 6.]

architect that the balance was due:—*Held*: conclusive, & a verdict for pltf. directed.—**ARNOLD v. WALKER** (1859), 1 F. & F. 671, N. P.

260. — Penalties not within architect's jurisdiction.]—BRITISH THOMSON HOUSTON CO., LTD. v. WEST BROTHERS, No. 69, ante.

Certificates generally.]—See Part III., ante.

SUB-SECT. 6.—RECOVERY OF LIQUIDATED DAMAGES.

261. Whether certificate condition precedent to.]—Declaration, that by an agreement between pltf. & deft. pltf. agreed to build & complete by a day named certain specified works, subject to alterations or additions which might be made, as mentioned in the agreement, & if pltf. failed to complete by the day named, he should pay to deft., as liquidated damages, £3 for every day until the completion of the works, & deft. might deduct such sum from any money due from him to pltf., or obtain payment of it in any way he might think fit; that it was also agreed that the balance of the sum agreed, £2,340, should be paid on completion of the works, when the inspector should have given his final certificate of approval, that the decision of the inspector, with respect to the quality & state of works executed, & to the time within which they should have been executed, should be final & without appeal, & that any dispute between pltf. & deft. as to the value of any alteration or addition, or concerning the true construction of the contract, or any matter relating thereto, the mode of deciding which was not otherwise expressly provided for, should be left to the determination & award of the inspector, who might give a certificate instead of an award; that pltf. completed the works & the inspector gave his final certificate, & that certain disputes arose as to what further sum was due to pltf. beyond the £2,340, & the disputes were referred to the inspector, who certified that £990 was the balance due to pltf. Breach, non-payment of such sum. Plea, that the disputes above mentioned were as

URBAN DISTRICT COUNCIL, [1912] 2 L. R. 356.—**IR.**

260 i. — Whether penalties within architect's jurisdiction.]—A contract provided that the work was to be completely finished by a day named under penalty; the architect had power to grant additional time & was to be the absolute judge of the extent of the additional time to be allowed; any dispute between the employer & the contractor as to any matter connected with the execution of the work was to be settled by the architect only, whose award was final. The work was not completed within the time fixed by the contract. After the actual completion of the contract the architect gave pltf. a final certificate under the contract certifying that work had been done under the contract entitling pltf. to a sum named in terms of the contract agreement. A statement at the foot showed that this sum had been arrived at without making any deduction for penalties. The architect afterwards wrote to deft. that he did not consider himself justified in imposing any penalties. In an action by pltf. to recover the balance of the contract price & for extras, deft. counterclaiming for damages for breach of contract, the jury found that the architect had decided before action brought that the additional time occupied in completion was reasonably & necessarily required as an extension:—*Held*: if the conditions gave the usual power to the

architect to give a final certificate, then the final certificate must be taken to have dealt with the claim for penalties.

Qu.: whether the conditions did give such power.—**MURDOCH v. LOCKIE** (1897), 15 N. Z. L. R. 296.—**N.Z.**

260 ii. — .]—WHITE v. ENSOR (1892), 11 N. Z. L. R. 586.—**N.Z.**

260 iii. — .]—CLARKE v. MURRAY (1885), 11 V. L. R. 817.—**AUS.**

260 iv. — .]—Pltf. did not complete the works contracted for till 20 weeks after the date for completion, & thereby became liable to a deduction from the contract price by way of penalty. The architects on completion certified that the whole had been completed, & that pltf. was entitled to be paid for the work:—*Held*: the architects could only certify subject to deft.'s right of deduction.—SIMPSON v. KERR** (1873), 33 U. C. R. 345.—**CAN.****

PART VIII. SECT. 3, SUB-SECT. 6.

261 i. Whether certificate condition precedent to recovery.]—In an action to recover an alleged balance on the contract:—*Held*: deft. was entitled to deduct \$10 per day as stipulated damages for delay, & need not obtain a certificate of the architect that the work was not progressing with sufficient speed.—CARTER v. LANDY** (1880), 19 N. B. R. 516.—**CAN.****

b. By action—Agreements for de-

to the value of certain additions, & not as to the time within which the works should have been executed, & that the question as to time was not in dispute before the inspector, that pltf. did not complete the works on the day named, & was liable to pay to deft. £873, being liquidated damages at the rate of £3 for every day from the day named to the day of completion, that deft. was entitled to deduct that sum from the £990, & payment of the £117 balance into ct. Replication, that there was, & always had been, a dispute as to the time in which such works ought to have been & were completed, & as to the right of deft. to be paid the £873 mentioned in the plea, or any part thereof, & such dispute had not been determined by the inspector, as in the agreement provided:—*Held*: the plea was good, & the replication bad, for the certificate of the inspector was not a condition precedent to deft.'s right to the £3 per day, nor did the clause as to referring the matter to the inspector exclude the right to bring an action, as there were no excluding words in the clause.—**JONES v. ST. JOHN'S COLLEGE, OXFORD** (1870), L. R. 6 Q. B. 115; 40 L. J. Q. B. 80; 23 L. T. 803; 19 W. R. 276.

Annotations:—**Distd.** **Dodd v. Churton**, [1897] 1 Q. B. 562. **Refd.** **Walker v. L. & N. W. Ry.** (1876), 1 C. P. D. 518; **Tew v. Newbold-on-Avon United District School Board** (1884), Cab. & El. 260; **Suttin v. Poole** (1901), 2 Hudson's B. C., 4th ed., 306. **Mentd.** **Howell v. Coupland** (1874), L. R. 9 Q. B. 462.

Delay in time for completion, see Part II., Sect. 3, ante.

262. By action—Prior action by builder—Defective performance raised in reduction of damages in.]—Special *assumpsit* on a contract to build a ship according to a specification, assigning a breach in not building the ship with scantling, fastening, & planking, according to the specification, & alleging special damage. Plea, that deft. had sued pltf. for the balance of the agreed price of the ship, after the payment of £3,500, & also for £150 for extra work, in the form of an action for work & labour, & for goods sold & delivered, that issue was joined, & on the trial of the cause, the pltf. gave evidence in his defence of the same breach of contract alleged in the declaration, &

duction.]—Upon a contract to do work within a specified time, with a penalty of £4 per week in case of default as rent of the premises:—*Held*: an action would lie to recover this sum, though by the agreement it was to be deducted from the last payment.—GASKIN v. WALES** (1859), 9 C. P. 314.—**CAN.****

c. — summary procedure.]—A claim for a *per diem* sum mentioned in a building contract as liquidated damages for delay may be a claim for liquidated damages, but not unless work was actually begun under the contract, & not completed within the time stipulated. Damages for total failure to perform the contract would not be within the clause allowing liquidated damages for delay; & a claim for such damages could not be the subject of a special indorsement.—LEMBKE v. CHIN WING** (1912), 21 W. L. R. 859; 2 W. W. R. 897.—**CAN.****

d. — .]—Deft. agreed with pltf. to execute certain works by a certain date, if not completed deft. was to be liable to "a penalty as liquidated damages" of £5 a week until completion:—*Held*: a liquidated demand within Ord. III., r. 6, for which in default of appearance pltf. was entitled to judgment under Ord. XIII., r. 3.—TOOMEY v. MURPHY**, [1897] 2 I. R. 601.—**IR.****

e. By set-off—Waiver.]—Pltf. agreed to repair deft.'s building by a cer-

insisted, if the amount of compensation to which he was entitled exceeded or equalled the balance & value of the extra work, that he, the pltf., was entitled to a verdict, & if less, then he was entitled to a deduction, upon the amount of both, to the extent of such amount of compensation, that the judge so directed the jury, & the jury found that the deft. had committed a breach of the contract, & that the pltf. was entitled to some compensation, which they deducted from the price of the ship & the value of the extra work, that the deft. had judgment for the amount, after such deduction had been made, since the commencement of the suit:—*Held*: the plea was bad.—**MONDEL v. STEEL** (1841), 8 M. & W. 858; 1 Dowl. N. S. 1; 10 L. J. Ex. 426; 151 E. R. 1288.

Annotations:—**Consd.** *Davis v. Hedges* (1871), L. R. 6 Q. B. 687. **Refd.** *Oastler v. Pound* (1863), 1 New Rep. 393; *Heyworth v. Hutchinson* (1867), L. R. 2 Q. B. 447; *Bow, McLachlan v. Ship Camosun*, [1909] A. C. 597; *Bright v. Rogers*, [1917] 1 K. B. 917. **Mentd.** *Riggo v. Burbidge* (1846), 15 M. & W. 598; *Bartlett v. Holmes* (1853), 13 C. B. 630; *The Camilla* (1858), Sw. 312; *Sayers v. London & Birmingham Flint Glass & Alkali Co.* (1858), 27 L. J. Ex. 294; *Bannerman v. White* (1861), 8 Jur. N. S. 282; *Horsfall v. Thomas* (1862), 6 L. T. 462; *Dakin v. Oxley* (1864), 15 C. B. N. S. 646; *Meyer v. Dresser* (1864), 16 C. B. N. S. 646; *Towerson v. Aspatria Agricultural Co-op. Soc.* (1872), 27 L. T. 276.

263. — Defective performance not raised in reduction of damages in.]—In an action for damages for the non-performance & improper performance of certain work which pltf. had employed deft. to do, the defence set up was that deft. had sued pltf. for the price of the work alleged to have been improperly done, & pltf. had settled by paying the whole amount then sued for, & that, as pltf. might have given the non-performance & the defective performance complained of in evidence in reduction of damages, pltf. was precluded from bringing a cross action for them:—*Held*: though pltf. might have used the causes of action for which he sued in reduction of the claim in the former action, yet he was not bound to do so, but might maintain a separate action for them.—**DAVIS v. HEDGES** (1871), L. R. 6 Q. B. 687; 40 L. J. Q. B. 276; 25 L. T. 155; 20 W. R. 60.

tain date under a penalty of \$25 per week. The work was not completed at the date specified. In an action by pltf. for the price of the work:—*Held*: deft. was entitled to offset the \$25 per week. The fact that deft. moved into the house, before the repairs were complete, was not a waiver of his right to claim for the full period during which the repairs remained incomplete.—**HORRAN v. TOBIN** (1887), 20 N. S. R. (8 R. & G.) 169; 8 C. L. T. 377.—**CAN.**

f. —.]—*Held*: penalties for delay in completion of a building contract being recoverable as liquidated damages might be the subject of set-off.—**WHITE v. ENSOR** (1892), 11 N. Z. L. R. 586.—**N.Z.**

g. — Penalty discretionary.]—A contractor engaged, by the terms of his contract, to have a line open by Oct. 1. The specification provided for a penalty of £50 per week, at discretion of the co.'s engineer:—*Held*: this was a discretion to impose, & not merely to remit; & there was no liability which could be the subject of set-off by the co. in an action by the contractor, until the engineer had actually imposed the penalty.—**MUNRO v. KENNIS & ATHENRY RY. CO.** (1866), 15 W. R. 255.—**IR.**

h. — Illiquid sum.]—A building contract stipulated that the builder should pay a penalty of £5 a week for every week after a certain date, during

which the works were not completed. In an action by the builder for payment of a balance of the contract price, the defender pleaded, that, the work not having been finished within the stipulated period, the pursuer was not entitled to insist in the action, as he was due the defender an amount of penalties larger than the sum concluded for:—*Held*: the defence was not properly compensation, but a claim arising out of a mutual contract; & therefore, the objection that it could not be pleaded in defence because it was an illiquid claim was unfounded.

Compensation can only be pleaded on liquid claims & does not apply where both parties have to prove their claims.—**JOHNSTON v. ROBERTSON** (1861), 33 Sc. Jur. 335; 23 Dunl. (Ct. of Sess.) 646.—**SCOT.**

k. —.]—In default of completion as stipulated it was agreed that the contractor should pay as liquidated damages, & not as a penalty, the sum of \$50 for every subsequent day until the completion:—*Held*: damages accruing under the clause in question did not, upon mere default, become sufficiently liquidated & ascertained so as to be set off in compensation against a claim upon a promissory note.—**OTTAWA NORTHERN & WESTERN RY. CO. v. DOMINION BRIDGE CO.** (1905), 36 S. C. R. 347.—**CAN.**

l. — Allowance.]—A contract provided that upon non-completion by a fixed date the contractor was to pay

Annotations:—**Refd.** *Bright v. Rogers*, [1917] 1 K. B. 917. **Mentd.** *Caird v. Moss* (1886), 33 Ch. D. 22; *Re Hilton*, Ex p. March (1892), 9 Morr. 286; *Bow, McLachlan v. Ship Camosun*, [1909] A. C. 597.

See, generally, WORK & LABOUR.

264. By set-off—Contractor exceeding time for execution of extras.]—Declaration in debt stated a building contract under seal, by which pltf. covenanted to complete buildings by Oct. 23, & deft. to pay him £418 on the completion, & it was further covenanted that, if deft. should order any extra work, he should pay pltf. its value, or, if he ordered any diminution or omission, pltf. should allow the value out of the £418; also that, if the buildings should not be finished on Oct. 23, pltf. should pay the penalty of £1 per day for every subsequent day employed, as liquidated damages, provided that, if deft. should require any additional work, pltf. should be allowed so much extra time beyond Oct. 23 as might be necessary for completing same. Pltf. averred that deft. ordered extra work, which required thirty-one days of additional time, & the value of which was £84; & that the contract would have been fulfilled by Oct. 23, but for such orders, & he demanded the £418, minus a sum for diminutions, & £84 for the extra work. Deft. pleaded, as to £22, parcel of the debt in the declaration mentioned, that the extra time necessary for completing the additional work was nine days only, but that pltf. had exceeded the time ending on Oct. 23 by thirty-one days, whereby he became liable to pay deft. £22 according to the deed, which £22 deft. offered to set-off:—*Held*: (1) the clause for payment of £1 per day applied to the covenant for extra time in respect of extra work, as well as to the clause which fixed a day for completing the contract as originally defined, & deft. might deduct, in the form of set-off, £1 per day for the number of days by which pltf. had exceeded the necessary time for completing the extra work; (2) the set-off was not bad because pleaded to the £418, & the £84 as constituting one debt.—**LEGGE v. HARLOCK** (1848), 12 Q. B. 1015; 18 L. J. Q. B. 45; 12 L. T. O. S. 291; 13 Jur. 229; 116 E. R. 1151.

or allow \$10 a day until completion:—*Held*: this authorised a deduction as liquidated damages of the amount so allowed, from the contract price.—**MCBEAN v. KINNEAR** (1892), 23 O. R. 313.—**CAN.**

m. — Need not be specially pleaded.]—*Held*: the sum payable as liquidated damages, on failure to complete within the time stipulated, might be deducted from the contract price without being pleaded specially by way of set-off.—**SCOTT v. DENT** (1876), 38 U. C. R. 30.—**CAN.**

n. — Or counterclaim.]—Circumstances in which:—*Held*: defts. were entitled to recover by way of counterclaim, the sum provided by the contract as liquidated damages.—**MCMAMARA v. SKAIN** (1892), 23 O. R. 103.—**CAN.**

o. How calculated.]—Defts. contracted to erect a building for pltf. & to complete it by Jan. 10. On June 8, three weeks after defts. had, according to their own story, completed the building, it collapsed, because the stone work in the foundations had not been properly done:—*Held*: the pltf. were entitled to recover at the daily rate fixed by the contract for the time which elapsed between Jan. 10 & the date on which they entered into complete use & possession of the building.—**COCKSHUTT PLOW CO. v. ALBERTA BUILDING CO.** (1910), 13 W. L. R. 234; *affd.*, 3 Alta. L. R. 503.—**CAN.**

SECT. 4.—SPECIFIC PERFORMANCE.

See, generally, SPECIFIC PERFORMANCE.

265. Agreement to build.]—Specific performance of an agreement to build may be decreed, if sufficiently certain, but a general covenant to lay out a certain sum in a building of a certain value cannot be so executed.—*MOSELY v. VIRGIN* (1796), 3 Ves. 184; 30 E. R. 959, L. C.

*Annotations:—***Refd.** *Bracebridge v. Buckley* (1816), 2 Price, 200; *De Mattos v. Gibson* (1859), 4 De G. & J. 276.

266. To ascertain sufficiency of performance.]—Covenant, in Feb., 1841, by a municipal corpn. to build a market forthwith. Bill, in Sept., 1843, for specific performance of the covenant. Answer, in Dec., stating that the corpn. had not until recently determined for what goods the market should be adapted, & that the building should proceed with due diligence. At the hearing, in June, 1844, the cause was ordered to stand over for six months. In May, 1844, the corpn. had approved of the plan for the market, & in July they met to consider the order in the cause, & subsequently built the market:—*Held*: (1) it was regular for pltf. to bring before the ct., upon petition, the facts which had taken place subsequently to the answer; (2) all proceedings should be stayed without costs.

Proceedings taken by defts. towards the fulfilment of a contract for the erection of a building may enable the ct. to decree a specific performance of the contract, in a case where, without such proceedings, it might have been difficult to define what would be a sufficient performance.—*PRICE v. PENZANCE CORPN.* (1845), 4 Hare, 506; 9 J. P. 775; 67 E. R. 748.

*Annotation:—***Consd.** *South Wales Ry. Co. v. Wythes* (1854), 1 K. & J. 186.

267. Construction of railway.]—An agreement between a railway co. & railway contractors, who were also landowners, for the construction of a branch railway provided that the co. should find the land within a reasonable time & build the stations, that the contractors should give a bond to the amount of £50,000 to secure the performance of the contract, & undertake to execute the works for a double line of railway, & the ballasting & permanent way for a single line, according to the terms of a specification, to be prepared by the engineer for the time being of the co., that the co. should work the branch in a reasonable & proper manner as compared to the remainder of the main railway, & that in case of difference as to working, same should be settled by arbn., & that any of the details of the arrangement, in case of difference, should be determined by a referee to be appointed by the S.-Gl. for the time being:—*Held*: this agreement was too vague, obscure,

& uncertain to be enforced in a specific performance suit, & the stipulation as to the execution of a bond could not be enforced apart from the rest, being merely an incidental & subsidiary part of the agreement.—*SOUTH WALES RY. CO. v. WYTHES* (1854), 5 De G. M. & G. 880; 3 Eq. Rep. 153; 24 L. J. Ch. 87; 24 L. T. O. S. 165; 3 W. R. 133; 43 E. R. 1112, L. JJ.

*Annotations:—***Distd.** *Greene v. West Cheshire Ry. Co.* (1871), L. R. 13 Eq. 44. **Refd.** *Kernot v. Potter* (1862), 3 De G. F. & J. 447; *Greenhill v. Isle of Wight (Newport Junction) Ry. Co.* (1871), 23 L. T. 885. **Mentd.** *Onions v. Cohen* (1865), 5 New Rep. 400; *Pestonjee Nussurwanjee v. Manockjee* (1868), 12 Moo. Ind. App. 112.

268. —.]—The directors of a railway co., by their duly authorised agent, entered into a contract with B., a railway contractor for the construction of their line at a certain price, payable in shares & debentures of the co. The directors subsequently repudiated the contract, denying the authority of their agent, & entered into an agreement, by which another railway co. was to undertake the construction of the line. B. filed his bill to obtain specific performance of his contract, & moved to restrain the directors from parting with the shares, which would have become applicable for his payment:—*Held*: the contract could not be severed, & as the positive relief of enforcing specific performance of the contract for construction of the line could not be granted, defts. could not be negatively restrained from parting with the shares, forming the consideration to B., in violation of the contract, especially as in the event of B. failing in his contract the co. could not be restored to their original position.—*PETO v. BRIGHTON, UCKFIELD & TUNBRIDGE WELLS RY. CO.* (1863), 1 Hem. & M. 468; 2 New Rep. 415; 32 L. J. Ch. 677; 9 L. T. 227; 11 W. R. 874; 71 E. R. 205.

*Annotations:—***Refd.** *Greenhill v. Isle of Wight (Newport Junction) Ry. Co.* (1871), 23 L. T. 885; *Measures v. Measures*, [1910] 2 Ch. 248. **Mentd.** *Brett v. East India & London Shipping Co.* (1864), 10 L. T. 187; *Nuneaton L. B. v. General Sewage Co.* (1875), L. R. 20 Eq. 127; *Grimston v. Cunningham*, [1894] 1 Q. B. 125.

269. —.]—Specific performance will not be decreed of a contract to employ a person to construct works, which the ct. is unable to superintend.

Where the directors of a railway co. entered into a written agreement to give pltf. "a contract for the construction of the line for £55,000, subject to a specification of the works or the line included in the sum to be agreed upon between pltf. & the engineer of the co., in case of dispute the matter to be referred" to an arbitrator, & a bill was filed for specific performance:—*Held*: the terms of this agreement were too indefinite to be enforced in a specific performance suit, but even had the terms been sufficiently definite, the agreement was of such a nature that specific performance could not have been decreed.—*GREENHILL v. ISLE OF*

PART VIII. SECT. 4.

265 i. Agreement to build.]—A father leased a farm to his son for five years & undertook to build on the farm, during the first year of the term, a house of certain expressed dimensions. There was a provision in the instrument for the determination of the lease at the end of any year by notice to that effect given in October previous. The father died after the expiry of the first year of the term, but had not done anything towards building the house. By his will he devised the farm to his son, but made no reference to the lease:—*Held*: the father having died after breach of the undertaking, the son was not entitled to have the house built at the expense of the father's personal estate, but at most was entitled to damages for non-performance of the agreement to build.—*Re MURRAY*

(1902), 1 O. W. R. 576; 4 O. L. R. 22 C. L. T. 373.—CAN.

266 i. To ascertain sufficiency of performance.—Partial destruction of work.]—One co. agreed to construct certain works for another, which on completion were to be inspected by engineers on behalf of each, whose finding was to be conclusive; upon the engineers approving of the works, & reporting them as completed, they were to be accepted. The parties to perform the work having, as they alleged, completed it, called upon the others to appoint an engineer, which request was not complied with; subsequently a portion of the works was destroyed. On a bill filed to compel an acceptance of the works:—*Held*: the delay of one of the contracting parties, until after such destruction, to name an engineer, as stipulated for by the agreement, did not preclude the other from obtaining an inspection of

the works; but such inspection & approval must, in the circumstances, be had by a reference to the master.—*GREAT WESTERN RY. CO. v. DESJARDINS CANAL CO.* (1862), 9 Gr. 503; *revised*, 2 E. & A. 330.—CAN.

267 i. Construction of railway—Prices alleged to be excessive—Balance ordered to be paid into court.]—*WHITEHEAD v. BUFFALO & LAKE HURON RY. CO.* (1859), 7 Gr. 351; *varied*, 8 Gr. 157.—CAN.

267 ii. —Work stopped by employer—Rights of contractor.]—Where contractors for the construction of railway undertake to perform it on a commission basis, their interest is but pecuniary & not in the thing. If the work is stopped, the contractors cannot pray for specific performance; they have but a claim for damages.—*WILLS v. CENTRAL RY.* (1914), Q. R. 24 K. B. 102.—CAN.

WIGHT (NEWPORT JUNCTION) RY. Co. (1871), 23 L. T. 885; 19 W. R. 345.

270. — Inquiry as to damages more suitable remedy.]—A railway co. agreed, for valuable consideration, with a landowner to erect, construct, & fit up a station on certain lands which they had bought from him. The agreement contained no further description of the station, nor any stipulations as to the use of it. The co. having refused to erect a station in the specified place, & substituted one at a distance of two miles:—*Held*: the case was one in which justice could be better done by an inquiry as to damages than by a decree for specific performance.—WILSON v. NORTHAMPTON & BANBURY JUNCTION RY. Co. (1874), 9 Ch App. 279; 43 L. J. Ch. 503; 30 L. T. 147; 22 W. R. 380, L. C. & L. JJ.

271. Contract to build or repair—Defined contract.]—Though the ct. will not, as a rule, specifically enforce contracts to build or repair, it will do so in cases where the contract for building is in its nature defined.—HEPBURN v. LEATHER (1884), 50 L. T. 660.

272. Preliminary building agreement.]—The ct. will not decree the specific performance of a preliminary building agreement, nor give damages for the breach of such an agreement.—WOOD v. SILCOCK (1884), 50 L. T. 251; 32 W. R. 845.

273. Work defined—Damages inadequate compensation—Possession of site.]—The ct. has jurisdiction to grant specific performance of a contract to erect a building if (1) the work to be done is defined, (2) pltf. has a substantial interest in its execution which cannot be adequately compensated for by damages, & (3) deft. has by the contract obtained from pltf. possession of the land on which the work is to be done.—WOLVERHAMPTON CORPN. v. EMMONS, [1901] 1 K. B. 515; 70 L. J. K. B. 429; 84 L. T. 407; 49 W. R. 553; 17 T. L. R. 234; 45 Sol. Jo. 256, C. A.

Annotations:—*Consd.* Molyneux v. Richard, [1906] 1 Ch. 34. *Refd.* Selby v. Whitbread, [1917] 1 K. B. 736. *Mentd.* London Electric Supply Corpn. v. Westminster Electric Supply Corpn. (1913) 11 L. G. R. 1046; Puddephatt v. Leith, [1916] 1 Ch. 200.

SECT. 5.—INJUNCTION.

See, generally, INJUNCTION.

274. To restrain contractor from interfering with works—After right of forfeiture exercised.]—Disputes having arisen between a railway co. & a contractor employed in making the railway, the co. insisting upon a right under the contract, owing to the alleged default of the contractor, to discharge him, take possession of the line & materials, & complete the works themselves, & the contractor resisting such claim, imputing the backward state of the works to the acts of the co., & holding forcible possession; collisions occurring between the workmen of the two parties, each being charged with impeding the operations of the other; & the completion & opening of the railway for traffic being in the meantime delayed, the ct., on the application of the co., restrained the contractor from continuing on the line or interfering with the operations of the co., directed

271 i. Contract to rebuild & repair—Inquiry as to damages more suitable remedy.]—Deft. agreed to take a lease of certain premises from pltf., & within twelve months from the date of the agreement to expend a sum in substantial repairs & improvements mentioned in the schedule to the agreement. Deft. did not execute the repairs & improvements. Pltf. claimed specific performance & damages:—*Held*: it was not a case for specific

performance, but for an inquiry as to damages.—RUSHBROOKE v. O'SULLIVAN, [1908] 1 I. R. 232.—IR.

PART VIII. SECT. 5.

278 i. To restrain pulling down of house—Not built according to contract.]—Defts. maintained that the walls of a house partly erected by the pltf., a contractor, were falling down as a result of bad workmanship. The architect on the job gave orders that

an account of what was due to the contractor for works & materials done & provided, without regard to the formal certificates of the co.'s engineer, & an issue to try whether the co., at the time they proceeded to enter upon the works & remove the contractor, were lawfully justified in so doing, reserving as well the question of the right of the contractor to compensation for loss of profit on unexecuted works, as all other directions, until after the trial & the report.—EAST LANCASHIRE RY. Co. v. HATTERSLEY (1849), 8 Hare, 72; 68 E. R. 278.

Annotation:—*Consd.* Kirk v. R., A.-G. v. Kirk (1872), L. R. 14 Eq. 558.

To restrain wrongful forfeiture.—*See* Part X., Sect. 6, *post*.

275. To restrain employing company from parting with shares—By which contract price payable.]—PETO v. BRIGHTON, UCKFIELD & TUNBRIDGE WELLS RY. Co., No. 268, *ante*.

276. To restrain actions commenced by employer—Contractor unable to prosecute claims—Order for accounts & inquiries.]—Actions were commenced by a builder against his employer for payment of money alleged to be due under certain contracts, and the actions were consolidated at the instance of the employer, who afterwards commenced, on his part, two actions against the builder for breaches of contract. On a bill by the builder alleging that, through the act of the employer in preventing his getting a conclusive certificate from the inspecting architect, he had been unable to continue his actions, & had been driven to a ct. of equity to obtain an inquiry as to what was due to him:—*Held*: he was entitled to such inquiry, without prejudice to any question as to breaches of contract that might arise on his part.—DABBS v. NUGENT (1865), 13 L. T. 396; 11 Jur. N. S. 943; 14 W. R. 94.

277. To restrain trustee from selling contractor's property—Sale detrimental to owner—Contract not specifically enforceable.]—A firm of shipbuilders agreed to alter a vessel according to a specification, & it was provided that in case of their failing to execute the alterations according to the agreement, the owners of the vessel should be at liberty, with workmen, to enter on the shipbuilder's yard, & themselves complete the alterations. The shipbuilders were adjudicated bkpts. before the vessel was completed:—*Held*: the ct. could not specifically perform the whole agreement, & would not restrain the trustee under the bkpcy. from selling the dock in which the vessel was lying, although the owners might be thus prevented from themselves entering & completing the vessel pursuant to the agreement.—MERCHANTS' TRADING Co. v. BANNER (1871), L. R. 12 Eq. 18; 40 L. J. Ch. 515; 24 L. T. 861; 19 W. R. 707.

278. To restrain pulling down of house—Not built according to contract.]—An application *ex p.* for an injunction was granted, where it was sought to restrain deft. from pulling down a house in course of erection for him by pltf., & alleged not to have been built according to contract.—DRAKE'S PATENT CONCRETE v. DOWER (1875), Bitt. Prac. Cas. 39; 1 Char. Cham. Cas. 13.

pltf. was to take down portions & rebuild. Pltf. omitted to do so & the architect then authorised defts. to employ some other party to do the job. The pltf. presented a note for suspension & interdict:—*Held*: note refused.—MILLER v. BUILDING COMMITTEE OF LOCHGELLY UNITED PRESBYTERIAN CHURCH (1867), Sc. L. R. 79.—SCOT.

To prevent completion by other
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Part IX.—Excuses for Non-Performance.

SECT. 1.—IMPOSSIBILITY.

279. Destruction of subject matter—Accidental fire.]—Pltfs. contracted to erect machinery on deft.'s premises at specific prices for particular portions, & to keep it in repair for two years, the price to be paid upon the completion of the whole. After some portions of the work had been finished, & others were in the course of completion, the premises, with all the machinery & materials thereon, were destroyed by an accidental fire:—*Held*: both parties were excused from the further performance of the contract.—**APPLEBY v. MYERS** (1867), L. R. 2 C. P. 651; 36 L. J. C. P. 331; 16 L. T. 669, Ex. Ch.

Annotations:—**Consd.** *Howell v. Coupland* (1874), L. R. 9 Q. B. 462; *Anderson v. Morice* (1875), L. R. 10 C. P. 609. **Expld.** *Thorn v. London* (1876), 1 App. Cas. 120. **Consd.** *O'Neil v. Armstrong, Mitchell*, [1895] 2 Q. R. 70. **Foll.** *The Madras*, [1898] P. 90. **Consd.** *Civil Service Co-op. Soc. v. General Steam Navigation Co.*, [1903] 2 K. B. 756. **Appl.** *Elliott v. Crutcheley*, [1903] 2 K. B. 476 (see [1906] A. C. 7). **Consd.** *Chandler v. Webster*, [1904] 1 K. B. 493; *Parkin v. South Hetton Coal Co.* (1907), 97 L. T. 98; *Scottish Navigation Co. v. Souter, Admiral Shipping Co. v. Weldner, Hopkins*, [1917] 1 K. B. 222. **Refd.** *Stubbs v. Holywell Ry. Co.* (1867), 15 W. R. 869; *Ford v. Cotesworth* (1870), 10 B. & S. 991; *Anderson v. Morice* (1876), 1 App. Cas. 713; *Howell v. Coupland* (1876), 1 Q. B. D. 258; *Nickoll & Knight v. Ashton, Edridge*, [1901] 2 K. B. 126; *Blakeley v. Muller, Hobson v. Pattenden* (1903), 88 L. T. 90; *Herne Bay Steamboat Co. v. Hutton* (1903), 88 L. T. 269; *Krell v. Henry*, [1903] 2 K. B. 740; *Austin Friars Steam Shipping Co. v. Struck*, [1905] 2 K. B. 315; *Re Hull & Meux* (1905), 92 L. T. 74; *Porter v. Tottenham U. D. C.*, [1914] 1 K. B. 603; *Dakin v. Lee*, [1916] 1 K. B. 566; *Foster's Agency v. Romaine* (1916), 32 T. L. R. 331; *Horlock v. Beal*, [1916] 1 A. C. 486; *Tamplin SS. Co. v. Anglo-Mexican Petroleum Products Co.*, [1916] 2 A. C. 397; *Lloyd Royal Belge Soc. Anon. v. Stathatos* (1917), 33 T. L. R. 390; *Lebeaupin v. Crispin*, [1920] 2 K. B. 714. **Mentd.** *The Teutonia, Duncan v. Köster* (1872), 26 L. T. 48; *O'Neil v. Armstrong, Mitchell*, [1895] 2 Q. B. 418; *Forman Proprietary v. The Liddesdale*, [1900] A. C. 190; *Clark v. Lindsay* (1903), 88 L. T. 198; *St. Enoch Shipping Co. v. Phosphate Mining Co.* (1915), 21 Com. Cas. 192.

280. — Loss of ship.]—Pltfs., shipowners, contracted with defts., a firm of engineers, that the latter should supply the former with new engines & boilers for their steamship, the *S.* The contract, dated in Dec., 1871, stipulated that the engines should be completed ready for sea & tried under steam previous to being handed over to pltfs., the result of such trial to be to the satisfaction of pltfs.' inspector, the work to be completed without delay & completed with all reasonable despatch, due notice to be given by pltfs. to defts. of the date at which the steamer was to be placed in their hands after the work was ready for the completion & fixing of the engines. The price was to be £5,800, payable as the work progressed as follows, viz., when the boilers were plated £2,000, when the whole of the work was ready for fixing on board £2,000, & the remaining £1,800 when the *S.* should be fully completed & tried under steam, any disputes to be settled by arbn., & certain old materials, on board the *S.*,

of the estimated value of £353 to become the property of defts. The *S.* made a voyage after the date of the contract, & on her return pltfs., on June 28, 1872, gave notice to defts. that she was ready to receive her boilers & machinery. Defts. were at that time at work upon the engines, etc., at their factory, but same were not then ready for fixing. The *S.* was sent on another voyage, on which, in the following Oct., she was wholly lost. In the previous Aug. the boilers had been plated by defts., & on the 27th of that month pltfs.' inspector certified that defts. were entitled to receive the first instalment, £2,000, which was paid. By the early part of Jan., 1873, the whole of the work was ready for fixing on board, & on the 13th of that month pltfs.' inspector certified for the payment of the second £2,000, & that amount was also paid. At that time it was known by pltfs., but not by defts., that the *S.* was lost. In Apr., defts., having by that time heard of the loss of the *S.* applied to pltfs. for payment of the remaining £1,800, alleging that they were prevented by the loss from fulfilling their contract. Pltfs. refused to pay, contending that they had paid enough to cover the amount due for work actually done. At that time defts. had done 71 per cent. of the work contracted for, the proportionate value of which was £4,118. In May pltfs. demanded of defts. the delivery of the engines & boilers, which the latter refused unless the balance of the contract price was paid to them. They offered to submit the dispute to arbn. within the terms of the contract, which offer pltfs. refused, & brought an action for the machinery & to recover damages for its detention, or to recover the sums they had paid to defts. as money had & received to pltfs.' use:—*Held*: (1) the contract was an undividable one for work & labour to be done on the ship; (2) as its full performance was rendered impossible by the loss of the vessel both parties were released, & no property in any portion of the work certified by the inspector to have been properly done had passed to pltfs., & they could not recover same in detinue; (3) pltfs. could not recover back the two sums of £2,000 or either of them as money had & received to their use.—**ANGLO-EGYPTIAN NAVIGATION CO. v. RENNIE** (1875), L. R. 10 C. P. 271; 44 L. J. C. P. 130; 32 L. T. 467; 23 W. R. 626; *subsequent proceedings* L. R. 10 C. P. 571, Ex. Ch.

Annotations:—**Refd.** *Lloyd Royal Belge Soc. Anon. v. Stathatos* (1917), 33 T. L. R. 390. **Mentd.** *Seath v. Moore* (1884), 11 App. Cas. 358, n.

281. — Action of wind & sea.]—**JACKSON v. EASTBOURNE LOCAL BOARD**, No. 27, *ante*.

282. Act of State—Performance prohibited.]—By a contract made in July, 1914, a firm of contractors contracted with a water board to construct a reservoir to be completed within six years, subject to a proviso that if by reason of (*inter*

contractor — Pleading.)—Where contractors for the construction of railway undertake to perform it on a commission basis, their interest is but pecuniary & not in the thing. If the work is stopped, the contractors cannot pray for an injunction preventing the work being done by others; they have but a claim for damages.

Where an injunction is in such case prayed for, the contractors must aver & prove that they are willing & able to proceed with the contract.—**WILLS v. CENTRAL RY.** (1914), Q. R. 24 K. B. 102.—**CAN.**

PART IX. SECT. 1.

r. Difficulty not amounting to impossibility.]—*Held*: the execution of the contract being difficult & not impossible, did not excuse deft.'s non-performance of it.—**PENBERTHY v. CORNER** (1918), 14 O. W. N. 275.—**CAN.**

s. Contract ab initio impossible — No defence.]—A shipbuilder contracted to build, to a model to be approved by the purchaser, a vessel of certain specified dimensions, & of a specified carrying capacity. The ship,

actually built to the approved model, & delivered under reservation of a claim of damages, was deficient in carrying capacity. In an action brought by the purchaser for damages for breach of contract:—*Held*: it was no defence to show that it was impossible to build a seaworthy ship of the required dimensions & carrying capacity according to the model.—**GILLESPIE (F.) & CO. v. HOWDEN & CO.** (1885), 12 R. (Ct. of Sess.) 800; 22 Sc. L. R. 527.—**SCOT.**

t. Act of State — Expropriation.]

alia) any difficulties, impediments, or obstructions whatsoever & howsoever occasioned the contractors should, in the opinion of the engineer, have been unduly delayed or impeded in the completion of the contract, it should be lawful for the engineer to grant an extension of the time for completion. By a notice given by the Ministry of Munitions in Feb., 1915, in exercise of the powers conferred by Defence of the Realm Acts & Regulations, the contractors were required to cease work on their contract, & they ceased work accordingly. The contractors claimed that the effect of the notice was to put an end to the contract:—*Held*: (1) the provision for extending the time did not apply to the prohibition of the Ministry; (2) the interruption created by the prohibition was of such a character & duration as to make the contract when resumed a different contract from the contract when broken off, & the contract had ceased to be operative.—**METROPOLITAN WATER BOARD v. DICK, KERR & Co.**, [1918] A. C. 119; 87 L. J. K. B. 370; 117 L. T. 766; 82 J. P. 61; 34 T. L. R. 113; 62 Sol. Jo. 102; 16 L. G. R. 1, H. L.

Annotations:—**Consd.** Blackburn Bobbin Co. v. Allen, [1918] 1 K. B. 540. **Foll.** Federal Steam Navigation Co. v. Dixon (1919), 64 Sol. Jo. 67. **Refd.** Innholders' Co. v. Wainwright (1917), 33 T. L. R. 356; Orconera Iron Ore Co. v. Fried Krupp Akt. (1917), 86 L. J. Ch. 613; Ertel Bleber v. Rio Tinto Co., etc., [1918] A. C. 260; Naylor, Bonzon v. Krainische Industrie Gesellschaft, [1918] 1 K. B. 331; Bank Line v. Capel, [1919] A. C. 435; Brightman v. Tate (1919), 35 T. L. R. 209; Woodfield Steam Shipping Co. v. Thompson (1919), 36 T. L. R. 43; Central India Mining Co. v. Soc. Coloniale Anversoise, [1920] 1 K. B. 753; *Re* Comptoir Commercial Anversois & Power, [1920] 1 K. B. 868; Denholm v. Shipping Controller (1920), 36 T. L. R. 855; Ralli v. Compania Naviera Sota y Aznar, [1920] 2 K. B. 287.

283. ——— **Construction of order.**—Construction of an order dated July 14, 1918, made by the Minister of Munitions under Defence of the Realm (Consolidation) Regulations, 1914, reg. 8E, which empowered the Minister to make orders for the restriction of building work.—**DIRECTOR OF PUBLIC PROSECUTIONS v. FORD** (1918), 35 T. L. R. 206; [1919] W. N. 43, D. C.

Annotations:—**Mentd.** Brightman v. Tate, [1919] 1 K. B. 463; Shutler v. Rolfe (1920), 36 T. L. R. 828.

284. ——— **Applts. contracted with resps.** that the latter should build a ship for them, according to approved plans & specifications, for £127,500, the steamer to be delivered by the end of Jan., 1915. The contract provided that in the event of any delays due to causes beyond the builders' control which should interfere with construction of the vessel, the builders should be allowed a corresponding extension of time. By reason of the interference of the Government staying the building of merchant vessels for a time, it was impossible to carry out the contract. Eventually the Board of Trade sanctioned the building of a standard vessel for applts., but resps. declined to put it in hand, contending that the contract they had agreed to carry out had gone so completely that the building of the ship as a standard ship was a wholly new contract:—*Held*: the interference of the Government was of such a character & duration as to make the building of the ship as contracted for a wholly different contract from the contract which resps. had agreed to execute, & the contract had ceased to be operative, & resps. were entitled to refuse to build the standard ship in place of the screw

steamer.—**FEDERAL STEAM NAVIGATION Co., LTD. v. DIXON & Co., LTD.** (1919), 64 Sol. Jo. 67, H. L. *Annotation*:—**Foll.** Woodfield Steam Shipping Co. v. Thompson (1919), 36 T. L. R. 43.

285. ——— **Defts. agreed to build two ships for plths. under two contracts, which, except as to price & date of delivery, were identical. One contract contained a clause providing that "whereas no delivery date can be specified the builders will make their best endeavours to give as early delivery as possible, which they anticipate will be early in 1918. If the builders be delayed by strikes, wars, riots, insurrection, or other unforeseen occurrence of any kind whatever, the builders shall be allowed an extension of time." The other contract contained a similar clause except that the word "early" was omitted before "in 1918." In Dec., 1916, the Government made an order forbidding the construction of any but standard ships, & this made it impossible for the time being to go on with the work for plths. In an action for a declaration that the contracts were still valid and subsisting:—*Held*: the interference on the part of the Government had so changed the state of things that the principle of frustration applied, & the action failed.—**WOODFIELD STEAM SHIPPING Co., LTD. v. THOMPSON (J. L.) & SONS, LTD.** (1919), 36 T. L. R. 43; 64 Sol. Jo. 67, C. A.**

286. ——— **Prohibition of importation of materials.**—Plths. contracted with defts. in May, 1914, to do carpenters' & joiners' work required in the erection of a mill, part of the work to be done consisting in the flooring of the mill with maple boards. The completion of the flooring became impossible owing to a prohibition of the importation of maple, & plths. applied under Cts. (Emergency Powers) Act, 1917 (c. 25), s. 1 (1), that the contract should be suspended or annulled:—*Held*: in the circumstances the proper course was not to suspend, but to annul the contract.—**SCHOFIELD (C.) & Co. v. MAPLE MILL, LTD.** (1918), 34 T. L. R. 423.

287. ——— **Ship requisitioned by Admiralty—Completion by Admiralty—Compensation.**—Plths. having entered into a contract for the construction of a steamer, contracted with defts. for the sale to them of the vessel when complete at a profit of £14,000, of which defts. paid £10,000 on the signing of the agreement. When the vessel was only partially completed she was requisitioned by the Admty., who completed her according to entirely different plans:—*Held*: plths.' contract had become impossible of performance, & their action for the balance of their profit failed, but they might have a future equitable claim against defts. to share in the compensation payable by the Admty., in the event of defts. being treated as the owners of the ship.—**DALE S. S. Co., LTD. v. NORTHERN S. S. Co., LTD.** (1918), 34 T. L. R. 271; 62 Sol. Jo. 328, C. A.

See, further, CONTRACT; SHIPPING & NAVIGATION.

SECT. 2.—ILLEGALITY.

See, generally, CONTRACT.

288. Contravention of Metropolitan Building Act, 1855 (c. 122).—A contract for the erection of a building in contravention of the above Act

—Claimants sought to recover from the Crown the amount of damages they alleged they were obliged to pay to a contractor who was prevented by the expropriation from completing the construction of a wharf he had under-

taken to build for them:—*Held*: as the contractor had been prevented from completing the construction of the wharf by the exercise of powers conferred by Act of Parliament, claimants were excused from any

liability to him in respect of the breach of contract, & could not maintain any claim against the Crown in that behalf.—**SAMSON v. R.** (1888), 2 Exch. C. R. 30.—CAN.

Sect. 2.—Illegality. Sect. 3. Part X. Sect. 1: Sub-sects. 1 & 2. Sect. 2: Sub-sect. 1.]

cannot be enforced.—**STEVENS v. GOURLEY** (1859), 7 C. B. N. S. 99; 29 L. J. C. P. 1; 1 L. T. 33; 6 Jur. N. S. 147; 8 W. R. 85; 141 E. R. 752.

Annotations:—Expld. & Distd. Re *Coltman, Coltman v. Coltman* (1881), 19 Ch. D. 64. **Distd.** *Harris v. De Pinna* (1886), 33 Ch. D. 238. **Refd.** *L. C. C. v. Pearce*, [1892] 2 Q. B. 109; *Brightman v. Tate*, [1919] 1 K. B. 463. **Mentd.** *Richardson v. Brown* (1885), 49 J. P. 661; *Hall v. Smallpiece* (1890), 59 L. J. M. C. 97; *L. C. C. v. Humphreys* (1894), 10 T. L. R. 594; *Badley v. Cuckfield Union R. D. C.* (1895), 15 R. 461; *Southend-on-Sea Corp'n. v. Archer, Southend-on-Sea Corp'n. v. Romanis* (1901), 70 L. J. K. B. 328; *Newell v. Ormskirk U. D. C.* (1907), 71 J. P. 119.

Metropolitan Building Acts generally, *see* **BOUNDARIES, FENCES, & PARTY WALLS**, pp. 304 *et seq.*, *ante*; **METROPOLIS**.

289. Erection of buildings on disused burial

ground—Disturbance & removal of dead bodies.]—An agreement provided for the erection of certain buildings upon a disused burial ground, which could not be erected without disturbing & removing the dead bodies:—**Held**: the contract was an illegal one, & could not be enforced.—**GIBBONS v. CHAMBERS** (1885), 1 Cab. & El. 577; 1 T. L. R. 530.

Annotation:—Consd. *Bolesworth v. Davis* (1886), 3 T. L. R. 214.

See, further, BURIAL & CREMATION.

SECT. 3.—PREVENTION BY EMPLOYER.

See Part II., Sect. 3, sub-sects. 2, 3, *ante*, & cases *infra*.

Part X.—Forfeiture.

SECT. 1.—WHEN RIGHT TO FORFEIT ARISES.

SUB-SECT. 1.—IN GENERAL.

290. On delay or default—Property to vest in employer—If loss or expense occasioned.]—An agreement between a railway co. & a contractor provided that in case the contractor should be guilty of any delay or default in the fulfilment of the contract, the co. might take the execution of the works out of his hand, & might use all or any of

his plant, materials, or implements, & that in addition to all other rights & remedies which the co. might have against the contractor, the co. might apply any money to which the contractor would otherwise be entitled under his contract towards satisfaction of all losses or expenses occasioned to the co. by the delay, & that all the materials, plant, & implements, which at the time of such delay or default should be in or about the site of the works, should thereupon become the

PART IX. SECT. 3.

a. Failure to supply materials.]—*BURNS v. USSHERWOOD* (1901), 4 Terr. L. R. 389.—CAN.

b. Failure to provide signed specifications.]—*GOOCH v. SNARR* (1874), 34 U. C. R. 616.—CAN.

c. Failure to provide lands necessary for execution & completion.]—*ARTERIAL DRAINAGE CO., LTD. v. RATHANGAN RIVER DRAINAGE BOARD* (1880), 6 L. R. Ir. 513.—IR.

d. Failure to make progress payments.]—To a declaration in an action for breach of a contract contained in an indenture, whereby deft. covenanted to build a house for pltf's, deft. pleaded that pltf's. had by withholding the monthly payment due to deft., contrary to the terms of the indenture, & by their architect refusing the monthly estimates, etc., hindered & obstructed deft. in the prosecution of the work, & thereby, of their own wrong, caused the breach complained of. On demurrer:—**Held**: the performance of deft.'s covenants was dependent upon the performance of pltf's., & the pleas were a sufficient answer to the declaration.—*HOSKINS v. BARBER* (1879), 7 *emp. Wood*, 264.—CAN.

e. —.]—Under a building contract payments were to be made during the progress of the work, & if default was made in such payments for fourteen days after the amount should have been certified pltf. was to be at liberty to suspend the works. Default having been made in one of the progress payments:—**Held**: pltf. was justified in refusing to proceed with the work.—*BELL v. KEESING* (1888), 7 N. Z. L. R. 155.—N.Z.

f. —.]—*WILLIAMS v. ALPENA OIL & GAS CO.* (1905), 6 O. W. R. 401.—CAN.

g. — First payment.]—Pltf. agreed to pay deft. in instalments of a fixed amount as the work progressed:—**Held**: failure to pay the first instal-

ment had not the effect of discharging deft. from his obligation to perform the rest of the work.—*CAMPBELL v. McLEOD* (1891), 24 N. S. R. 66.—CAN.

PART X. SECT. 1, SUB-SECT. 1.

h. On delay or default—Failure to rectify defects after notice—Delay caused by default of employers.]—In an action for wrongfully preventing pltf's. from completing the works in the contract, defts. pleaded that pltf's. were not proceeding with diligence, or with such speed as would be necessary for their completion within the time specified, & that in accordance with the contract notice was served by defts.' engineer requiring pltf's. to rectify the matter, & pltf's. failed to rectify them for more than seven days after service of the notice; & defts. afterwards elected to take the whole of the works out of pltf's. hands, & gave them notice thereof. Pltf's. replied that the failure to rectify the matters mentioned in the engineer's notice, & to use the requisite diligence & speed therein referred to, was caused by delay & default of defts. & their engineer, in providing the lands permanently required for the execution of the works, & in supplying plans & drawings, & in setting out land, defining rivers, drains, & embankments, & in giving pltf's. such particulars as would enable them to proceed with said works:—**Held**: these replies were good.—*ARTERIAL DRAINAGE CO., LTD. v. RATHANGAN RIVER DRAINAGE BOARD* (1880), 6 L. R. Ir. 513.—IR.

k. — Except as extra work.]—*GRACE v. OSLER* (1911), 19 W. L. R. 109, 326.—CAN.

l. — Contract reserving penalty.]—**Held**: defts. were not entitled to take over the work & dismiss pltf's. therefrom because the work was not completed by the date specified in the contract, the contract expressly providing a pecuniary penalty for such non-completion, to which remedy defts.

were restricted.—*ALBERTA BUILDING CO. v. CALGARY CITY* (1911), 16 W. L. R. 443.—CAN.

m. — Caused by employers.]—**Held**: defts. being responsible for the delay, were not justified in taking the work out of pltf's. hands.—*BECK v. YORK* (1914), 7 O. W. N. 493.—CAN.

n. — Breach of contract—Forfeiture of license to enter.]—Pltf. refused to comply with his contract & undertook to hold possession of the lands for the purpose of erecting a different building:—**Held**: (1) the contract amounted to a license from the owner to the builder to enter upon the lands for the purpose of erecting the building contracted for; (2) by pltf.'s own action his right to occupy the lands had come to an end & defts. could resume possession & remove pltf.—*McINNIS v. PUBLIC SCHOOL BOARD OF SCHOOL SECTION 16 IN THE TOWNSHIP OF TAY* (1915), 9 O. W. N. 281.—CAN.

o. — Rescission of contract—On employers refusal to pay.]—During the continuance of the works, disputes arose as to the amount due to pltf., although certified by the architect as agreed, & in consequence pltf. refused to continue the work, whereupon defts., after giving due notice, entered upon the premises. Pltf. sued for damages in consequence of the defts. having taken possession & for the balance due on the accounts:—**Held**: pltf. having rescinded the contract, on defts.' refusal to pay the amount certified, defts. were entitled after due notice to enter & take possession.—*KUPPUSAMI NAIDU v. SMITH & CO.* (1895), 1 L. R. 19 Mad. 178.—IND.

p. — Novel construction—Vague specifications.]—It was not clear from the evidence that the work, the method of construction of which was novel, could satisfactorily have been constructed upon the lines of the vague specifications. Pltf's. were dismissed by defts.:—**Held**: pltf's. had prosecuted

absolute property of the co., & be valued or sold, & the amount of such valuation or sale credited to the contractor in reduction of the money, if any, recoverable from him by the co. The co. took the execution of the contract out of the contractor's hand under this clause, & the contractor brought an action for breach of contract, which, with all matters in difference between the parties, was referred to arbn.:—*Held*: the plant & materials did not become the absolute property of the co. unless loss or expense had been occasioned to them, & an interlocutory injunction should be awarded to restrain them from removing & selling the plant & materials pending the arbn.—*GARRETT v. SALISBURY & DORSET JUNCTION RY. CO.* (1866), L. R. 2 Eq. 358; 14 L. T. 693; 12 Jur. N. S. 495; 14 W. R. 816.

SUB-SECT. 2.—ON BANKRUPTCY OF CONTRACTOR.

See *BANKRUPTCY & INSOLVENCY*, Vol. V., pp. 640, 657, 658, 667, 672, 673, 913; Nos. 5751, 5862, 5863, 5921, 5952-5956, 7474.

SECT. 2.—EXERCISE OF RIGHT TO FORFEIT.

SUB-SECT. 1.—MODE.

291. Sufficiency of notice.]—Pltf., an engineer, contracted by deed with defts., a corpn., to execute certain works. The deed contained a clause, by

the work to the best of their ability & their dismissal was not authorised by the terms of the contract.—*METALLIC ROOFING CO. v. TORONTO CITY* (1904), 3 O. W. R. 646; *on appeal* (1905), 6 O. W. R. 656; (1906), 37 S. C. R. 692.—*CAN.*

q. — Independent covenants —*Pleading.]—TATE v. PORT HOPE, LINDSAY & BEAVERTON RY. CO.* (1858), 17 U. C. R. 354.—*CAN.*

PART X. SECT. 2, SUB-SECT. 1.

r. Whether notice condition precedent.]—Upon the evidence:—*Held*: defts. were entitled to treat pltf. as in default, but defts. should have notified pltf. of their intention to cancel unless the default should be remedied, that being a condition precedent to the right of cancellation; & defts. not having so notified pltf., defts. were liable for a breach of contract in stopping the work.—*McMILLAN & FARRELL v. SOUTHERN ALBERTA LAND CO.* (1913), 25 W. L. R. 177.—*CAN.*

s. — Completion of part—Waiver.]—*TORONTO HARBOUR COMRS. v. SAND & DREDGING* (1903), 2 O. W. R. 1178.—*CAN.*

291 i. Sufficiency of notice.]—A notice to be given by the architect to the contractor prior to forfeiture should intimate to the contractor in what respect the architect is dissatisfied & what he requires to be done, so that during the time mentioned in the notice, the contractor might have an opportunity of removing the objection, in default of which, the architect might dismiss him at the expiration of the time, but not before.—*SMITH v. GORDON* (1880), 30 C. P. 553.—*CAN.*

291 ii. —.]—Under the circumstances:—*Held*: a notice specifying the particular defects to be remedied was a condition precedent to action & a protest in general terms was not a sufficient compliance therewith to place the contractors in default.—*RICHMOND TOWN v. LAFONTAINE* (1899), 30 S. C. R. 155.—*CAN.*

291 iii. —.]—A notice given after

which it was covenanted that defts.' engineer should have power to direct the way in which various portions of the work should be done, & if it should appear to him that they were not properly executed, & with due expedition, it should be lawful for him to give notice in writing to pltf. to alter any improper work, & to supply proper & sufficient materials & labour, & with due expedition to proceed therewith, & if pltf. should for the space of seven days after such notice had been given fail to comply therewith, then it should be lawful for defts.' engineer to take the work out of pltf.'s hands. It appearing to defts.' engineer that the works were not being properly executed, & with due expedition, he gave the following written notice to the plaintiff:—"I give notice to you to supply all proper & sufficient materials & labour for the due prosecution of the works, & with due expedition to proceed therewith, & further, that if you shall for the space of seven days after the giving of this notice fail or neglect to comply therewith, I shall as engineer, & on behalf of [defendants], take the works wholly out of your hands":—*Held*: the notice was sufficiently specific.—*PAULING v. DOVER CORPN.* (1855), 10 Exch. 753; 24 L. J. Ex. 128; 156 E. R. 644.

292. By architect — Unfair conduct of.]—*PAWLEY v. TURNBULL*, No. 305, *post*.

293. — Failure to supply plans.]—Pltf. contracted with defts. to erect buildings. By the 27th clause of the specification it was agreed that, if pltf. should not, according to the determination

the date fixed for completion to determine a contract & enforce forfeiture, must give the contractor a reasonable time in which to complete the work, & the contractor must, with reference to such reasonable time for completion, make default or delay in diligently continuing to execute or advance the work to the satisfaction of the engineer. The engineer is to decide having regard to a time that in the opinion of the ct. is reasonable & the contractor is to have notice of his decision.—*R. v. STEWART* (1901), 32 S. C. R. 483.—*CAN.*

291 iv. —.]—*Held*: the notice given to pltf. by the architect, advising pltf. that unless he "proceeded satisfactorily with the work within seventy-two hours after mailing of the letter," the architect would certify the facts to the owner, was lacking in the element of specific objection & did not indicate in what respect the work was to be prosecuted.—*ANDERSON v. CHANDLER* (1902), 1 O. W. R. 417; (1903), 2 O. W. R. 186.—*CAN.*

291 v. —.]—In a contract between pltf. & M., it was provided that in case of M.'s bkpcy. pltf. might take possession of the works & carry them on in the manner & subject to the conditions provided in the contract. The contract provided that pltf. might, on giving notice of their intention so to do, take the work out of the hands of M. & carry it on under the direction of the city surveyor. It was also provided that they might, on giving notice of their intention so to do, take the works out of the hands of M. & re-let them to another contractor. M. became a bkpt., & a notice was sent of pltf.'s intention forthwith to take possession of the works, & to take steps for ensuring the due completion of the contract, & the works were then let to a second contractor at a higher price:—*Held*: the notice was not such a notice as was provided for by the contract, & the right of pltf. to charge M. with the loss sustained on the re-letting being dependent on the validity of this notice, pltf. could not recover against deft., who was M.'s surety.—*WELLINGTON (MAYOR, ETC.)*

v. ROBERTS & McNAUGHT (1883), 2 N. Z. L. R. C. A. 56.—*N.Z.*

291 vi. — Letter following verbal conversation.]—The architect verbally pointed out certain defects to the contractor, & subsequently wrote to him: "I also notice that windows built in are not as shown on drawings, & must ask that they be altered as pointed out some time back. The timbers are not as specified. Kindly attend to these items, & oblige":—*Held*: this letter did not constitute such a certificate & notice as was required by the contract to justify cancellation, & the verbal conversation could not be incorporated into the document so as to supplement it.—*GREEN v. PAGE* (1905), T. S. 599.—*S. AF.*

a. Effect of giving notice—Rights of contractor.]—*Held*: the architect, having, under the authority of a clause in the agreement, elected to give a notice to pltf. calling his attention to certain parts of the work remaining incomplete, requiring him to complete them within three days, & stating that, failing compliance, the contract would be cancelled & the work completed by the architect, had, by taking advantage, on behalf of defts., of the benefits of this clause, conferred upon pltf. the corresponding benefits, that the work must be paid for by defts. with a deduction of the cost of such labour & materials as was incurred in completing the contract; & an election having once been made, neither the owners nor the architect could withdraw.—*WATTS v. McLEAY* (1911), 19 W. L. R. 916.—*CAN.*

b. By architect—Extent of authority.]—A building contract provided that in case the works were not carried on with such expedition & with such materials & workmanship as the architect might deem proper, then, with the special & written authority of the proprietor, he should be at liberty, after giving him seven days' notice in writing, to dismiss the contractor, & employ other persons to finish the works:—*Held*: (1) such special authority meant an authority to be acted

Sect. 2.—Exercise of right to forfeit: Sub-sects. 1 & 2.

of the architect, exercise due diligence, etc., defts. might determine the contract & enter on the works. The architect certified that pltf. was not exercising due diligence, & defts., under the above clause, determined the contract. To an action by pltf. for not allowing him to complete the works defts. pleaded a justification under the 27th clause of the specification, to which pltf. replied that his failure to exercise due diligence, etc., was caused by the delay & default of defts. & their architect in not providing plans & setting out the land. Defts. rejoined that the non-exercise of due diligence, etc., were not, according to the determination of the architect, caused by the default of defts. & their architect:—*Held*: under the contract the architect could not bind pltf. by his determination that defts. had not by their default prevented pltf. from proceeding with the work, & the replication was good, & the rejoinder to it bad.—**ROBERTS v. BURY IMPROVEMENT COMRS.** (1870), L. R. 5 C. P. 310; 39 L. J. C. P. 129; 22 L. T. 132; 34 J. P. 821; 18 W. R. 702, Ex. Ch.

Annotations:—**Consd.** Lawson v. Wallasey L. B. (1882), 52 L. J. Q. B. 302; Sattin v. Poole (1901), 2 Hudson's B. C. 4th ed. 306. **Refd.** Jones v. St. John's College, Oxford (1870), L. R. 6 Q. B. 115; Lawson v. Wallasey L. B. (1883), 11 Q. B. D. 229; *Re* Rio de Janeiro Flour Mills & Granaries & De Morgan, Snell (1891), 8 T. L. R. 108; Lodder v. Slowey, [1904] A. C. 442; Mort's Dock & Engineering Co. v. Wadey (1905), 22 T. L. R. 61. **Mentd.** Walker v. L. & N. W. Ry. (1876), 1 C. P. D. 518.

Failure to supply plans generally, see Part II., Sect. 2, sub-sect. 2, B, & Sect. 3, sub-sect. 3, *ante*.

Wrongful exercise of right—Remedies for.—*See* Sect. 6, *post*.

294. Unreasonably—Absence of mala fides.—By a contract pltf. was to execute works to the satisfaction of defts., with a condition that if the works should not proceed as rapidly & satisfactorily as defts. required, they should have power to enter & employ men to complete the works, & deduct the cost from any money due to pltf. To an action by pltf. for work & labour, defts. pleaded setting out the contract, & averring that the works not having proceeded as rapidly as they required, they entered under the above condition, & they claimed to deduct the cost incurred from money due to pltf. Pltf. replied that the works did proceed as rapidly & satisfactorily as defts. could reasonably require, & that defts. "unreasonably, improperly & capriciously" required the works to proceed, etc.:—*Held*: in the absence of any allegation of *mala fides* in defts., the replication was bad.

The intention was that defts., if dissatisfied, whether with or without sufficient reason, with the progress of the work, should have the absolute & unqualified power to put on additional hands & get the work done, & deduct the cost from the contract price payable to pltf., & if these terms had been ever so unreasonable, we should have felt

upon with reference to some individual contractor, & not a general authority to dismiss in his discretion any workman or contractor.

Another condition provided that the architect might dismiss any workman who might be disapproved of:—*Held*: this applied only to a workman as distinguished from a contractor.—**SMITH v. GORDON** (1880), 30 C. P. 553.—**CAN.**

c. — Inconsistent clauses.—**NEELON v. TORONTO CITY** (1895), 25 S. C. R. 579.—**CAN.**

d. — Reasonableness of time in notice—Cause of delay.—**MCDONELL v. CANADA SOUTHERN RY. Co.** (1873), 33 U. C. R. 313.—**CAN.**

e. By employer—Delay caused by refusal of progress certificate—Duty to make enquiries.—**ALBERTA BUILDING Co. v. CALGARY CITY** (1911), 16 W. L. R. 443.—**CAN.**

f. — Interference when works advanced—In absence of agreement—Extent of liability.—**MOORE v. BRITISH COLUMBIA POTTERY Co.** (1890), 2 B. C. R. 45.—**CAN.**

PART X. SECT. 2, SUB-SECT. 2.

g. On expiry of reasonable time after notice.—*Held*: pltf., being entitled to a reasonable time to do their work to the satisfaction of the architect, after notification of defects,

bound to give effect to them, & to hold that, so long as defts. were acting *bona fide* under an honest sense of dissatisfaction, although that dissatisfaction might be ill-founded & unreasonable, they were entitled to insist on the condition, & consequently that the replication, which only alleges that their dissatisfaction was unreasonable & capricious, but which stops short of alleging *mala fides* in defts. in acting as is stated in the plea, is insufficient (**COCKBURN, C.J.**).—**STADHARD v. LEE** (1863), 3 B. & S. 364; 1 New Rep. 433; 32 L. J. Q. B. 75; 7 L. T. 850; 9 Jur. N. S. 908; 122 E. R. 138; *sub nom.* **STANNARD v. LEE**, 11 W. R. 361.

Annotations:—**Refd.** Foster & Dicksee v. Hastings Corp'n. (1903), 87 L. T. 736; Diggle v. Ogston Motor Co. (1915), 84 L. J. K. B. 2165. **Mentd.** Batterbury v. Vyse (1863), 2 H. & C. 42.

SUB-SECT. 2.—TIME.

295. Before any payments due—Amount paid to be considered full value.—Pltf. contracted by deed with defts., as a local board of health, to execute certain works, according to a specification, & that the works should be begun, proceeded with, & completed, to the satisfaction of their surveyor. Payment was to be made by instalments, upon the certificate of the surveyor. By the deed it was provided "that if pltf., from bkpcy., insolvency, or any cause whatsoever, should not proceed with the works to the satisfaction of the surveyor, it should be lawful for defts., after three days' notice, signed by their surveyor, to employ other persons to complete the works, & that the deed should, at the expiration of the notice, be void, at the option of defts., & the amount already paid to pltf. should be considered the full value of the works which should up to that time have been executed, & the materials on the premises should become the property of defts. without any further payment":—*Held*: this forfeiture clause might be enforced by defts., although pltf. had not become entitled to any payment for the work done.—**DAVIES v. SWANSEA CORPN.** (1853), 8 Exch. 808; 22 L. J. Ex. 297; 17 J. P. 649; 155 E. R. 1579.

Annotations:—**Fold.** Wilkinson v. Lowndes (1860), 24 J. P. 487. **Mentd.** Midland Ry. v. Withington L. B. (1883), 11 Q. B. D. 788; Lyles v. Southend-on-Sea Corp'n. (1905), 92 L. T. 586.

296. Within time fixed for completion.—A building contract by which pltf. contracted with defts. to construct a dock & other works in connection therewith, provided as follows:—"Should the contractor fail to proceed in the execution of the works in the manner & at the rate of progress required by the engineer, or to maintain the works as hereinafter mentioned to the satisfaction of the engineer, his contract shall, at the option of the co., but not otherwise, be considered void as far as relates to the works or maintenance remaining to be done, & all sums of money that may be due to

should not have been discharged.—**THORNTON-SMITH Co. v. WOODRUFF** (1909), 14 O. W. R. 84, 691; 1 O. W. N. 45.—**CAN.**

296 i. Within time fixed for completion.—A building contract provided that if the architect during the progress of the work should discover that the contractor was not proceeding in a sufficiently expeditious manner, he might determine the contract:—*Held*: after the expiration of the contract time, without any extension of time having been given, the architect had no power to determine the contract under this provision.—**BAILEY v. HART** (1883), 9 V. L. R. 66.—**AUS.**

the contractor, together with all materials & implements in his possession & all sums named as penalties for the non-fulfilment of the contract, shall be forfeited to the co., & the amount shall be considered as ascertained damages for breach of contract." The contract provided that "the whole of the works should be entirely completed on or before Aug. 31, 1873." The works were not completed by that date. There were other clauses in the contract in the following terms:—"If the contractors shall not complete the works within the period limited for the purpose, or if they shall become bkpt., or if from any cause whatever, not arising from any acts done or omitted to be done by the co. contrary to the true intent & meaning of these presents, they shall be delayed or prevented in the completion of the works according to the specification, it shall be lawful for the co., without any previous notice, to take the works entirely or in part out of their hands, & to employ any other contractor to complete same. Should the engineer be at any time dissatisfied with the nature or mode of proceeding with, or at the rate of progress or maintenance of, the works, or any part thereof, he shall have full power to procure & make use of all labour & materials from the money that may then be due or that may become due to the contractor, but it is hereby expressly declared that the possession of this power by the engineer shall not in any degree relieve the contractor from his obligation to proceed in the execution of & complete the works with the requisite expedition or to maintain them as hereinafter mentioned." On Jan. 22, 1874, & consequently after the time fixed by the contract for completion of the works, defts. gave notice to plffs. to avoid the contract & thereupon took possession of the works & of the materials & implements of plffs.:—*Held*: the above clause, with reference to the avoidance of the contract & the forfeiture of the contractor's implements and materials, could only be enforced before the time originally fixed for completion of the works had expired.—*WALKER v. LONDON & NORTH WESTERN RY. CO.* (1876), 1

296 ii. —.—.]—*BECK v. YORK* (1913), 25 O. W. R. 730; 5 O. W. N. 836.—*CAN.*

h. *After time fixed for completion.*]—Under the circumstances:—*Held*: the contract could be put an end to after the day fixed for completion, the parties having continued the work according to the contract, as if the contract still governed.—*McDONELL v. CANADA SOUTHERN RY. CO.* (1873), 33 U. C. R. 313.—*CAN.*

k. *After time fixed & extended time—During informal second extension.*]—The contract provided that if the contractor neglected or refused to prosecute the work to the engineer's satisfaction, the corpn. might employ & place on the work such force of men & teams, & procure such materials, as might be deemed necessary to complete the work by the day named for completion, & charge the cost thereof to plff.; & by the specifications, which were made part of the contract, the same powers were conferred without any restriction as to time. The work not having been proceeded with to the engineer's satisfaction, the corpn., before the expiration of the second extension of time, exercised the powers above conferred:—*Held*: (1) under the contract the power conferred could only be exercised during the time fixed for the completion of the work or the extension thereof, but under the specifications thereafter; (2) even if the corpn. could not under the contract avail themselves of the second extension as granted informally, the powers

C. P. D. 518; 45 L. J. Q. B. 787; 36 L. T. 53; 25 W. R. 10.

Annotation:—*Folld. Wood v. Tendring R. S. A.* (1886), 3 T. L. R. 272.

297. *Within extended time for completion.*]—*WOOD v. TENDRING RURAL SANITARY AUTHORITY* (1886), 3 T. L. R. 272.

SECT. 3.—WAIVER OF RIGHT TO FORFEIT.

298. *What amounts to—Advances to builder—After accrual of right.*]—A building agreement between a landowner & a builder contained a stipulation that the landowner, upon the default of the builder in fulfilling his part of the agreement, might re-enter upon the land & expel the builder, & that on such re-entry all the materials then in & about the premises should be forfeited to & become the property of the landowner "as & for liquidated damages":—*Semble*: if the ground of forfeiture was the omission of the builder to complete the buildings on the day appointed by the agreement, & the landowner had after that day made advances of money to the builder for the purposes of the agreement, or had in any other way treated the agreement as still subsisting, he would have waived the forfeiture.—*Re GARRUD, Ex p. NEWITT* (1881), 16 Ch. D. 522; 51 L. J. Ch. 381; 44 L. T. 5; 29 W. R. 344, C. A.

Annotations:—*Mentd. Reeves v. Barlow* (1883), 11 Q. B. D. 610; *Climpson v. Coles* (1889), 23 Q. B. D. 465; *Church v. Sage* (1892), 67 L. T. 800; *Marshall v. Mackintosh* (1898), 78 L. T. 750.

299. *Fresh breach after waiver—New right of forfeiture.*]—On a clause in a building agreement under which rent had not been paid, & not amounting to a demise, that in case of default in not completing buildings at successive periods, the owner should be at liberty to re-enter & seize materials, etc., there having been continued & successive defaults, & several periods of indulgence, but no waiver of the last default, & no alteration of the builder's position to his prejudice, & no default on

were properly exercised under the specifications.—*MANGAN v. WINDSOR TOWN* (1894), 24 O. R. 675.—*CAN.*

297 i. *Not during extended time for completion.*]—Under the circumstances:—*Held*: the forfeiture could not be enforced after the expiration of the contract time, & during an extension of time granted in accordance with the contract.—*ESSENDON & FLEMINGTON CORPN. v. NINNIS* (1879), 5 V. L. R. 236.—*AUS.*

297 ii. —.—.]—A building contract provided that the work should be finished by a day named, with power to the co.'s estate agent to extend the time in certain events, & also that if the contractor should not progress in the execution of the works in all respects to the satisfaction of the estate agent it should be lawful for the co., without giving any notice, to take the works out of the contractor's hands. The estate agent, under the power, extended the time & gave the contractor a reasonable time after the day named. On a demurrer by plff. to a statement of defence, relying on the power of entry:—*Held*: the defence was bad, for as it admitted the allegation in the statement of claim that the acts complained of were done before the extension of time so given had expired, defts. could not exercise the power relied on simply on the ground of delay up to a time within such extended period, although they might have exercised it on the proper grounds, even before the extension of time given had expired.—

MOHAN v. DUNDALK, NEWRY, & GREENORE RY. CO. (1880), 15 I. L. T. 11.—*IR.*

PART X. SECT. 3.

l. *What amounts to—Delay in giving notice.*]—Under the circumstances:—*Held*: although the work had not been prosecuted with due diligence, the forfeiture had not been waived by delaying the notice, the question whether or not the work was being diligently prosecuted being a difficult one to settle until so much of the time had elapsed as to render it clearly impossible that the work could be completed within the time agreed on.—*MILLIKEN v. HALIFAX CITY* (1889), 21 N. S. R. 418.—*CAN.*

m. —.— *Acceptance & user.*]—On the expiration of the time for the completion of the works the employers served a protest upon the contractors complaining in general terms of the insufficiency & unsatisfactory construction of the works, but made use of the works complained of for about nine years when, without further notice, action was brought for the rescission of the contract & forfeiture of the works under conditions in the contract:—*Held*: after the long delay, when the contractors could not be replaced in the original position, the complaint must be deemed to have been waived by acceptance & use of the waterworks & it would be inequitable to rescind the contract.—*RICHMOND TOWN v. LAFONTAINE* (1899), 30 S. C. R. 155.—*CAN.*

Secl. 3.—Waiver of right to forfeit. Sects. 4, 5 & 6.]

the part of the owner:—*Held*: the owner was entitled to re-enter & seize the materials.—**STEVENS v. TAYLOR** (1860), 2 F. & F. 419.

(1862), 13 C. B. N. S. 358; *Hill v. South Staffordshire Ry.* (1865), 11 Jur. N. S. 192; *Wildes v. Russell* (1866), Har. & Ruth. 689; *Western Bank of Scotland v. Addie*, *Addie v. Western Bank of Scotland* (1867), L. R. 1 Sc. & Div. 145; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1; *Mackay v. Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394; *Stegmann v. O'Connor* (1899), 81 L. T. 627; *Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants*, [1901] A. C. 426; *Foster & Dicksee v. Hastings Corpn.* (1903), 87 L. T. 736.

SECT. 4.—COMPLETION BY EMPLOYER AFTER FORFEITURE.

300. Whether contractor entitled to relief in equity—Action for damages.]—In a contract with a railway co. for the execution of certain works, there was a clause empowering the co., after notice, to take possession of the plant & to finish the work. The co. acted on this clause:—*Held*: this did not furnish ground for a bill in equity as putting an end to the contract, though it might be the subject of an action for damages.—**RANGER v. GREAT WESTERN RY. CO.** (1854), 5 H. L. Cas. 72; 24 L. T. O. S. 22; 18 Jur. 795; 10 E. R. 824, H. L.; *varying* (1843), 3 Ry. & Can. Cas. 298.

Annotations:—**Reid**. *Waring v. M. S. & L. Ry.* (1849), 7 Haro, 482; *South Wales Ry. v. Wythes* (1854), 1 K. & J. 186; *Lodder v. Slowey*, [1904] A. C. 442. **Mentd.** *Kirk v. Bromley Union Grdns.* (1846), 11 Jur. 49; *Re London & Birmingham & Buckinghamshire Ry. Co., Ex n. Curzon* (1857), 6 W. R. 141; *Scott v. Liverpool Corpn.* (1858), 3 Do G. & J. 334; *Re Royal British Bank* (1859), 3 Do G. & J. 387; *Thornhill v. Neats* (1860), 8 C. B. N. S. 831; *Pawley v. Turnbull* (1861), 3 Giff. 70; *New Brunswick & Canada Ry. v. Conybeare* (1862), 9 H. L. Cas. 711; *Thames Iron Works Co. v. Royal Mail Steam-Packet Co.*

n. — Permission & encouragement to proceed—After accrual of right.]—**ARTERIAL DRAINAGE CO., LTD. v. RATHANGAN RIVER DRAINAGE BOARD** (1880), 6 L. R. Ir. 513.—**IR.**

PART X. SECT. 4.

o. Mode of completion—Discretion of employer.]—Where a contractor becomes bkpt. & the contractee has to complete the work contracted for, the latter is allowed a large discretion in the way he completes it, & in the absence of gross negligence or fraud, need not do it in the most economical way.—**FULTON v. DORNWELL** (1885), 4 N. Z. L. R. 207.—**N.Z.**

p. — Duty to act reasonably.]—Where a building contract provides that in certain events the proprietor may take the work out of the contractor's hands & complete it at the cost of the contractor in any manner he may deem best, the proprietor, where he exercises the power, may not be bound to finish the work in the cheapest way possible, but he must act reasonably. Strong powers given to the proprietor by such a contract will not avail him if he has acted capriciously & without *bona fides*.—**DILLON v. JACK** (1903), 23 N. Z. L. R. 547.—**N.Z.**

q. Right to charge contractor with extra cost of completion.]—At the date when a building collapsed, the contractors had not completed the work to the satisfaction of the architects, & they were still bound to take up the work & complete it. A proper notice was given to them, asking them to do so, & they refused. After the necessary time stipulated for in the contract had elapsed, plffs. went on & completed:—*Held*: they were entitled, under the terms of the contract, to recover from defts. the amounts expended by them in reconstructing the building & finishing it according to specifications.—**COCKSHUTT PLOW CO. v. ALBERTA BUILDING CO.** (1910), 13 W. L. R. 234; *affd.*, 3 Alta. L. R. 503.—**CAN.**

r. — Completion according to specifications.]—Under the contract, if the expense incurred by defts. in completing the building was less than the

unpaid balance of the amount to be paid under the contract, plffs. were entitled to be paid the difference; but, if the expense of completing the building exceeded the balance of the amount to be paid under the contract, defts. were entitled to recover the excess from plffs. For this defts. counter-claimed:—*Held*: (1) defts. were entitled to set off the costs of completing the building according to the original plans & specifications against the contract price; (2) they were not entitled to recover the whole amount expended by them in the work of restoring or completing, but only such as came within the plans & specifications; (3) defts. could not recover the cost of work they did not perform, nor recover damages for depreciation owing to defects.—**GRACE v. OSLER** 19 W. L. R. 102, 326.—**CAN.**

s. — Deductions for plant & materials used.]—*Held*: (1) the work not having been completed within the time stipulated, or in accordance with the contract, the owners could take the contract out of the hands of the contractors, & charge them with the extra cost of completing the same; (2) in making up that amount the amount awarded for the value of the plant & materials taken over from the contractors should be deducted.—**BERLINGUET v. R.** (1886), 13 S. C. R. 26.—**CAN.**

t. Plant used for completion—Right of contractor to recover value of—Interest.]—Where the Crown disposed the contractor of his plant & used it for the purposes of the completion of the work:—*Held*: the contractor was entitled to recover the value of such plant as a going concern.

Where the contractor was not allowed interest upon the value of such plant:—*Held*: he was not to be charged with interest upon the balance of the purchase price of a portion of the plant which, with his consent, the Crown had subsequently paid.—**It. v. STEWART** (1901), 32 S. C. R. 483.—**CAN.**

u. Enforcement of claims of contractor or assigns.]—Where on the bkpcy. of the contractor, the contractee completes the work, the contractor &

SECT 5.—HOW FAR FORFEITURE CLAUSE IS A BILL OF SALE.

See **BILLS OF SALE**, pp. 14, 15, *ante*.

SECT. 6.—REMEDIES FOR WRONGFUL FORFEITURE.

301. Damages—Action at law.]—**RANGER v. GREAT WESTERN RY. CO.**, No. 300, *ante*.

302. — For wrongfully preventing completion—On improper refusal to certify.]—Pltf. by agreement in writing dated Aug. 5, 1885, contracted to construct sewers for defts. for £2,616, payable on certificates by the engineer. Pltf. commenced in Aug. 1885, & though the work was not a success, proceeded according to the specification & following the directions of the engineer, & was not in default when on July 10, 1886, defts. took possession of the works & excluded pltf. Pltf. sued for the

those claiming under him, if they wish to enforce claims arising out of the contract, must establish by plain evidence the existence of such claims & their precise nature & extent, & every allowance will be made in considering the conduct of the contractee in the position in which the default of the contractor has placed him.—**FULTON v. DORNWELL** (1885), 4 N. Z. L. R. 207.—**N.Z.**

b. Whether contractor entitled to final payment after completion—Alternative mode of recoupment.]—Pltf. contracted to erect certain works for a specified sum, with a provision for *interim* payments, within a certain time; in case of default defts., after notice to the contractor to proceed, had power to enter, utilise contractor's plant & materials, & complete at his cost, or, in the alternative, set off the cost of such completion against any sums due or to become payable to the contractor as *interim* payments. The contractor made default, & defts. completed the work:—*Held*: (1) pltf., having broken his contract, was not entitled to final payment after the work had been completed; (2) a clause providing for an alternative mode of recoupment after default could not be construed as providing for a different method of performance of the contract.—**SIMPSON v. TRIM TOWN COMRS.**, [1898] 32 L. T. 129.

c. Money deposited as security—Right of contractor to recover—Completion under second contract for less than original price.]—**DUSSAULT & PAGEAU v. It.** (1919), 58 S. C. R. 1; 44 D. L. R. 421.—**CAN.**

PART X. SECT. 6.

d. Damages—Conversion of plant & materials.]—Where defts. had wrongfully taken over the work & dismissed plffs. therefrom:—*Held*: plffs. were entitled to damages sustained by them, by reason of defts. having taken possession of & converted to their use the plant, appliances, & tools used by plffs. upon or in connection with the work.—**ALBERTA BUILDING CO. v. CALGARY CITY** (1911), 16 W. L. R. 443.—**CAN.**

balance of the contract price, & it was found by the referee that the engineer had *malâ fide* & wrongfully refused to certify, but that defts. had not colluded with him:—*Held*: pltf.'s remedy was damages for wrongfully preventing pltf. from completing the contract work by wrongfully taking possession, the measure of damages being the amount to which presumably pltf. would have been entitled if the work had been completed, & had the engineer thereupon issued such certificate as he ought to have issued.—*SMITH v. HOWDEN UNION RURAL SANITARY AUTHORITY & FOWLER* (1890), 2 Hudson's B. C. 4th ed. 156, D. C.
Annotation:—*Refd.* Jackson v. Romford R. D. C. (1909), 73 J. P. 248.

303. — Employer cannot retain — Against extra cost of completion.]—*ROOME v. HACKNEY BATH COMRS.* (1895), Emden's B. C. 4th ed. 666, C. A.

304. — & contract price — Forfeiture not empowered by contract.]—F. contracted to pull down houses for W. within forty-two working days from the time when he should be admitted on the site. He was to be paid £75 for the work, & was to be entitled to have for his own use all materials pulled down. In the event of the work being delayed F. was to pay W. £1 for every working day the work was delayed. The work was in fact delayed, & some time after the expiration of the time limited by the contract for completion of the work W. complained of F.'s delay, when F. said that he could not tell if the work would be completed in four months. A fortnight after that interview W. forcibly took possession of the site, & employed another contractor to complete the work. F. had paid a deposit of £100 to W. for the due fulfilment of the work. F. brought an action to recover the £100 deposit & for damages for breach of contract:—*Held*: W. had no right to determine the contract, & F. was entitled to the return of the deposit, the contract price, & damages for lost profit on the unfinished balance of the contract.—*FELTON v. WHARRIE* (1906), 2 Hudson's B. C. 4th ed. 398, C. A.

305. Payment of balance due — Relief from penalties.]—Bill by a contractor, alleging unfair conduct on the part of the architect, whose decision was by the terms of the contract made final, & who ousted the contractor & finished the buildings. The ct., on proof of such unfair conduct, decreed payment of the balance due to pltf. on the contract, & relieved him from penalties, declared the architect's decision not binding, & ordered both defts., the architect & the contracting party, to pay the costs of the suit.—*PAWLEY v. TURNBULL* (1861), 3 Giff. 70; 4 L. T. 672; 7 Jur. N. S. 792; 66 E. R. 327.

Annotations:—*Consd.* Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 520, n.; *Smith v. Howden Union R. S. A. & Fowler* (1890), 2 Hudson's B. C. 4th ed. 156; *Re* Nott & Cardiff Corp., [1918] 2 K. B. 146. *Refd.* Lariviere v. Morgan (1872), 26 L. T. 339; *De Worms v. Mellier* (1873), L. R. 16 Eq. 554; *Kellett v. New Mills U. D. C.* (1900), 2 Hudson's B. C. 4th ed. 298.

e. — Relief from liability to complete.]—*SIDNEY BOAT & MOTOR MANUFACTURING CO. v. GILLIS*, [1909] 44 N. S. R. 152; 7 E. L. R. 518.—*CAN.*

f. — Claim not raised in former action — Estoppel.]—*BOYER BROTHERS v. DORAN & DEVLIN* (1919), 16 O. W. N. 373.—*CAN.*

g. Injunction — Urgent necessity for completion.]—A contract entered into between road trustees & a contractor for the erection of a bridge forming part of a turnpike road contained a stipulation that in the event of the contractor failing to carry on

the work in a satisfactory manner, or to complete the same before July 31, 1866, the trustees should be entitled, on the certificate of their engineer to that effect, to enter into possession of the works, & complete the same with the contractor's tools & material. The trustees having, in Aug., 1866, obtained this certificate, & a decree-arbitral from an arbiter named in the contract, authorising them to enter into possession, did so. The contractor having raised a reduction of the decree-arbitral, presented an application for *interim-interdict* against the trustees. On obtaining the report of an engineer

that there was urgent necessity for the completion of the bridge:—*Held*: the trustees should be allowed to proceed with the works on finding caution for any damage which the contractor might instruct.—*JOHNSTON v. DUMFRIESSHIRE ROAD TRUSTEES* (1867), 5 Macph. (Ct. of Sess.) 1127.—*SCOT.*

h. — To restrain contractor from preventing completion by employer.]—The corp. of C. were authorised by an Act to construct a new bridge, it being provided that the works authorised should be completed within six years, & the powers thereby

Quantum meruit.]—See Part IV., Sect. 2, *ante*.

306. Injunction—Delay authorised by engineer.]—Pltfs. contracted to execute works on a railway, to the satisfaction of the engineer of the co., by Oct. 1, 1848, making such alterations in, & hastening, the works as the engineer should direct, & the co. agreed to pay for such works a stipulated sum, & thereof to pay a proportionate part monthly, according to the value of the works which the engineer should certify to have been done, retaining 5 per cent. of the certified amount, & the contract provided that all disputes as to fact, discretion or opinion were to be referred to the absolute determination & award of the engineer, whose decision was to be final, & without appeal, & if the engineer should be dissatisfied with the works, the co. might take possession of & complete same, at the expense of pltfs., after giving them fourteen days' notice. The works were delayed, with the assent of the co., but in Jan., 1849, the engineer required the works to be prosecuted with increased speed, & insisted that the line should be opened on June 1. On May 21 the co. gave notice to pltfs., in the terms of the contract, that they would, at the expiration of fourteen days, take possession of & proceed with the works. Pltfs. thereupon filed their bill to restrain the co. from taking such possession, alleging that, when pltfs. were proceeding with due speed, the engineer had, by the authority of the directors, ordered that the works should be delayed for a considerable time, that the co. had waived the completion of the works by Oct., 1848, & that pltfs. were only bound to carry on & complete same at a rate computed on the footing of the original contract, & modified by the delay which the co. had required, that the engineer had, by the order of the directors, given monthly certificates for less than a fair proportion of the contract sum, according to the work actually done at such times, that a large sum was due to pltfs. which had not been paid, & that the co. had not, in fact, paid all the sums which had been certified. The bill denied any default on the part of pltfs., & charged that the notice was given for the fraudulent purpose of avoiding the payment of sums due to pltfs., & of ejecting them from the works, & procuring other persons to finish the works at an earlier period than pltfs. were bound to do. The bill also prayed an account of what was due to pltfs. from the co. in respect of the works, & an injunction to restrain the co. from proceeding against pltfs. for penalties under the contract, on the ground of their non-completion. Upon demurrer by the co., it was objected, (1) the contract had not been completed on the part of pltfs., & it was not a contract of which, as against pltfs., if they had been defts., the ct. could have decreed a specific performance; (2) the entire control of the works was by the contract given to the engineer, whose decision was to be without appeal:—*Held*: pltfs. were entitled to the aid of a ct. of equity, & the demurrer must

Sect. 6.—Remedies for wrongful forfeiture. Part XI.

be overruled.—**WARING v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.** (1849), 7 Hare, 482; 18 L. J. Ch. 450; 14 Jur. 613; 68 E. R. 109; *affd.* (1850), 2 H. & Tw. 239, L. C.

*Annotations:—***Reid.** Bliss v. Smith (1865), 34 Beav. 508; Smith v. Howden Union R. S. A. & Fowler (1890), 2 Hudson's B. C. 4th ed. 156; Foster & Dicksee v. Hastings Corpn. (1903), 87 L. T. 736. **Mentd.** Re Brighton Club & Norfolk Hotel Co. (1865), 35 Beav. 204; Garrett v. Banstead & Epsom Downs Ry. (1865), 4 De G. J. & Sm. 462; Garrett v. Salisbury & Dorset Junction Ry. (1866), L. R. 2 Eq. 358; Kellett v. New Mills U. D. C. (1900), 2 Hudson's B. C. 4th ed. 298.

307. — General principles.]—Upon motion for an injunction by a contractor to restrain the co., whose works he had contracted to execute, from availing themselves of a clause in the contract enabling them to declare the contract void as to the work yet incomplete, from declaring the sums due for work done to be forfeited, & from entering on the works in progress:—**Held:** unless the case was so clear as to be almost undisputed, the ct. would not issue an injunction; (2) in deciding such a case, the ct. would always consider whether greater wrong would be done to pltf. by withholding, or to deft. by granting, such an injunction; (3) to issue an injunction according to the last clause of the notice of motion would be analogous to ordering specific performance of a contract, which the ct. had no power to enforce, but the remedy for any breach of which must lie in damages.—**MUNRO v. WIVENHOE & BRIGHTLINGSEA RY. CO.** (1865), 4 De G. J. & Sm. 723; 12 L. T. 655; 11 Jur. N. S. 612; 13 W. R. 880; 46 E. R. 1100, L. JJ.

*Annotations:—***Reid.** Garrett v. Salisbury & Dorset Junction Ry. (1866), L. R. 2 Eq. 358; Foster & Dicksee v. Hastings Corpn. (1903), 87 L. T. 736.

308. — Damages ample compensation for breach.]—Pltf. contracted to execute the works of defts., & the contract provided that, in certain events, the directors might take the further performance of the contract out of his hands & themselves execute the remaining works, & also that a person named should be the referee in all disputes between the parties. Disputes having arisen, the co. by their engineer violently, as the bill alleged, took possession of the works, & upon his bill being filed, pltf. moved for an injunction to restrain them from such possession & from interfering with pltf. in the further execution of the works:—**Held:** as the ct. would have no power to compel a due completion of the contract by pltf., if it reinstated him, whereas he would have ample remedy in damages if he were improperly displaced by defts., the injury to defts. of granting an injunction would far exceed that to pltf. of refusing it, & an injunction must be refused. **Seemle:** in certain circumstances such an injunction might properly issue.—**GARRETT v. BANSTEAD & EPSOM DOWNS RY. CO.** (1864), 4 De G. J. & Sm. 462; 12 L. T. 654; 11 Jur. N. S. 591; 13 W. R. 878; 46 E. R. 997, L. JJ.

*Annotations:—***Reid.** Garrett v. Salisbury & Dorset Junction Ry. (1866), L. R. 2 Eq. 358; Foster & Dicksee v. Hastings Corpn. (1903), 87 L. T. 736.

granted should then cease. Deft. contracted with the corpn. for the construction of the new bridge. Subsequently the engineer of pltf. reported that, in his opinion, deft. had failed to make such progress with the works as was requisite to insure their completion within the time limited by the contract. The corpn. thereupon duly served deft. with notice, under certain provisions of the contract, of their

intention, to take up & complete the works; & upon deft.'s refusal to give up the works, the corpn. brought an action, & moved for an interlocutory injunction to restrain deft. from preventing them from taking up & completing the works, & to restrain him from withholding the works from them. Deft. alleged that pltf. had caused delay by their own default, & that alterations had been made & extra

309. Pending arbitration.]—An agreement between a railway co. & a contractor provided that in case the contractor should be guilty of any delay or default in the fulfilment of the contract, the co. might take the execution of the works out of his hand, & might use all or any of his plant, materials, or implements; & that in addition to all other rights & remedies which the co. might have against the contractor, the co. might apply any money to which the contractor would otherwise be entitled under his contract towards satisfaction of all losses or expenses occasioned to the co. by the delay, & that all the materials, plant, & implements, which at the time of such delay or default should be in or about the site of the works, should thereupon become the absolute property of the co., & be valued or sold, & the amount of such valuation or sale credited to the contractor in reduction of the money, if any, recoverable from him by the co. The co. took the execution out of the contractor's hand under this clause. The contractor brought an action for breach of contract, which with all matters in difference between the parties was referred to arbn.:—**Held:** the plant & materials did not become the absolute property of the co. unless loss or expense had been occasioned to them, & an interlocutory injunction should be awarded to restrain them from removing & selling the plant & materials pending the arbn.—**GARRETT v. SALISBURY & DORSET JUNCTION RY. CO.** (1866), L. R. 2 Eq. 358; 14 L. T. 693; 12 Jur. N. S. 495; 14 W. R. 816.

310. — —.]—**JENNINGS v. BRIGHTON INTERCEPTING & OUTFALL SEWERS BOARD, BRIGHTON INTERCEPTING & OUTFALL SEWERS BOARD v. JENNINGS** (1872), 4 De G. J. & Sm. 735, n.; 46 E. R. 1105, L. C.

311. — —.]—On a motion to restrain defts. from acting on a notice, given by them or their engineer pursuant to a contract between pltf. & defts., from entering on or taking possession of works in course of execution under such contract & for damages, it appeared that defts. were carrying out a scheme for a water supply, & had contracted with pltf. to sink certain wells. The work was to be performed to the satisfaction of defts.' engineer, & any dispute was to go to arbn., & if in the judgment of the engineer sufficient dispatch was not used defts. or their engineer might dismiss the contractors & their workmen. Difficulties having arisen in carrying out the work, & delay being thereby occasioned, defts. gave notice dismissing the contractors & their men:—**Held:** (1) the terms of the contract were consistent as a whole, & the reference to arbn. was engrafted upon them, & the contractors were not bound to give up to the engineer the decision of every question; (2) the ct. ought to imply that defts. would not act upon the summary clauses until the arbitrators had affirmed the judgment of the engineer, & injunction granted to preserve the *status quo* until trial or an award should be made.—**FOSTER & DICKSEE v. HASTINGS CORPN.** (1903), 87 L. T. 736; 19 T. L. R. 204.

works ordered by the engineer, which entitled him to an extension of time. No extension of time had been given by the engineer, in whose discretion the giving of an extension of time was left by the terms of the contract:—**Held:** the injunction sought should be granted upon an undertaking by pltf. to abide any order for damages that might be made.—**CORK CORPN. v.** (1881), 7 L. R. I. 191.—**IR.**

Part XI.—Materials.

SECT. 1.—VESTING OF PROPERTY IN MATERIALS, ETC.

SUB-SECT. 1.—BY AFFIXING MATERIALS, ETC.

312. Materials not affixed.]—B., a builder, contracted with A. & others, trustees of a new hotel about to be erected, to build the hotel, except as to the ironmonger's, plumber's, & glazier's work, for a specified sum, & covenanted to complete certain portions of the work within certain specified periods, being paid by instalments at corresponding dates, & that if he should neglect to complete any portion within the time limited, he should forfeit & pay £250 as liquidated damages. The agreement contained a clause empowering the trustees, in case (*inter alia*) B. should become bkpt., to take possession of the work already done by him, & to put an end to the agreement, which should be altogether null & void, & that the trustees, in such case, should pay B. or his assignees only so much money as the architect should adjudge to be the value of the work actually done & fixed by B., as compared with the whole work to be done. The course of business during the progress of the work was for the clerk of the works to inspect every article which came in under the contract, & none were received except on his approval. After the works had proceeded some time, B. became bkpt. Before his bkpcy., certain wooden sash-frames had been delivered by him on the premises, approved by the clerk of the works, & returned to B. for the purpose of having iron pulleys, belonging to the trustees, affixed to them, & at the time of the bkpcy., these frames, with the pulleys attached to them, were at B.'s shop. He afterwards, but before the issuing of the fiat, re-delivered them to the trustees, & the sash-frames being afterwards demanded of them by B.'s assignees, they gave an unqualified refusal to deliver them up:—*Held*: (1) the property in the wooden sash-frames had not passed to the trustees at the time of the bkpcy.; (2) they were not entitled to retain them under the agreement, as being work already done, they not having been fixed to the hotel, but even if they were within that clause of the agreement, it could not bind the assignees, inasmuch as their right accrued on the bkpcy., whereas the option of the trustees was not to be exercised until after the bkpcy.—*TRIPP v. ARMITAGE* (1839), 4 M. & W. 687; 1 Horn. & H. 442; 8 L. J. Ex. 107; 3 Jur. 249; 150 E. R. 1597.

Annotations:—*Folld. Rouch v. G. W. Ry.* (1841), 1 Q. B. 51. *Apprvd. Seath v. Moore* (1886), 11 App. Cas. 350. *Reid. Clarke v. Bulmer* (1843), 1 Dow. & L. 367; *Young v. Cooper* (1851), 6 Exch. 259; *Turley v. Bates* (1863), 2 H. & C. 200; *Banbury & Cheltenham Direct Ry. v. Daniel* (1884), 54 L. J. Ch. 265.

313. — Right to use—After notice.]—A railway co. contracted with R. that R. should build a bridge for the co. on their railway. R. was to provide implements & materials, & if the co.'s architect considered that R. did not proceed with

proper expedition, the co., on seven days' notice, might employ other or additional workmen, & in that case, might use the implements & materials of R. which for the time being should be used by R. in or about the works, & R. was to repay all additional expenses. The co. were to have a lien on the implements & materials which for the time being should be upon the ground whereon the bridge was to be built, as a security for the completion of the works, R. undertaking to execute such deeds as counsel for the co. should advise for confirming the lien & security. A fiat of bkpcy. issued against R. on July 31, on which day the co. took possession of implements & materials used by R. in building the bridge. On Aug. 1 the co. gave notice, as provided in the contract; on Aug. 2 they commenced completing the bridge, & in so doing used some of the materials, & detained the rest:—*Held*: the co. were not entitled to use the implements & materials till the expiration of the seven days' notice, & the previous use was a conversion, but they were entitled, after the seven days, to use all implements & materials used by the contractor on any part of the works for constructing the bridge, including the materials of a temporary railway constructed for bringing articles to the bridge from an adjoining river, & a crane at the end of such temporary railway, although not on the co.'s land.—*HAWTHORN v. NEWCASTLE UPON TYNE & NORTH SHIELDS RY. CO.* (1840), 3 Q. B. 734, n.; 2 Ry. & Can. Cas. 288; 9 L. J. Q. B. 385; 114 E. R. 688.

Annotations:—*Reid. Baker v. Gray* (1856), 17 C. B. 462; *Re Waugh, Ex p. Dickin* (1876), 4 Ch. D. 524. *Mentd. Freeman v. Edwards* (1848), 2 Exch. 732.

314. Contract to build ship.]—An agreement between J., a shipbuilder, pltf., & other parties, set forth the particulars of the build & description of a new ship, one-third built, in the yard of J., specifying the dimensions & materials of the vessel, & that it was to be completed, fitted out, & launched by a given time for a certain sum, pltf. & the other parties engaging to take shares "in the before-mentioned vessel as set opposite to their names," & also for payment by bills, cash, & materials. J. having become a bkpt. before the vessel was completed:—*Held*: pltf. could not maintain trover against J.'s assignees, as the agreement did not amount to a sale of the vessel in its then present state, but was an entire contract to purchase when finished, until which time, no property passed to the purchaser.—*LAIDLER v. BURLINSON* (1837), 2 M. & W. 602; *Murp. & H.* 109; 6 L. J. Ex. 160; 150 E. R. 898.

Annotations:—*Reid. Reid v. Fairbanks* (1853), 21 L. T. O. S. 166; *Wood v. Bell* (1856), 5 E. & B. 772; *Anglo-Egyptian Navigation Co. v. Ronnie* (1875), L. R. 10 C. P. 271. *Mentd. Turley v. Bates* (1863), 2 H. & C. 200; *Seath v. Moore* (1886), 11 App. Cas. 350.

315. —.]—Resps., shipbuilders, were under contract to build a ship for Italian shipowners, who were to pay for the vessel by instalments at several

PART XI. SECT. 1, SUB-SECT. 1.

312 i. Materials not affixed.]—Materials provided by builders as portions of fabrics, whether wholly or partially finished, cannot be regarded as appropriate to the contract, or as sold, unless they have been affixed, or in a reasonable sense made part of the corpus.—*SEATH v. MOORE* (1886), 11 App. Cas. 350; 55 L. J. P. C. 54; 54 L. T. 690; 5 Asp. M. L. C. 586.—*SCOT.*

312 ii. Bricks made on premises.]

—Pltf. agreed to build a house for deft., who gave pltf. permission to make the bricks of which the house was to be built on his land, & to sell any surplus; pltf. not proceeding with the building, deft. seized some bricks which pltf. had made:—*Held*: the bricks were the property of deft.—*WILCOX v. BURNSIDE* (1835), 4 O. S. 288.—*CAN.*

j. — Contractor's right of action — Whether excluded by clause of reference.]—*Held*: an action raised by a

contractor against his employer for damages from his employer having, as he alleged, illegally taken possession of machinery & materials, was not excluded by a clause of reference in the contract.—*TOUGH v. DUMBARTON WATER WORKS COMRS.* (1872), 11 Macph. (Ct. of Sess.) 236.—*SCOT.*

k. — Evidence of vesting.]—A person deposited upon the works of another certain materials to be used in carrying out a contract with such second person, who had recognised &

Sect. 1.—Vesting of property in materials, etc.: Subsects. 1 & 2

specified periods of construction. Steam trials at sea were to be made at the cost of the builder, & delivery was to be considered complete after a satisfactory official trial & approval at Genoa:—*Held*: the contract was for a completed ship, & no property passed to the purchasers until the vessel was completed.—*LAING & SONS, LTD. v. BARCLAY, CURLE & Co., LTD.*, [1908] A. C. 35; 77 L. J. P. C. 33; 97 L. T. 816; 10 Asp. M. L. C. 583, H. L.

See, further, SALE OF GOODS; SHIPPING & NAVIGATION.

316. Materials not affixed.]—If a ship-builder makes a rudder, intending it to form part of a ship when completed, & the purchaser of the ship considers & treats it as the ship's rudder, though it be never attached to the ship, & remains unfinished in the builder's possession at his bkpcy., this is evidence for the jury that the rudder is that of the ship, & the property of the purchaser.—*GOSS v. QUINTON* (1842), 3 Man. & G. 825; 4 Scott, N. R. 471; 12 L. J. C. P. 173; 7 Jur. 901; 133 E. R. 1372.

Annotations:—Refd. *Wood v. Bell* (1856), 6 E. & B. 355. *Mentd.* *Bessey v. Windham* (1844), 6 Q. B. 166; *White v. Morris* (1852), 11 C. B. 1015.

317. ———.]—In consideration of certain periodical payments, A. agreed to build a ship for B., to be launched on or before July 31, 1853. The agreement contained the following proviso: "Provided always & it is hereby expressly agreed between the parties, their exors., etc., that, in case A. should fail to complete the ship according to the covenants & stipulations hereinbefore contained to be performed on his part, then it shall be lawful for B. to enter upon & take possession of the ship or vessel, which from & after the payment of the first instalment shall be & be deemed & continue to be as soon as the ship or vessel shall be commenced, in every respect & for every purpose the property of B., & to cause the works hereby agreed to be done to be completed by any person whom he shall see fit to employ therein, using such of the materials of A. as shall be applicable to the purpose," etc., A. to re-pay to B. so much as he should expend thereon in excess of the contract price. A. having failed to complete the ship by the stipulated time, B. took possession of her, & after an act of bkpcy. committed by A., proceeded to finish her, using therein certain materials which were in the yard, & were suitable but had not been specifically appropriated by A. to the ship. Some of these materials had been selected by B. before A.'s bkpcy., & some were placed within the carcase of the ship, the remainder in a shed alongside, but none of them had actually been used by B. before A.'s bkpcy.:—*Held*: the assignees were entitled to recover against B. the whole value of these materials.—*BAKER v. GRAY* (1856), 17 C. B. 462; 25 L. J. C. P. 161; 2 Jur. N. S. 400; 4 W. R. 297; 139 E. R. 1154.

318. ——— Materials detached for convenience.]—In Mar., 1854, J. agreed with pltf. to

build him a screw steamer, according to the specifications by H., for £16,000 payable by instalments, as follows: Four sums of £1,000 each on days named in Mar., Apr., May & June, £3,000 on Aug. 10, 1854, provided the vessel was plated & decks laid, £3,000 on Oct. 10, provided the vessel was ready for trial, £3,000 on Jan. 10, 1855, provided the vessel was according to contract & properly completed, and £3,000 on Mar. 10, 1855, or by bill of exchange dated Jan. 10. The building commenced in Mar. & continued till Dec., 1854, when J. became bkpt. At that time the ship was on the slip in frame, not decked & about two-thirds plated. The instalments contracted for were paid to J. by pltf. in advance. The building of the ship was carried on under the superintendence of H., on behalf of pltf., who examined & rejected the materials when necessary, & caused others to be substituted. Soon after the building began pltf. named the ship the *B.*, & she was thenceforth known by that name by J. & his workmen. In Oct. pltf.'s name was punched on the keel by J.'s assent, for the purpose of securing the ship to pltf. In Nov. J. was pressed to assign the *B.* & her engines & fittings to pltf., but he declined, on the ground that he would thus be signing himself & his creditors out of all he possessed, though during the discussion he admitted that she was the property of pltf. The steam engines were designed on a peculiar plan, & the engine-room was adapted to them, & the engine work was carried on by J. at the same time as the vessel, the parts of the engine being made & marked so as to fit together, & no other engines were made by J. during the same period. Iron plates & angle irons were made for the *B.*, & pre-arranged for different parts of her, & marked accordingly, but not rivetted to her. A large quantity of plankings prepared & intended for the vessel, but not fastened to her, were on J.'s wharf at the date of the bkpcy.:—*Held*: the property in the ship passed to pltf. as she advanced in her progress towards completion, & such of the materials on the wharf as had been formed into shape for the ship & had been fitted into the ship, & approved as suitable for the ship, passed with the ship, though detached after having been fitted, & lying detached at the time of the bkpcy., but such of the materials as had not been so fitted in & approved as parts of the ship did not vest in pltf., although they had been worked up into shape for the use of the vessel & were intended to be fitted into & to form part of her.—*WOOD v. BELL* (1856), 6 E. & B. 355; 25 L. J. Q. B. 321; 2 Jur. N. S. 664; 4 W. R. 553; 119 E. R. 897, Ex. Ch.

Annotations:—Consd. *Anglo-Egyptian Navigation Co. v. Rennie* (1875), L. R. 10 C. P. 271; *Seath v. Moore* (1886), 11 App. Cas. 350. *Refd.* *Banbury & Cheltenham Direct Ry. v. Daniel* (1884), 54 L. J. Ch. 265. *Mentd.* *British Columbia Saw-Mill Co. v. Nettleship* (1868), L. R. 3 C. P. 499; *France v. Gaudet* (1871), 40 L. J. Q. B. 121.

319. ———.]—Resps., shipowners, entered into a contract with a firm of shipbuilders for the construction of a ship at a given price. The ship

accepted such deposit by the advance of the value thereof:—*Held*: such materials had vested in the person with whom they were deposited as a purchaser, & were not liable to attachment under a decree against the depositor.—*ANON.* (1870), 2 N. W. 337.—**IND.**

1. ——— d. plant — Measure of damages.]—The Crown dispossessed a contractor of his plant, & used it in the completion of the work:—*Held*: the contractor was entitled to recover

the value as a going concern.—*R. v. STEWART* (1901), 32 S. C. R. 483.—**CAN.**

m. ——— Claimed by employer as necessary for completion.]—A contractor failed to carry out his work, & the proprietor assumed the undertaking himself:—*Held*: he could not attach the tools, machinery, & materials of the contractor & prevent their removal on the ground that they were necessary for the completion of the work.—*CANADIAN NATURAL GAS CO.*

v. COTE (1917), Q. R. 51 S. C. 491.—**CAN.**

n. Extent to which property may pass—Materials vesting in employers—Right of user of tools.]—On the bkpcy. of a builder & abandonment of the contract, the building materials & tools he had brought upon the premises were retained by his employers:—*Held*: the employers were entitled to retain the materials in order to complete the work, subject to a claim for the value of them & to retain the tools

was to be built under the superintendence of the resps., & the contract contained the following clause: "The vessel as she is constructed, & all her engines, boilers & machinery, & all materials from time to time intended for her or them, whether in the shipbuilding yard, workshop, river or elsewhere, shall immediately as same proceeds become the property of the purchasers, & shall not be within the ownership, control, or disposition of the builders, but the builders shall at all times have a lien thereon for their unpaid purchase money." Before the vessel was completed the shipbuilders became bkpt. Materials for the ship, marked with the ship's number & the place in the ship which they were intended to occupy, were lying at the railway station for delivery:—*Held*: as the contract was for a complete ship, & these materials had not been incorporated into the vessel, the property in them did not vest in the shipowner, but in the trustee of the sequestrated estate of the builders.—*REID v. MACBETH & GRAY*, [1901] A. C. 223; 73 L. J. P. C. 57; 90 L. T. 422; 20 T. L. R. 316, H. L.

See, further, *BANKRUPTCY & INSOLVENCY*, Vol. V., pp. 630 *et seq.*

320. Hoardings erected during continuance of contract.—A building owner let the hoarding which extended over part of a public street to plffs. for advertising purposes. The builder let the same hoarding to defts., who posted their advertisements over those of plffs. Subsequently defts. obtained a licence for advertising under Advertising Stations (Rating) Act, 1889 (c. 27), s. 5. In an action by plffs. to restrain defts. from taking possession of the hoarding:—*Held*: (1) the hoarding did not belong to the building owner but to the builder, & the action failed; (2) defts. had no title when they took possession as they had not then obtained a licence.—*PARTINGTON ADVERTISING CO. v. WILLING & CO., LTD.* (1896), 12 T. L. R. 176.

for use in the execution of it, subject to a claim for their restoration on the completion of the work, & reasonable remuneration for the use of them.—*KERR v. DUNDEE GAS CO.* (1861), 23 Dunl. (Ct. of Sess.) 343.—*SCOT.*

PART XI. SECT. 1, SUB-SECT. 2.

o. What are plant & materials—Kitchen utensils & supplies.—F. agreed with defts. that all the plant, materials, etc., provided by him for the work should be, until completion, the property of defts., but that upon completion, all such plant & materials as should not have been used & converted should be delivered up to F. Pltf. based his claim to ownership of the seized property upon two absolute bills of sale by F. made & registered within a month of each other:—*Held*: pltf. could recover the value of any goods seized which had not been provided by F. for the work; but kitchen supplies & utensils were not plant, materials, or other things provided for the work.—*CLANCY v. GRAND TRUNK PACIFIC RY. CO.* (1910), 15 B. C. R. 497.—*CAN.*

p. —Horses.—By a clause of a railway contract all plant & things whatsoever, provided by the contractor were until the completion of the work to be the property of the co., when such as had not been used & converted into the works & remained undisposed of were to be delivered over to the contractor; in other clauses the words "teams & horses" were used as well as the word "plant":—*Held*: horses were not included in "plant."—*MIDDLETON v. FLANAGAN* (1894), 25 O. R. 417.—*CAN.*

q. S. P. BLOOMSTEIN v. MCARTHUR

(J. D.) Co. (1908), 8 W. L. R. 753.—*CAN.*

322 i. When property passes—Employers' manager to certify abandonment on insolvency of contractor—Stoppage by contractor for interference.—(Circumstances in which:—*Held*: the materials had not become the property of the employers.—*UPLANDS, LTD. v. GOODACRE* (1913), 18 B. C. R. 343; 50 S. C. R. 75.—*CAN.*

322 ii. —Work taken out of contractor's hands—On account of delay.—A contract contained a clause enabling defts. upon taking the works out of the contractors' hands, to use plant & materials of any description belonging to plffs. which should be on, or near to, or employed in the execution of, the works, without paying for same:—*Held*: a defence alleging that defts. had taken up the works under the contract for delay, & relying on the above clause, was a sufficient answer to an action for the conversion & detention of such plant & materials by defts.—*MOHAN v. DUNDALK, NEWRY, & GREENORE RY. CO.* (1880), 6 L. R. Ir. 477.—*IR.*

r. What materials pass—Materials brought on by unauthorised sub-contractor—Before & after notice to discontinue.—By a contract all work & material as delivered on the premises was to form part of the works & be considered the property of the owner, & not to be removed without his consent; the contractor to have liberty to remove all surplus material after he had completed the works. Without the architect's consent as required by the contract the contractor entered into a sub-contract with pltf. for part of the work, pltf. commenced work under

2.—BY AGREEMENT AS TO UNFIXED MATERIALS, ETC.

321. Nature & objects of vesting clause—Construction.—The usual clause in contracts for the construction of works or for building leases, providing that all materials brought on the ground are to become the property of the building owner, must be construed as vesting the materials in the building owner, subject to a condition of defeasance if the builder completes the works. It is a security to the building owner for the performance of the work. If the contractor fails to complete he cannot recover the materials, although the building owner does not complete the works himself or by another contractor.—*HART v. PORTGAIN HARBOUR CO., LTD.*, [1903] 1 Ch. 690; 72 L. J. Ch. 426; 88 L. T. 341; 51 W. R. 461.

Annotation:—*Appl. Metropolitan Water Board v. Dick, Kerr*, [1917] 2 K. B. 1 (see [1918] A. C. 119).

322. When property passes—Engineer to certify amount payable for materials delivered—Effect of certificate.—By an agreement, made between pltf. co. & deft., a contractor, for the construction of a railway, it was provided that, once a month, the co.'s engineer should certify the amount payable to the contractor in respect of the value of the materials delivered, & that such certificates should be paid by the co. seven days after presentation:—*Held*: the property in "materials delivered," upon their being certified for by the engineer, passed to the co., though the materials were not fixed.—*BANBURY & CHELTENHAM DIRECT RY. CO. v. DANIEL* (1884), 54 L. J. Ch. 265; 33 W. R. 321.

323. Extent to which property may pass—Materials vesting in employer—Contractor's right of user—Execution against employer.—Rails & other chattels which, by the terms of the contract, when placed on the land became the absolute property of the co., the contractor to have no property

his sub-contract, & continued to work for some time, when he was ordered to discontinue by the architect:—*Held*: pltf. was entitled to remove from the premises material placed there after he was directed to discontinue, & also material delivered off the premises, as well as plant constituting the fixtures & the apparatus, etc., necessary for carrying on his business, or to recover from the owner the value of any material used by him in the buildings; but not any material placed there before he was ordered to discontinue.—*ASHFIELD v. EDGELL* (1891), 21 O. R. 195.—*CAN.*

323 i. Extent to which property may pass—Materials vesting in employer—Subsequent destruction by fire.—E., a builder, contracted with I. & Co., storekeepers, to make certain additions to their store. The contract provided that all materials to be used in the work, after being placed on the site, should be considered the property of I. & Co. After much of the material had been brought on to the ground, & some of the work done, this work & material as well as I. & Co.'s store were destroyed by accidental fire:—*Held*: E. could not recover for the materials as goods supplied on the ground that when brought on to the site they became the property of I. & Co.—*EDWARDS v. IRELAND & CO.* (1892), 11 N. Z. L. R. 80.—*N.Z.*

323 ii. —Liability of employer for wear & tear of contractor's plant.—A petition having been presented to the sheriff, praying for warrant to inventory the materials, plant, etc., of the contractor, & to take possession & use it in completing the works without being liable for wear & tear, & for interdict against the contractor

Sect. 1.—Vesting of property in materials, etc.:
sects. 2, 3 & 4. **Sect. 2: Sub-sects. 1 & 2.]**

therein, except the right of using them on the land for the purpose of the works, except that on completion of the line, as a condition precedent, the plant was to be given to the contractor as part consideration, or, if used by the co., to be paid for:—*Held*: not liable to be taken in execution for the co.'s debts.—**BEESTON v. MARRIOTT** (1864), 4 Giff. 436; 2 New Rep. 437; 8 L. T. 690; 9 Jur. N. S. 960; 11 W. R. 896; 66 E. R. 778.

Annotation:—**Refd.** Ilfracombe Ry. v. Poltimore (1868), 37 L. J. C. P. 86.

324. ——— Execution against contractor.]—

By a building contract it was agreed that all materials brought on the land by the intended lessee should become the property of the intended lessors. The intended lessee entered & commenced building, but obtained no lease:—*Held*: the materials brought on the land by him vested in the intended lessors & were not liable to be taken in execution by a creditor of the intended lessee.—**BLAKE v. IZARD** (1867), 16 W. R. 108.

Annotations:—**Consd.** *Re Garrud, Ex p. Newitt* (1881), 16 Ch. D. 522; *Climpson v. Coles* (1889), 23 Q. B. D. 465. **Refd.** *Reeves v. Barlow* (1884), 12 Q. B. D. 436; *Church v. Sage* (1892), 67 L. T. 800.

325. ——— ———.]—By a building contract, after providing for the erection of houses, & the granting of leases thereof to the builder as they should be finished, & for advances to be made by A., the owner of the land, to enable B., the builder, to carry on the work, to be repaid before the leases were granted, it was agreed, by art. 7, that "all materials which should have been brought upon the premises by B. for the purpose of erecting such buildings, should be considered as immediately attached to & belonging to the premises, & that no part thereof should be removed therefrom without A.'s consent"; &, by art. 8, it was further agreed that, "in case B., his exors., etc., should fail to proceed with the erection & completion of the houses, or any of them, within the times specified, it should be lawful for A., his heirs, etc., to enter upon & take possession of the whole or any part of the land not leased, with all buildings & improvements thereon, & all bricks & other building materials thereon, for his & their own absolute use & benefit":—*Held*: art. 7 gave A. such an equitable interest in the materials as to disentitle the sheriff to seize them under an execution against B., & that A.'s rights under that art. were not in any way qualified by art. 8.—**BROWN v. BATEMAN** (1867), L. R. 2 C. P. 272; 36 L. J. C. P. 134; 15 L. T. 658; 15 W. R. 350.

Annotations:—**Folld.** *Blake v. Izard* (1867), 16 W. R. 108. **Distd.** *Re McManus, Ex p. Jardine* (1875), 10 Ch. App. 325, n. **Consd.** *Re Waugh, Ex p. Dickin* (1876), 4 Ch. D. 527, n. **Folld.** *Re Harrison, Ex p. Meads* (1879), 49 L. J. Bey. 47. **Expld.** *Re Harrison, Ex p. Jay* (1880), 14 Ch. D. 19. **Consd.** *Reeves v. Barlow* (1884), 12 Q. B. D. 436; *Climpson v. Coles* (1889), 23 Q. B. D. 465. **Refd.** *Ilfracombe Ry. v. Poltimore* (1868), 37 L. J. C. P. 86; *Re Garrud, Ex p. Newitt* (1881), 16 Ch. D. 522; *Church v. Sage* (1892), 67 L. T. 800. **Mentd.** *Re Steele, Ex p. Conning* (1873), L. R. 16 Eq. 414; *Re Standard Manufacturing Co., Ex p. Lowe* (1891), 39 W. R. 369; *Re Lind,*

molesting or hindering the co. in entering on or completing the works contracted for, the sheriff granted the prayer of the petition. The ct. recalled his interlocutor so far as it found that the railway should not be liable for wear & tear of the contractor's materials, reserving the pleas of parties.—**WILSON v. CALEDONIAN RY. CO. & GRAHAM** (1860), 22 Dunl. (Ct. of Sess.) 697.—**SCOT.**

324 i. ——— Execution against contractor.]—A building contract which provides that materials brought on the

ground or near thereto are to be considered the property of the proprietor vests such materials in the contractee, subject to the equities of the contractor, & they cannot be taken in execution by the judgment creditors of the contractor.—**TAPPER v. BODLEY** (1884), 3 N. Z. L. R. 4.—**N.Z.**

PART XI. SECT. 2, SUB-SECT. 1.

a. On completion of work.]—A builder has no lien upon a house built by him on the land of his employer for

Industrials Finance Syndicate, Ltd. v. Lind, [1915] 2 Ch. 345.

See, further, **BILLS OF SALE**, pp. 14, 15, *ante*.

SUB-SECT. 3.—RIGHTS QUALIFYING VESTING OF MATERIALS, ETC.

Reputed ownership.]—*See* **BANKRUPTCY & INSOLVENCY**, Vol. V., pp. 672, 673, 753, 758, 790; Nos. 5955, 6491, 6523, 6524, 6765.

326. Distress for rent due from builder—Whether unfinished ship exempted—Property in employer.]—A shipbuilder contracted to build a ship on premises which he held as tenant to defts.; the ship was to be paid for by instalments at certain stages of the work. After the ship had been partly paid for, it was seized by defts. as a distress for rent due from the builder. The person for whom the ship was being built paid the rent under protest, & sued to recover the amount:—*Held*: assuming the property in the ship to have passed to pltf. under the contract, still the ship, not having been sent or delivered to the builder, was liable to distress, & pltf. was not entitled to recover.—**CLARKE v. MILLWALL DOCK CO.** (1886), 17 Q. B. D. 494; 55 L. J. Q. B. 378; 51 L. T. 814; 51 J. P. 5; 34 W. R. 698; 2 T. L. R. 669, C. A.

Annotation:—**Refd.** *Challoner v. Robinson*, [1908] 1 Ch. 49.

See, further, **DISTRESS**.

SUB-SECT. 4.—HOW FAR VESTING CLAUSE IS A BILL OF SALE.

See **BILLS OF SALE**, pp. 14, 15, *ante*.

SECT. 2.—LIEN.

See, generally, **LIEN**.

SUB-SECT. 1.—FOR BENEFIT OF CONTRACTOR.

327. Lien of sub-contractor—On purchase-money payable to principal contractor—Property in materials in sub-contractor.]—Contractors for the erection of steel tanks to be erected on the purchasers' premises, & to be paid for after completion, employed pltf. as a sub-contractor to erect & fix the tanks, he also to be paid a smaller price after completion. Pltf. had nearly finished the erection of one tank when the contractors became insolvent. The tanks when completed would be no fixtures:—*Held*: no property in the tanks so far as erected had passed to the contractors or the purchasers, & on completion pltf. would not be bound to hand over the tanks, except on having his purchase-money paid or secured by a first charge on the price to be paid to the contractors.—**BELLAMY v. DAVEY**, [1891] 3 Ch. 540; 60 L. J. Ch. 778; 65 L. T. 308; 40 W. R. 118; 7 T. L. R. 725.

Annotation:—**Dbtd. & distd.** *Pritchett Co. v. Currie*, [1916] 2 Ch. 515.

the price of the building.—**JOHNSON v. CREW** (1836), 5 O. S. 200.—**CAN.**

t. ——— Payment by instalments—Payment of last instalment into court.]—**HEINSTEIN & SONS v. POLSON IRON WORKS, LTD.** (1918), 15 O. W. N. 94.—**CAN.**

a. ———.]—The period for completing a line of railway under a contract had elapsed, & the line was ready for public traffic:—*Held*: the contractors were not entitled to retain possession of the line, or to prevent

328. Property in materials in contractor.]—Defts. contracted with C. to provide an electrical installation, including (*inter alia*) a storage battery, at her house for £1,363. Defts. then sub-contracted with plths. for the supply of the battery to be erected by them on C.'s premises at the price of £286, including erection. In accordance with the terms of the sub-contract plths. sent the materials for the battery by rail to a specified station, whence they were to be carted by defts. to C.'s premises & there erected by plths. Defts. carted the goods, but plths. did not proceed with the erection of the battery, which was ultimately completed by defts., who went into liquidation. In an action against C., to which defts. were added as defts., C., in pursuance of an order, paid into ct. £269, part of the balance owing by her to defts., & upon that proceedings were stayed as against her:—*Held*: (1) upon construction of the sub-contract, it was not a contract for the sale of a completed article, but of the component parts of the battery, with a supplemental contract that after delivery they should be erected on C.'s premises, & the delivery of the parts was an unconditional appropriation to the contract of goods in a deliverable state within Sale of Goods Act, 1893 (c. 71), s. 18, r. 5, & the property therein passed to defts.; (2) assuming the property in the goods did not pass, plths. had no lien upon the money in ct., which represented a portion of the consideration payable by C. to defts. under the principal contract.—*PRITCHETT & GOLD & ELECTRICAL POWER STORAGE CO., LTD. v. CURRIE*, [1916] 2 Ch. 515; 85 L. J. Ch. 753; 115 L. T. 325, C. A.

Annotation:—*Refd.* *Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97.

SUB-SECT. 2.—FOR BENEFIT OF EMPLOYER.

329. Advances on security of materials—Bankruptcy of contractor—Whether employer's lien affected.]—S. contracted with defts. to execute an extensive building operation for them, in consideration of a certain sum, & of being allowed to use certain materials. Defts.' engineer was empowered to reject any materials or work not in his opinion conformable to the plans & specifications, & to provide other materials, & employ competent persons to perform the work, if S. failed to do so, as well as to deduct the amount from the sum payable to him under the contract. S. placed on defts.' premises engines, materials, implements, & other articles of various kinds, necessary to carry on the works. During the progress of the works advances were made by defts. to S. on his application, he agreeing that all the engines, materials, etc., brought or to be brought on defts.' premises for use in constructing the works, should be a security for such advances. Those advances always exceeded the value of the property so on the premises. S. became bkpt. before the works were completed, upon which defts. erased his marks on the engines, materials, implements, etc.,

the opening of it, although certain operations under the contract still remained to be executed, & certain claims alleged by them to be due under the contract were still unpaid.—*CASTLE-DOUGLAS & DUMFRIES RY. CO. v. LEE, SON & FREEMAN* (1859), 22 Dunl. (Ct. of Sess.) 18; 32 Sc. Jur. 12.—*SCOT*.

b. As against trustee in ————
—*Advances made with knowledge of insolvency.*—C. undertook by different

contracts to supply & fit up engines in various ships being built by applts. It was subsequently agreed that on payment being made on account of any contract, the portions of the subjects thereof, so far as constructed, & all materials laid down in C.'s yard for the purpose of constructing the same, should become the absolute property of applts., subject only to the lien of C. for the payment of the price, or any balance thereof that may remain due. At the date of this

then on the premises. In trover by the assignees of S. against defts. to recover such engines, materials, etc.:—*Held*: as there had been such a possession of the engines, materials, etc., by defts. as would support the lien, which it was the effect of bkpt.'s agreement to confer on them, plths. were only entitled to recover for such materials, etc. as were brought on defts.' premises after the act of bkpcy.—*CROWFOOT v. LONDON DOCK CO.* (1834), 2 Cr. & M. 637; 4 Tyr. 967; 4 L. J. Ex. 267; 149 E. R. 915.

Annotations:—*Refd.* *Hawthorn v. Newcastle-upon-Tyne & North Shields Ry. Co.* (1840), 2 Ry. & Can. Cas. 288. *Mentd.* *Lunn v. Thornton* (1844), 14 L. J. C. P. 161.

330. ————.]—In Dec., 1861, bkpt. contracted with W. to build a barge for him, to be paid for in bricks, the barge to be completed on June 5, 1862. Bkpt. hired a yard for a number of months, for the purpose of completing the contract, which period expired before the completion of the work, & W. then hired the yard. In June it was agreed by bkpt. in writing that the barge should be held by W. as a security for advances made by him. In July the bkpcy. took place. The advances made by W. exceeded the amount of work done & materials supplied by bkpt.:—*Held*: W. had a lien upon, & was entitled to hold, the barge, unless the assignees chose to complete the contract.—*Re ATTWATER, Ex p. WATTS* (1862), 1 New Rep. 170; 32 L. J. Bcy. 35; 7 L. T. 585; 9 Jur. N. S. 238, L. C.

331. Contract giving lien—What materials covered.]—A railway co. contracted with R. that R. should build a bridge for the co. on their railway. R. was to provide implements & materials, & if the co.'s architect considered that R. did not proceed with proper expedition, the co., on seven days' notice, might employ other or additional workmen, & in that case, might use the implements & materials of R. which for the time being should be used by R. in or about the works, & R. was to repay all additional expenses. The co. were to have a lien on the implements & materials which for the time being should be upon the ground whereon the bridge was to be built, as a security for the completion of the works, R. undertaking to execute such deeds as counsel for the co. should advise for confirming the lien & security. A fiat of bkpcy. issued against R. on July 31, on which day the co. took possession of implements & materials used by R. in building the bridge. On Aug. 1 the co. gave notice, as provided in the contract; on Aug. 2 they commenced completing the bridge, & in so doing used some of the materials, & detained the rest:—*Held*: (1) the co. were entitled to a lien upon all such implements & materials, so used, as were upon any land, possessed by the co., on which the building of the bridge was, in a popular sense, being carried on, but not to a lien upon the materials of a temporary railway constructed for bringing articles to the bridge from an adjoining river, nor to a crane at the end of such temporary railway, not being on the co.'s land; (2) these rights of the co. were not invalidated by other implements & materials, so

agreement C. was insolvent to the knowledge of applts. After further advances had been made C. became bkpt.:—*Held*: applts. were not entitled, as against the trustee in C.'s bkpcy., to take possession of the materials to be used in carrying out their contracts, which were in C.'s yard at the date of the bkpcy.—*SEATH v. MOORE* (1886), 11 App. Cas. 350; 55 L. J. P. C. 54; 54 L. T. 690; 5 Asp. M. L. C. 586, H. L.—*SCOT*.

Sect. 2.—Lien: Sub-sect. 2. Sect. 3. Part XII.
Sect. 1.]

used, having been removed without any objection from the co.'s authority, the lien being a shifting one, & attaching to such articles as were brought from time to time, & ceasing as to such only as were removed, nor by the implements & materials not being scheduled.—*HAWTHORN v. NEWCASTLE UPON TYNE & NORTH SHIELDS RY. CO.* (1840), 3 Q. B. 734, n.; 2 Ry. & Can. Cas. 288; 9 L. J. Q. B. 385; 114 E. R. 688.

Annotations:—Folld. Re Waugh, Ex p. Dickinson (1876), 4 Ch. D. 524. *Reid. Baker v. Gray* (1856), 17 C. B. 402. *Mentd. Freeman v. Edwards* (1848), 2 Exch. 732.

332. Contract giving power to seize & retain in event of bankruptcy—Notice of intention to seize given after filing of petition—Equitable lien.]—A building contract contained stipulations that in the event of the insolvency or bkpcy. of the builder, the architect of the proprietors should have power, after two clear days' notice, to appoint other persons to complete the work, & should also in such case have power to seize & retain all materials, plant & implements, & might either proceed with the work or sell them & apply the proceeds to the completion of the work, & that in the event of the contract being put an end to as aforesaid, the contractor should not remove either work, materials, implements, scaffolding or plant, from the premises, but all materials & work should be left or appropriated for the use of whomsoever might be appointed to finish the work. After being engaged on the contract for about eighteen months, & receiving sums on account thereof which covered the value of the materials, plant & implements then upon the premises, the contractor filed a petition for liquidation. Three days afterwards the proprietors gave him notice that they intended to employ other means to finish the work, & claimed the materials, plant & implements under the contract. It did not appear whether the proprietors at that time had notice of the petition, but they had such notice before the expiration of two days, & before they took possession:—*Held*: under the contract the proprietors acquired a right to a lien upon the goods in the events which happened.—*Re WAUGH, Ex p. DICKIN* (1876), 4 Ch. D. 524; 46 L. J. Bcy. 26; 35 L. T. 769; 25 W. R. 258.

Annotation:—Distd. Re Harrison, Ex p. Jay (1880), 14 Ch. D. 19.

333. Employer's lien to take effect after notice—Notice given after seizure by sheriff—Execution against contractor.]—By a building agreement it was provided that if the builder should neglect to proceed with due diligence in the performance of the work, the building owner should be at liberty to give notice in writing to the builder requiring him to proceed with the work with reasonable despatch, & that from the date of such notice the builder should not be at liberty to remove from the premises any plant belonging to him placed there for the purposes of the works, & that the building owner should have a lien upon such plant thenceforward until the notice was complied with. A judgment having been recovered by a third person against the builder, the sheriff entered under a *fi. fa.*, & seized in execution of the judgment certain plant belonging to the builder which had been brought by him to the premises for the purposes of the work. After the seizure

by the sheriff, & while the plant was still on the premises & unsold, the building owner gave to the builder, who had not proceeded with due diligence in the performance of the works, notice under the contract to proceed therewith, & he thereupon claimed as against the execution creditor a lien on the plant:—*Held*: the intervening seizure by the sheriff prevented the building owner's right of lien under the notice from taking effect.—*BYFORD v. RUSSELL*, [1907] 2 K. B. 522; 76 L. J. K. B. 744; 97 L. T. 104, D. C.

334. Substitution of contract giving employer lien & power of sale—Clauses as to lien, etc., not incorporated in second contract.]—A contract for the construction of a railway provided that if the contractor should make default, the co. might enter & complete the works & make use of the contractor's waggons, machinery & plant, & also have a lien on same, with power of sale to reimburse themselves any loss or damage they might sustain by reason of such default. The contractor having become embarrassed, the co., either out of regard for him or because his bkpcy. would have delayed the completion of the works, made a second contract with him, by which it was provided that they should take to & complete the works, & for that purpose they should be allowed £10,000, & the use of all the contractor's plant, etc., which should, on the completion of the works, be restored to the contractor in whatever state it might then be. This second contract provided that if it should then be found that anything was due to or from the co. from or to the contractor, the amount should be paid by the one to the other within three months after the engineer should have certified the amount that should be due, & it provided that "in all other respects the original contract should stand, except so far as it was altered by or should be inconsistent with the second contract." The contractor had made no default down to the date of the second contract. The co. completed the works, & the engineer certified that a large sum was due to them from the contractor. The co. thereupon refused to deliver up the plant to the contractor, & claimed power to sell the plant, & to reimburse themselves out of the proceeds:—*Held*: they were not so entitled, for the provisions of the second contract were in substitution of the corresponding provisions in the first contract, & the two instruments were not to be read as one, nor were the clauses of the first conferring the lien & power of sale to be taken as incorporated into the second contract.—*HUNT v. SOUTH EASTERN RY. CO.* (1875), 45 L. J. Q. B. 87, H. L.

Annotations:—Mentd. Williams v. Agius, [1914] A. C. 510. *Morris v. Baron*, [1918] A. C. 1.

SECT. 3.—MATERIALS BELONGING TO EMPLOYER.

335. Materials purchased by employer—Right to set off against sum payable to contractor.]—If A. agrees to do work for a certain sum of money, & afterwards B. purchases some of the materials, which are worked up by A., the money expended on that account must be set off & cannot be given in evidence on the general issue.—*ALLINSON v. DAVIES* (1796), Peake, Add. Cas. 82, N. P.

336. ———.]—Pltfs. contracted in writing to do certain work for deft. & to find the materials

PART XI. SECT. 3.

c. Materials furnished by employer
*—In part payment.]—*Deft. agreed to put up a building for pltf., & to take

in payment from him materials, at the cost prices, or such quantity as should be required, & the balance, if any, in cash. The timber had been all furnished, & the building partly com-

pleted, when it was blown down & abandoned:—*Held*: the timber so delivered belonged to deft.—*GRAHAM v. WILEY* (1858), 16 U. C. R. 265.—*CAN.*

for it for a fixed sum. Deft. afterwards supplied a portion of the materials, which plffs. accepted & used up in the work. In an action for the work done by plffs.:—*Held*: deft. was entitled to deduct from the damages the value of the materials supplied by him, without pleading a set-off. *NEWTON v. FORSTER* (1844), 12 M. & W. 772; 152 E. R. 1411.

337. Old materials used by builder—Duty of builder to deduct from charges—According to specification.]—By a building contract, the builder agreed to repair a house according to the plans & specifications, & to the satisfaction of the architect, the work to be done under the architect's directions. By the specification the builder was to allow for

the value of the old lead, & he alleged that he made this allowance in his estimate. The architect certified his satisfaction of the completion of the contract. In an action by the builder against the owner of the house for the money agreed to be paid by the latter:—*Held*: no evidence could be received from deft. that the work was not done according to the plans & specifications, & unless plff. could prove that he had informed deft. or the architect of his having allowed for the old lead in his estimate, he must deduct the value from the amount of his charge.—*HARVEY v. LAWRENCE* (1867), 15 L. T. 571.

Conclusiveness of certificate generally, see Part III., Sect. 3, sub-sect. 2, *ante*.

Part XII.—Assignment and Devolution of Rights and Liabilities.

SECT. 1.—ASSIGNMENT.

See, generally, CHOSER IN ACTION.

338. In consideration of sum payable to assignor on completion—Assignee entering into substituted contract—Rights of assignor.]—Plff. & defts. entered into an agreement with a railway co. to execute a contract for making a tunnel upon a line of railway, called "the Morley contract." Plff. then assigned to defts. all his right & interest in the contract, & defts. agreed to pay a given sum to plff. upon completion of the contract. Subsequently, it became necessary to vary the levels, & defts. agreed with the co. to make the tunnel in a different direction from that specified in the Morley contract, & upon different terms as to payment:—*Held*: plff. had no right to sue defts. for the sum stipulated to be paid to him by the agreement, as the Morley contract never was completed.—*HUMPHREYS v. JONES* (1850), 5 Exch. 952; 20 L. J. Ex. 88; 155 E. R. 415.

339. Of retention money—Bankruptcy of contractor after assignment—Completion by trustee in bankruptcy.]—A builder assigned to T. £200 of what should be coming to him under a building contract with A. The contract provided that the building should be finished by a certain day, & if not, that A. might employ another builder to complete it. When the assignment was made the time for completion had expired. Soon afterwards the builder executed a creditor's deed. The trustee of this deed completed the building, with his own money, & was repaid by A. Allowing this repayment as proper, nothing remained due on the contract. T. then filed his bill to enforce

payment of the £200:—*Held*: the payments by A. to the trustee were proper, & the bill ought to be dismissed with costs.—*TOOTH v. HALLETT* (1869), 4 Ch. App. 242; 38 L. J. Ch. 396; 20 L. T. 155; 17 W. R. 423, L. JJ.

Annotations:—*Distd.* Brice v. Bannister (1878), 3 Q. B. D. 569; *Re Toward, Ex p. Moss* (1884), 14 Q. B. D. 310; *Drew v. Josolyne* (1887), 18 Q. B. D. 590.

340. ———.]—A building contract provided that payments should be made, as the work proceeded, of such sums on account of the price of the work as should be stated in the certificates of an architect, such certificates to be given at the architect's discretion at the rate of 80 per cent. upon the contract value of the work done at the dates of such certificates, & that the remaining 20 per cent. should be retained till completion of the work. The contract empowered the building owners, in the event of the contractors committing an act of bkpcy., to discharge them from the further execution of the work, & employ some other person to complete it, & to deduct the amount paid to such other person for completing same from the contract price. The contractors assigned a portion of the retention moneys, i.e., the price of work done under the contract retained under the before-mentioned provision, by way of mtge. to secure a debt, & notice of the assignment was given to the building owners. After making such assignment the contractors filed a petition for liquidation, the works then remaining incomplete. A trustee in liquidation & a committee of inspection were appointed. The trustee, in pursuance of a resolution of the committee, completed the work, himself advancing

PART XII. SECT. 1.

d. Whether contractor entitled to assign—Provision against assignment.]—Under a contract to construct certain railway works, the contractor was entitled to receive certain monthly payments during the continuance of the work, but such payments were provisional only, & if at the final settlement money was found due from the contractor, he would be obliged to make a refund. The contract further provided that workmen engaged by the contractor should be paid in usual manner & at usual time, & that the contractor should have no right to cede any of his obligations. The contractor subsequently agreed with the railway engineer that workmen should be paid out of the monthly payments. Plff., who had been warned by the engineer that the railway would not recognise any right he might obtain from the contractor to receive any of the monthly payments & knew of the

arrangement as to the payment of workmen, accepted a cession of rights under the contract from the contractor. Thereafter the railway refused to recognise such cession & with the help of the contractor, paid money due under the contract to workmen:—*Held*: (1) during the continuance of the work, the rights & obligations under the contract were indivisible & could not be ceded without the consent of the railway; (2) plff. had no right as against the railway to receive any of the monthly payments.—*ARMSTRONG v. SIVEWRIGHT* (1893), 10 C. L. J. 257.—S. AF.

e. ——— Not amounting to prohibition.]—A contract for drainage work stipulated that defts. would not recognise any assignment of the contract. Plff. & another firm were the contractors, & shortly after work was commenced, the latter assigned their interest to plff.:—*Held*: an assignment of the contract was not pro-

hibited, & defts. were not to be prejudiced by an assignment & need not recognise it.—*BARRETT BROTHERS v. CORNWALL TOWNSHIP* (1908), 12 O. W. R. 970.—CAN.

f. ——— Rescission on breach of —No evidence of assent.]—*R. v. SMITH* (1882), 10 S. C. R. 1.—CAN.

g. ——— to obtain consent.]—Where a contract with a municipal corpn. provides that it shall not be sublet without the consent of the corpn. it is incumbent on the contractor to obtain such consent before subletting, & if he fails to do so he cannot maintain an action against a proposed subcontractor for not carrying on the portion of the work he agreed to do.—*RYAN v. WILLOUGHBY* (1900), 31 S. C. R. 33.—CAN.

h. ——— Work usually undertaken by special trades.]—Under the circumstances:—*Held*: the plffs. were entitled to sublet the branches of the

Sect. 1.—Assignment.]

money for that purpose, of which an amount exceeding that of the retention money assigned as aforesaid was still unpaid, there being no other assets from which he could be recouped in respect thereof. The trustee & the mtgees. both claimed the amount of the retention money assigned as aforesaid from the building owners:—*Held*: in the absence of anything to show that the building owners had exercised the power of taking the work out of the contractors' hands, the trustee must be taken to have completed the work under the original contract as trustee of the contractors' estate, & not as a person employed to complete the work in substitution for the contractors, & the assignment of the retention money held good as against the trustee, & the mtgees. were entitled to succeed.—*DREW v. JOSOLYNE* (1887), 18 Q. B. D. 590; 56 L. J. Q. B. 490; 57 L. T. 5; 35 W. R. 570; 3 T. L. R. 482, C. A.

See, further, BANKRUPTCY & INSOLVENCY, Vol. V., pp. 694–697.

341. Right to set off damages for breach.]—By the terms of a contract between the Comrs. of Sewers and a wood paving co., the co. were to pave a particular street called V. Street, & the comrs. were to pay 60 per cent. of the money due a month after the engineer certified the works to be complete, 30 per cent. within three months afterwards, & 10 per cent. at the expiration of two years. During the two years the co. were to keep the wood surface of the roadway in repair, & if, before the expiration of the two years, the comrs. should give them notice, the co. were also to keep the roadway in repair for fifteen years upon being paid for same at the annual rate of 6d. per square yard. The comrs. were to be at liberty to retain from time to time "out of any money payable by them to the contractors," an amount equal to the above annual charge, by way of security, & in the event of failure by the co. to perform the contract, the money retained was to be forfeited, & to be held by the comrs. as liquidated damages for the default; & it was provided that whenever "according to the terms of this contract," any money should be due from the co. to the comrs. for damages or otherwise, the comrs. might either sue for such money or deduct or set off same against any money due from them to the co. The contract being dated on Sept. 22, 1882, the co. on Nov. 15, gave to L. & C., timber merchants, a charge on all their interest in the contract to secure a debt for goods sold & delivered, & on Dec. 9, notice of this charge was given to the comrs.

work usually undertaken by special trades & there being no want of good faith & no carelessness on the part of plffs. in letting, plffs. were entitled to recover the amount paid to sub-contractors.—*MACKISSOCK & THOMAS, LTD. v. BLACK* (1912), 21 W. L. R. 424; 2 W. W. R. 465.—CAN.

k. Assignment of moneys payable in respect of contract—Damages for additional expense included.]—Deft., a contractor, employed by a city corpn. to construct a drain assigned to a bank as security for certain advances the sums payable to him in respect of his contract with the corpn. Deft. was hindered in his work & put to additional expense in consequence of the escape of water into plffs.' works from the corpn.'s other drains which were defective. Deft. having recovered damages against the corpn., the bank claimed this money under the assignment:—*Held*: as the additional expense incurred by deft. through breach of duty on the part of the corpn.,

was necessary in order to enable him to complete his contract, it was money "in respect of the contract," to which the bank was entitled.—*GRAHAM v. BOURQUE* (1903), 2 O. W. R. 927, 1182.—CAN.

l. — Admission of funds.]—The contractor for building a church, being indebted to D. for materials furnished therefor, gave him the following order on defts., who were the building trustees, of which they were duly notified: "Pay to the order of D. the sum of \$306 out of certificate of money due me on June 1 for materials furnished to above church." This defts. refused to accept, & on May 31 paid, out of moneys arising out of the contract, an order for a larger sum, made on that date in favour of another person, under an arrangement made by them with the latter alone:—*Held*: there was a good equitable assignment in favour of D. of money due on June 1, & defts., by the payment of the other order, were estopped from

On the same Dec. 9, but after the notice, the co. presented a petition for a winding-up order, & on Dec. 12 & 16 the provisional official liquidator was empowered & ordered to complete the contract & to obtain the necessary timber on security of the money to be received subject to L. & C.'s charge. On Jan. 13, 1883, the winding-up order was made; on Jan. 29 the liquidator, having completed the work, sent in a claim to the comrs., & on Mar. 8, the engineer certified the work to be complete. On Mar. 19, the comrs. sent to the liquidator a claim of set-off for anticipated loss by breach of the contract to repair for fifteen years, the amount of such claim being estimated by the difference between 1s. a square yard, which the comrs. considered they would have to pay for the repairs, & the 6d. a square yard provided for by the agreement. They also claimed to set off damages accrued & anticipated under other contracts for paving other streets. Except as to a trifling sum, it was not alleged that any cause of action for breach of any of these contracts accrued before Jan. 27, 1883. On May 25, 1883, the comrs. served the co., in liquidation, with formal notice to repair for fifteen years from Mar. 8, 1885:—*Held*: (1) the liquidator was not entitled to a first charge on the money payable under the contract for the cost of completing the work incurred by him since the winding-up; (2) the chargees, L. & C., were entitled to a charge on 90 per cent. of the money payable under the contract, subject as above, undiminished by any retainer or set-off by the comrs. either under the V. Street contract or otherwise; (3) the comrs. might prove for their cross claim under the contract of Sept. 22, 1882; (4) the comrs. were not entitled to retain any money due under the contract of Sept. 22, 1882, in respect of money due under any of the concurrent contracts.—*Re ASPHALTIC WOOD PAVEMENT CO., LEE & CHAPMAN'S CASE* (1885), 30 Ch. D. 216; 54 L. J. Ch. 460; 53 L. T. 65; 33 W. R. 513, C. A.

Annotations:—Consd. Paddy v. Clutton, [1920] 2 Ch. 554. ReId. Sovereign Life Assce. v. Dodd, [1892] 2 Q. B. 573; Re Daintrey, Ex p. Mant, [1900] 1 Q. B. 546. Mentd. Ross v. Army & Navy Hotel Co. (1886), 34 Ch. D. 43; Re Kildgrove Steel, Iron & Coal Co (1894), 38 Sol. Jo. 252.

342. — Unauthorised misrepresentation by employer's agent—Employer not estopped from denying liability.]—Defts., a tramway co., employed contractors to execute certain works. By the contract defts. had a right to retain a certain percentage of the amounts for which their engineer from time to time certified on account of the price of the works, until after completion of same. The

denying that there were sufficient moneys then due to the contractor to cover his order.—*BANK OF BRITISH NORTH AMERICA v. GIBSON* (1892), 21 O. R. 613.—CAN.

m. Bonus payable to assignor on unfinished work—Agreement by employer to refund—If assignee prevented from completing.]—D., having a contract with deft. to do work on a railway, transferred his contract to plff. at deft.'s request, on receiving a bonus of one penny per yard on the work remaining to be done. Plff. gave D. his note for the amount, on the undertaking of deft. that if plff. was prevented from completing the work, deft. would pay the penny per yard for the amount unfinished. Plff. performed part of the work, & left the rest unfinished, at deft.'s request that he should work elsewhere. Plff. having paid the amount of the note to D.:—*Held*: he could recover it from deft., as money paid to his use.—*HAWKINS v. McBEAN* (1861), 5 All. 209.—CAN.

contractors applied to pltfs. for an advance upon the security of retention money under the contract. Defts.' secretary, in answer to inquiries made by pltfs., erroneously represented to them that there was a certain amount of retention money in defts.' hands which would be payable after completion of the works, whereas, in fact it was not so. Pltfs. thereupon advanced money to the contractors on the security of an assignment of the retention money. There was no evidence to show that the secretary had authority to make the representations which he had made:—*Held*: it was not within the scope of a secretary's authority to make such representations, & in an action by pltfs. as assignees of the retention money, defts. were not estopped from denying that such money was due.—*BARNETT v. SOUTH LONDON TRAMWAYS CO.* (1887), 18 Q. B. D. 815; 56 L. J. Q. B. 452; 57 L. T. 436; 35 W. R. 640; 3 T. L. R. 611, C. A.

Annotations:—*Mentd.* *Capel v. Sim's Ships Compositions Co.* (1888), 57 L. J. Ch. 713; *Whitechurch v. Cavanagh*, [1902] A. C. 117; *Tendring Hundred Waterworks Co. v. Jones* [1903] 2 Ch. 615.

See, further, COMPANIES.

343. Equities to which assignment subject—Employer diminishing rights of assignee after notice—Payments to sureties of contractor.—In June, 1864, Y., a builder, contracted with the justices of A. to build a gaol for £12,953, provision being made in the contract for extra work, additions, & omissions, to be certified from time to time by the architect, & the contract price to be paid as follows: the architect to certify from time to time that work to a certain amount had been done to his satisfaction, & the amount so certified to be paid to Y., subject to a deduction to be made by the architect of 20 per cent. upon the amount until such deduction should amount to 10 per cent., upon the contract price, or a reserved sum of £1,295; when the whole work should be completed, three-fourths of the balance due to be paid to Y. two months after the architect's certificate of completion, & the remainder of such balance to be paid to him at the end of six months upon the architect's certificate that the works were then in good and substantial repair. Defts., K. & B., were sureties by bond to the justices for the due performance by Y. of the contract. Y. proceeded with the work, & in Jan., 1866, the reserved sum in the hands of the justices amounted to £1,295, of which fact defts. were aware. Being then in want of money to complete his contract, Y. prevailed upon pltfs., his bankers, to make him advances to enable him so to do, in consideration of his assigning to them all future payments under

the contract, together with the reserved sum of £1,295, & other securities, & Y., by deed of Jan. 27, 1866, assigned to pltfs., as a security for such advances, "all instalments & sums of money then due & payable, or thereafter to become or accrue due & payable to him, under or by virtue of the contract, either upon, before, or after the completion of the works mentioned in the same contract." K. also at the same time gave his bond for £1,000 to pltfs. as a further security, & both defts., & also the justices, had knowledge of the assignment. Pltfs. made the required advances, which were expended by Y. upon the works, £1,896 was due to them from Y. in respect thereof. On Sept. 29, 1866, Y., who up to that time had received from the justices £9,400 on account of his contract, became bkpt., & thereupon the justices, through their clerk of the peace, on Oct. 1, wrote to defts., the sureties, to know what course they deemed best to pursue, to which the defts., by letter of Oct. 5, replied as follows: "We beg to state that we are prepared to enter upon the works directly, & complete same for the amount of money, & the plant, that would have been due had Y. completed the contract. To save us further annoyance or damage from any action on the part of Y.'s creditors, we should be very grateful if you would kindly enter into a fresh contract with us upon the basis of the above terms." At a meeting of the justices on the following day, it was resolved that the proposal of defts., as contained in their letter, to enter upon the works at the new gaol immediately, & complete same under the provisions of the existing contract should be agreed to, & that it was not desirable to enter into any new contract with them. Immediately after this resolution defts. took possession of the works, & proceeded to carry them out, & completed them by Nov. 1, 1867, the architect giving his certificate of completion on Jan. 20, 1868, & his final certificate of good repair on July 22, 1868. Defts. expended £5,420 on the completion of the gaol, & received £2,800, from the justices, who had also paid £9,400 to Y., & upon the architect making up the amount & taking into account the extras & omissions in accordance with the terms of Y.'s contract, the balance certified by him as due by the justices was £1,243 16s. 6d., which sum pltfs. claimed under their deed of assignment. Defts. also claimed it, & brought an action to recover it against the justices, who thereupon paid the money into court:—*Held*: (KELLY, C.B., & BRAMWELL, B.; MARTIN & CLEASBY, B.B., diss.) pltfs. were not, & defts. were, entitled to

343 i. Equities to which subject—Employer diminishing rights of assignee after notice—Payment to subsequent assignee.—The Agent-General of the colony in England having entered into a contract for the construction of a line of railway in the colony, received notice from pltfs., English bankers, that the contractor had assigned to them the balance of a certain retention fund on its becoming payable by the govt. to the contractor. The Agent-General refused to accept the notice, or even to read the correspondence on which pltfs. relied as constituting the assignment, & after the fund became payable he remitted the money to the Cape, where it was paid by the govt. to the C. Bank, to whom the contractor had ceded his rights under the contract, subsequent to the notice of assignment given to the Agent-General:—*Held*: inasmuch as the contractor's letters to pltfs. constituted in the opinion of the ct. an absolute assignment, & as notice to the Agent-General was admitted to be notice to the govt., the payment to

the C. Bank was not justified, & pltfs. were entitled to recover the money so paid from the govt.—*WRIGHT & CO. v. COLONIAL GOVERNMENT* (1891), 8 S. C. 260.—S. AF.

n. — Assignment subject to original contract—Right of employer to make deductions.—A contract between defts. & pltf.'s assignor for the paving of a certain street provided that the former might deduct & pay the price of any materials unpaid for by the latter. The contractor assigned to pltf. all moneys to become due under the contract, of which defts. were duly notified. Subsequently defts. deducted from the contract moneys the amount of a claim for materials furnished to the contractor, & paid the same:—*Held*: they had a right so to do, pltf.'s assignment being necessarily subject to the provisions of the original contract.—*FARQUHAR v. TORONTO CITY* (1895), 26 O. R. 356.—CAN.

o. Completion by assignee—Acceptance of work.—S. & Co. entered into

an agreement with deft. to instal a heating plant into deft.'s house for a stated sum. S. & Co. assigned the contract to pltfs. & informed deft. of the fact. Pltfs. carried out the work including certain additions to the original, deft. making no complaints regarding the work until after the commencement of the action:—*Held*: deft. was liable as he had accepted pltfs.' work.—*REGINA HEATING & PLUMBING CO. v. GILLESPIE* (1908), 8 W. L. R. 93.—CAN.

p. — Estoppel.—H. entered into a contract with F. for certain work to be done by H. to houses in Jersey, payment to be made by F. at stated periods. Two other agreements were contemporaneously made between the same parties for the purchase of pieces of land adjoining for building other houses. These contracts were to be passed "*davant Justice*" within one year, which was not done. H. commenced the work & F. paid him a first instalment. H.

Sect. 1.—Assignment. Sect. 2. Part XIII. Sects.

the balance in question.—**SMITH v. KIRK** (1871), 25 L. T. 426.

344. ——— Payments to contractor.]—

G. agreed to build a vessel for deft., the price of which was to be paid by instalments. Before the vessel was finished, G., being in debt to pltf., by an instrument in writing directed deft. to pay to pltf. £100 out of money due or to become due from deft. to G. At the time of giving this direction all the instalments which were due had been paid by deft. to G. Notice in writing of the above-mentioned instrument was given to deft., but he refused to be bound by it, & afterwards paid to G. the balance of the price of the vessel, amounting to more than £100 :—*Held* : the instrument in writing constituted a valid assignment of £100, part of the money due or to become due from deft. to G., & pltf. was entitled to recover that amount from deft., notwithstanding the subsequent payments by him to G.—**BRICE v. BANNISTER** (1878), 3 Q. B. D. 569 ; 47 L. J. Q. B. 722 ; 38 L. T. 739 ; 26 W. R. 670, C. A.

Annotations :—**Consd.** **Buck v. Robson** (1878), 3 Q. B. D. 686. **Distd.** **Re Jones, Ex p. Nichols** (1883), 22 Ch. D. 782. **Follid.** **May v. Lane** (1894), 43 W. R. 58. **Refd.** **Re Toward, Ex p. Trustee** (1884), 54 L. J. Q. B. 126 ; **Percival v. Dunn** (1885), 29 Ch. D. 128 ; **Barnetts, Hoares v. South London Tram. Co.** (1886), 2 T. L. R. 848 ; **Drew v. Josolyne** (1887), 18 Q. B. D. 590 ; **Mercantile Bank of London v. Evans** (1898), 79 L. T. 496. **Mentd.** **Fisher v. Calvert** (1879), 27 W. R. 301 ; **Re Whitting, Ex p. Hall** (1879), 10 Ch. D. 615 ; **British Waggon Co. v. Lea** (1880), 5 Q. B. D. 149 ; **Walker v. Bradford Old Bank** (1884), 12 Q. B. D. 511 ; **Western Wagon & Property Co. v. West**, [1892] 1 Ch. 271 ; **Durham v. Robertson**, [1898] 1 Q. B. 765 ; **Torkington v. Magee**, [1902] 2 K. B. 427 ; **Brandts v. Dunlop Rubber Co.**, [1904] 1 K. B. 387 ; **Skipper & Tucker v. Holloway & Howard**, [1910] 2 K. B. 630 ; **Glegg v. Bromley** (1912), 81 L. J. K. B. 1081 ; **Re Gunsbourg, Ex p. Trustee** (1919), 88 L. J. K. B. 479 ; **Re Westerton, Public Trustee v. Gray**, [1919] 2 Ch. 104.

345. Assignment of proportionate parts of price—Right to set off damages for non-completion of whole work.]—Where a proportionate part of the price for a railway becomes due on the completion of each section, the employer can set off damages for non-completion of the whole railway against assignees of the proportionate parts of the price.—**NEWFOUNDLAND GOVERNMENT v. NEWFOUNDLAND RY. CO.** (1888), 13 App. Cas. 199 ; 57 L. J. P. C. 35 ; *sub nom.* **A.-G. FOR NEWFOUNDLAND v. NEWFOUNDLAND RY. CO.**, 58 L. T. 285 ; 4 T. L. R. 292, P. C.

Annotations :—**Refd.** **Samuel, Samuel v. West Hartlepool Steam Navigation Co.** (1907), 12 Com. Cas. 203 ; **Baker v. Adam** (1910), 102 L. T. 248 ; **Stoddart v. Union Trust**, [1912] 1 K. B. 181 ; **Reeves v. Pope**, [1914] 2 K. B. 284. **Mentd.** **Christie v. Taunton, Delmard, Lane, Re Taunton, Delmard, Lane**, [1893] 2 Ch. 175.

SECT. 2.—DEVOLUTION.

See, generally, EXECUTORS & ADMINISTRATORS.

346. On death of contractor—Duty of executors to perform contract.]—If a man be bound to build a house for another before such a time, & he who is bound dies before the time, his exors. are bound to perform this.—**QUICK & HARRIS v. LUDBORROW** (1615), 3 Bulst. 29 ; 1 Roll. Rep. 196 ; 81 E. R. 25.

Annotation :—**Refd.** **Silboni v. Kirkman** (1836), 1 M. & W. 418.

347. On death of employer—Right of heir to compel performance—Expenses out of personal estate of deceased.]—Pltf.'s father seised in fee of land, agreed to pay J. £1,000 to build a house on the premises, & died before the house was built :—*Held* : pltf., the heir, might compel the builder to build it, & his father's exor. to pay for it.—**HOLT v. HOLT** (1694), 2 Vern. 322 ; 1 Eq. Cas. Abr. 274, pl. 11 ; 23 E. R. 808.

Annotation :—**Mentd.** **Lechmere v. Lechmere** (1735), Cas. temp. Talb. 80.

348. ——— ——— ———.]—A person contracted with a builder to erect a house on a piece of freehold land belonging to him, & died intestate before the house was finished :—*Held* : the heir-at-law was entitled to have the house finished at the expense of the personal estate of intestate.—**COOPER v. JARMAN** (1866), L. R. 3 Eq. 98 ; 36 L. J. Ch. 85 ; 12 Jur. N. S. 956 ; 15 W. R. 142. *Annotation* :—**Consd.** **Re Day, Sprake v. Day**, [1898] 2 Ch. 510.

349. ——— ——— ———.]—Where testator devised land by his will & entered into a contract for the building of cottages on such land, which contract was unfinished at the time of his death :—*Held* : (1) the devisee was entitled to have the contract completed at the cost of the estate ; (2) this principle did not apply to land already conveyed to the devisee before testator's death.—**Re DAY, SPRAKE v. DAY**, [1898] 2 Ch. 510 ; 67 L. J. Ch. 619 ; 79 L. T. 436 ; 47 W. R. 238.

On bankruptcy of contractor.]—*See* **BANKRUPTCY & INSOLVENCY**, Vol. V., pp. 640, 657, 658,

Part XIII.—Substituted Contracts and Sub-Contracts.

SECT. 1.—SUBSTITUTED CONTRACTS.

See, generally, CONTRACT.

350. Effect of novation—Work taken over on terms of original contract—Stipulations as to

being unable to complete the work, transferred his contract to L., & F. consented to the transfer upon condition that the agreements for the purchase & sale between him & H. should be passed before the Royal Ct. H. afterwards became a bkpt. & F. was declared *tenant apres décret* to his estate. L. finished the work, F. having recognised L. as being substituted for H. F. refused to pay L. on the ground that the completion of the other agreements with H. was a condition precedent to the right to recover for the work done :—*Held* : as F. had recognised & suffered the work to be completed by L. & had the benefit of the contract he could not

refuse payment to L. for the work done on the ground of the non-performance of the agreements made by him with H.—**FALLIE v. LE SUEUR & LE HUGUEL** (1859), 12 Moo. P. C. C. 501 ; 7 W. R. 707.—**CHANNEL ISLANDS.**

q. — Attachment against absconding contractor—Right of assignees to recover.]—Pltf. contracted to build a mill dam for defts. While carrying on the work he assigned the contract to his sureties, & afterwards absconded, & an attachment was issued against him. The assignees carried out the contract, & then sued in his name for the money due. After action brought this attachment was withdrawn, &

defts. released by the attaching creditors from any claim by them to the money that might be recovered in this action. Within six months another attachment was placed in the sheriff's hands, of which defts. were duly notified :—*Held* : the assignees were entitled to recover as well for the work done by pltf. before as since his departure, & defts. paying would not be liable to the creditors of pltf.—**CLARK v. PROUDFOOT** (1851), 9 U. C. R. 290.—**CAN.**

r. Assignment without notice—Attachment.]—**GRAY v. HOFFAR** (1896), 5 B. O. R. 56.—**CAN.**

1891, the co. should have the right to deduct from the retention money, as & for liquidated damages, £500, & £5 a day for each day from such date until completion; & that, should the contractor become bkpt. or insolvent, it should be lawful for the co. "to terminate the contract, so far as respects the performance of same under the directions & by means of the contractor, but without thereby affecting in any other respects the liabilities of the contractor." The time for completion was extended until Dec. 31, 1892, & subsequently until Jan. 16, 1893. In Nov., 1892, the contractor was unable to continue the works, & the co. re-entered & took possession. Thereupon applt. took from the contractor an assignment of "all the estate, part, share, & interest of the contractor of & in the contract, & the full benefit & advantage thereof, & all rights, powers, & privileges of the contractor thereunder." On Dec. 5, 1892, it was agreed between applt. & the co. that applt. should complete the works in accordance with the original contract. Applt. completed the works on Sept. 22, 1893. The co. claimed to deduct certain sums as liquidated damages from the retention money. The matter was referred to an arbitrator, who found, as a fact, that the delay in completion was due to the delay of the original contractor, but decided that the co. were entitled to deduct from the retention money £1,745, being £500 for non-completion on the extended date, & £5 *per diem* for each day between the extended date & the date of actual completion:—*Held*: the words, "but without thereby affecting in any other respects the liability of the contractor," contained in the proviso as to terminating the contract, effectually kept alive the co.'s right to deduct liquidated damages from the retention money, & by the agreement of Dec. 5, 1892, applt. was subject to the contractual liabilities of the original contractor, & to the aforesaid deduction in the settlement of accounts

as between himself & the co.—*Re YEADON WATERWORKS Co. & WRIGHT* (1895), 72 L. T. 538, D. C.; *affd.* 72 L. T. 832, C. A.

SECT. 2.—SUB-CONTRACTS.

SUB-SECT. 1.—RELATIONS BETWEEN SUB-CONTRACTOR AND EMPLOYER.

351. Whether privity of contract—Specialist employed by contractor.]—R. having undertaken, by a written contract, to build for a corp'n. a house on a farm occupied by A., engaged S. to do the carpenter's work, & the following agreement was made & signed by R. & S., & witnessed by A.: "It having been arranged that R. shall build a new house on the farm occupied by A., it is hereby agreed & understood between R. & S., that S. shall do all the carpenter's work, etc., under the inspection & control of A. & that the amount of the work shall be paid by A. to S. only, & that this agreement shall be his guarantee for so doing." On the same day A. wrote to S. as follows: "It having been agreed that R. shall build a new house on the farm occupied by me, & that, by an agreement this day shown me between you & R. you are to do the carpenter's work, etc., & that the payment, when done, is to be made by me to you, & to no other person, according to plan & specification, I hereby undertake to pay same, by having a proper discharge":—*Held*: S. having done the work, could not maintain an action of *indebitatus assumpsit* for work & labour against A. for the value of it.—*SWEETING v. ASPLIN* (1840), 7 M. & W. 165; H. & W. 6; 10 L. J. Ex. 3; 151 E. R. 723.

352. ——— Employer not liable for delay.]—By a contract made between builders & building owners the builders undertook to erect & complete the "works" of a hospital, including

PART XIII. SECT. 1.

s. What amounts to novation—Part of work taken over by new contractor—Defective work by original contractor—Acceptance.]—Defts. passed a byelaw, for the purpose of acquiring the land & erecting a building at a cost of \$1,500, for the raising of which sum provision was therein made. B.'s tender for carpenter work, etc., including a shingle roof, was accepted, but at a special meeting of the council, at which only three of the councillors, who were present, and threw off \$4 a square, & which B. of the roof part of his contract, agreed to put on a metallic roof & L. \$6 a square, & it was resolved by the council that iron shingles instead of the wooden shingles be put on the roof of the new building. All this was done subject to the approval of the person who was not present, but who afterwards approved of it, & at whose instance L. ordered the material & did the work. L. received a payment on account, but on the discovery of some defects in B.'s work, defts. refused, although they had taken possession of the building, to pay the balance, on the grounds that the roof was not properly done, & L. was a sub-contractor under B., & there was no contract under seal with him:—*Held*: (1) the legal effect of this was to consummate a tripartite agreement, by which B. was to give up part of his contract, & L. was to do the work for a specified price, & that between plf. L., defts., & B. there was a novation of contract so far as the roof was concerned, & as to that L. became the principal & only contractor; (2) the

taking possession, payment on account, etc., was sufficient evidence to justify a finding of an acceptance of the work as an executed contract.—*LAWRENCE v. LUCKNOW VILLAGE* (1887), 13 O. R. 421.—CAN.

i. Effect of novation—Rights reserved under original contract—Pleading.]—To an action for breach of contract between plf. & deft., that deft. would build plf.'s railway to be completed by a day named, deft. pleaded equitably that plf., with consent of deft., agreed with E. to finish the railway, & deft., before breach, abandoned the contract, & E. entered upon & took possession of the works, & continued same with plf.'s consent. Replication, that by the agreement in the last plea mentioned, plf.'s rights against deft. were expressly reserved:—*Held*: on replication good, but plea bad, as not showing that the alleged substituted contract contained all the essentials requisite to make it a complete discharge & release of the original one.—*PORT WHITBY & PORT PERRY RY. Co. v. DUMBLE* (1871), 32 U. C. R. 36; 22 C. P. 36.—CAN.

PART XIII. SECT. 2, SUB-SECT. 1.

351 i. Whether privity of contract.]—A n agreement was entered into between gravel road co. & W., to construct a certain road at a certain price & on a certain route, which route was afterwards deviated from by the co., & were the engineer instructed plf., who constructed sub-contractors of W., to the deviate the extra portion created by maintain a n:—*Held*: plf. could not co., the co. in action against the road not having contracted with

plf.—*COWAN v. GODERICH NORTHERN GRAVEL ROAD Co.* (1860), 10 C. P. 87.—CAN.

351 ii. ———.]—T. contracted with defts., a corp'n., to construct certain work for them, & on the same day plf. agreed with T. to do a portion of it for \$900, subject to the same conditions which bound T. in his contract with defts. T. on the same day by letter authorised defts. to pay plf. for his work to the amount of T.'s contract with him, & defts. in answer agreed to this. Defts. paid plf. all but twenty per cent. as the work progressed, but their manager refused to certify as the contract required, complaining that it was improperly performed. He, however, had verbally agreed to pay plf.'s men \$100 if they would discharge the corp'n.:—*Held*: plf. had no right of action against defts., for there was no contract between them.—*STANDING v. LONDON GAS Co.* (1861), 21 U. C. R. 209.—CAN.

351 iii. ———.]—*COWAN v. MCCREADY*, 1 L. C. L. J. 66.—CAN.

351 iv. ——— Consent of Crown to subletting.]—Under a building or construction contract the Crown is not bound to pay any claim asserted by a mere sub-contractor, although the Crown has consented to the contract being sublet. Where the Crown declines to assent to any assignment there can be no implied assignment raised upon a consent to sublet so as to establish privity between the Crown & a third person to whom the original contractor has sublet the execution of the contract.—*PEARSON v. R.* (1917), 16 Exch. C. R. 225.—CAN.

-Sub-contracts: Sub-sect. 1.]

chimney-stacks & heating apparatus, in two years for £210,888, with penalties for delay. The chimney-stacks & heating apparatus were to be provided by specialists or sub-contractors. The building owners reserved to themselves the option to employ these specialists. Certain specialists for the work of the chimney-stacks & heating apparatus were appointed by the architect under the contract, & he made terms with them as to the works they were to execute & the prices they were to charge. These prices were subsequently paid by the builders out of the whole sum paid to them under the contract. The architect sent the builders orders to give to the specialists, & the builders made no objection, & gave them to the specialists. In the execution of these works there was delay on the part of the specialists whereby, as the builders alleged, they suffered damage:—*Held*: (1) the builders, & not the building owners, contracted with the specialists, & there was nothing in the contract inconsistent with such sub-contracts; (2) the builders had no right of action against the building owners for the delay of the specialists.—**LESLIE & CO., LTD. v. METROPOLITAN ASYLUMS DISTRICT MANAGERS** (1901), 68 J. P. 86; 1 L. G. R. 862, C. A.

Annotations:—**Folld.** Mitchell v. Guildford Union Grdns. (1903), 68 J. P. 84. **Consd.** Bower v. Chapel-en-le-Frith R. D. C. (1910), 75 J. P. 122; Young v. White (1911), 76 J. P. 14; Hampton v. Glamorgan County Council (1915), 84 L. J. K. B. 1506. **Refd.** Porter v. Tottenham U. D. C., [1914] 1 K. B. 663.

353. ———— *By a contract in writing with specification annexed, made between a builder & building owners, the builder undertook to do the whole of certain work, for a certain sum, but part of the work was to be sub-contracted. The specialists or sub-contractors were appointed by the building owners, but they were to be paid by the builder out of the contract price. The builder undertook to finish the work by a certain date, unless the works were hindered by (inter alia) delay on the part of the engineers or other specialists. The builder was not to be liable for any defects in works provided by the specialists, unless by reason of contributory negligence on his part or his having paid any final balance to the specialists without first having the architects' written authority to do so. In the course of the*

work there was delay on the part of the specialists whereby the builder suffered damage. The builder brought an action for breach of contract against the building owners, alleging that under the contract & specification there was an implied promise on the part of the building owners that the delivery & fixing of the specialists' work should not be unreasonably delayed, or that the delivery & fixing should be done at such reasonable times as to enable the builder to complete his work within the time fixed by the contract or within a reasonable time thereafter, & that the building owners had broken one or both of these implied promises:—*Held*: on the proper construction of the contract & specification, there were no such implied promise or promises, & there was no breach of contract on the part of the building owners, affording the builder a right to damages.—**MITCHELL v. GUILDFORD UNION GUARDIANS** (1903), 68 J. P. 84; 1 L. G. R. 857.

Annotations:—**Refd.** Young v. White (1911), 76 J. P. 14; Porter v. Tottenham U. D. C., [1914] 1 K. B. 663.

354. Whether employer liable to sub-contractor—Acceptance of goods.]—*Deft. contracted with a surveyor, who ordered goods from pltf. for the use of deft.'s house:—Held: deft. was not liable.*—**BRAMAH v. ABINGDON (LORD)** (circa 1810), cited in 15 East, at p. 66.

Annotation:—**Refd.** Paterson v. Gandasequi (1812), 15 East, 62.

355. ——— *Verbal promise to pay out of money payable to principal contractor.]*—*A. having undertaken to complete the carpenter's work in a house of deft., & to find all materials, & being unable to procure timber for that purpose, it was supplied by B. on the following undertaking being signed by deft.: "I agree to pay B. for timber to a house situate, etc., out of the money that I have to pay A., provided A.'s work is completed":—Held: this was not a collateral, but a direct undertaking by deft. to pay upon the completion of the work, & it was immaterial whether the work were done by A., or by another person.*—**DIXON v. HATFIELD** (1825), 2 Bing. 439; 10 Moore, C. P. 42; 130 E. R. 375; *sub nom.* **DICKSON v. HATFIELD**, 3 L. J. O. S. C. P. 59.

Annotation:—**Refd.** Sweeting v. Asplin (1840), 7 M. & W. 165.

356. ——— *Whether principal contractor acting as agent of employer—Evidence to show whether*

355 i. Whether employer liable to contractor—Verbal promise to pay—Continuing liability of contractor.]—*A. contracted to build houses for deft., & sublet the plastering to pltf. Pltf. commenced the work, but refused to go on without security, whereupon A. gave him a written order to the architects to give him certificates for the plastering as the work proceeded. After this pltf. got money from time to time from the architects without reference to A. A. failed, & pltf. stopped work for some weeks, when deft. told him to go on, saying he, pltf., knew all was right; & he thereupon went on & completed the work:—Held: there was no substitution of pltf. for A., but that A.'s liability continued; & deft.'s promise being collateral, & oral, was void, under the Stat. Frauds.*—**POUCHER v. TREAHEY** (1875), 37 U. C. R. 367.—**CAN.**

355 ii. S. P. BOND v. TREAHEY (1875), 37 U. C. R. 360.—**CAN.**

355 iii. ——— *New contract.]*—*Where a contractor for the building of a house made default in carrying on the work, & in consequence, the owner, acting under the contract, dismissed him, & agreed orally with a sub-contractor, who had been employed by the contractor, that if the sub-contractor*

would go on & finish the work he, the owner, would pay him:—*Held: the agreement with the sub-contractor was a new & independent contract, & was not a contract to answer for the debt, default, or miscarriage of another within Stat. Frauds, & was valid & binding on the owner, although not in writing.*—**PETRIE v. HUNTER, GUEST v. HUNTER** (1882), 2 O. R. 233; 10 A. R. 127.—**CAN.**

355 iv. ——— *Imperial Roofing Co. v. Dick* (1913), 23 W. L. R. 821; 10 D. L. R. 454; 4 W. W. R. 100.—**CAN.**

355 v. ——— *Liability as buyer of goods.]*—*B. a builder in the course of erecting certain houses became unable to get building materials on his own credit & applied to S. S. carried on the work employing B. as a servant paying him wages & also paying for materials ordered by B. S. informed C. & Co. of the arrangement & promised to see them paid for any materials supplied to B.'s order:—Held: C. & Co. had a claim against S. as buyer of the goods.*—**STEVENSON'S TRUSTEE v. CAMPBELL & SONS** (1896), 23 R. (Ct. of Sess.) 711.—**SCOT.**

a. ——— *Written agreement to pay.]*—**LOFTUS v. LEE** (1859), 18 U. C. R. 195.—**CAN.**

b. ——— *Payment guaranteed out of money payable to principal contractor—Completion by new contractor.]*—*In terms of his contract a building contractor was to receive no payment for work done until completion of the building. Materials were supplied to the contractor by a third person on the owner's guarantee of payment out of the moneys that might become due to the contractor under his contract. The contractor before such guarantee & contrary to his contract received from the building owner payments for portion of the work done; he eventually made default & the building was completed by a new contractor for less than the original contract price:—Held: inasmuch as on completion of the building the original contractor would have been entitled to a quantum meruit for the work he had done & as the payments to him were outside of his contract, the building owner was liable, under his guarantee to pay for the materials.*—**BEART (GEORGE) & CO. v. MINING & BUILDING MATERIAL CO.** (1910), T. P. D. 786.—**S. AF.**

356 i. ——— *Whether principal contractor acting as agent of employer—Whether sub-contract adopted by employer.]*—**ANDERSON v. GORDON** (1830), 8 Sh. (Ct. of Sess.) 304.—**SCOT.**

principal contractor indebted.]—Upon an action for goods supplied for the building of certain cottages the question arose whether the goods were supplied to a builder, afterwards bkpt., or to deft., who had employed the builder. Deft. called the builder, who stated that pltf.'s contract was made with himself, & that he had received money from deft. in respect of the cottages:—*Held*: he might also be asked by deft. which way the balance was between him & deft. at the time of the bkpcy.—*GERISH v. CHARTIER* (1845), 1 C. B. 13; 14 L. J. C. P. 84; 4 L. T. O. S. 293; 9 Jur. 69; 135 E. R. 439.

357. — Evidence that employer real principal—Orders to others.]—On the trial of an action to recover from deft. a sum of money for work done & materials supplied in respect of certain dwelling-houses & premises, it was alleged by pltf., & denied by deft., that he, pltf., had received orders from deft. to do the work & supply the materials. The dwelling-houses were being erected by L. & B., who had originally given orders to pltf., & at the trial it was contended for deft. that credit had been given to L. & B. & that he was simply mtgee. It was contended for pltf. that deft. was really owner & personally interested in the premises, & that L. & B. were his agents:—*Held*: pltf. was at liberty to call other persons to prove that they had received orders from deft. personally to do work or to supply materials upon or for the same dwelling-houses, as such proof was evidence to show that deft. was really the owner & person interested in the dwelling-houses.—*WOODWARD v. BUCHANAN* (1870), L. R. 5 Q. B. 285; 39 L. J. Q. B. 71; 22 L. T. 123.

358. — Prime cost items—Contract for benefit of employer.]—Building owners contracted with building contractors for the erection of a building, for the purposes of which certain specialities were to be ordered from stated firms. Amongst the specialities were certain casements. Many months after the head contract was entered into the building owners invited pltf. to quote for the casements according to a specification, which provided that the amount of the accepted quotation would be inserted as a "prime cost item" in the building contract, that pltf. would enter into an agreement with the building contractors to execute & complete the casements within a given time under penalty, that the architect of the building owners would have power to vary the work, & that payment for the work should only be made on the certificate of that architect. Pltf. having quoted according to this specification, the building owners forwarded the quotation to the building contractors, with a request that they should place the order with pltf. Subsequently the building contractors informed pltf. that they, the building contractors, had instructions to accept pltf.'s estimate for the casements. In an action by pltf. to recover a balance of the price of these casements from the building owners:—*Held*: while the contract for the casements was *prima facie* a contract with the building contractors, it was also a contract made in fact by the building contractors acting as agents on behalf of the building owners as real principals, because it was to procure something for their benefit, & on the facts pltf. were entitled to judgment.—*CRITTALL MANUFACTURING CO. v. LONDON COUNTY COUNCIL & MARCH* (1910), 75 J. P. 203.

361 i. — For work outside original contract—Extras ordered by architect.]—*COWAN v. GODERICH* NORTHERN GRAVEL ROAD CO. (1860), 10 C. P. 87.—*CAN.*

o. — Acceptance of order drawn by contractor—Completion by third party on default of contractor.]—M., by a written contract, agreed with deft. for the erection of a dwelling house in two

Annotations:—*Fol* *White* (1911), 76 J. P. 14. *Dtd.* *County Council*, [1917] A. C. 13. *Hampton v. Glamor* **Contractor debited in**

sub-contractor.]—Pltf., who were specialists in steel work, tel. the execution of architects employed by deft. for of a certain work, which formed part of a which was to be erected for deft., the owner. At the date of the tender, which the accepted, pltf. did not know the names of the builder or of the building owner. Some months after the tender a building contract was signed the building owner, which contained the usual clauses as to the employment of specialists, & which provided for the steel work a sum in excess of that at which pltf. had undertaken to carry it out. Subsequently the builder gave pltf. an order for the steel work in accordance with their tender. Shortly before the conclusion of his work by the builder, the architects, at the request of pltf., sent the builder a certificate & a cheque for £500, stating that this included £150, being part of the sum due to pltf. The builder went into liquidation without having paid pltf. the £150. In an action by the specialists against the building owner to recover that sum:—*Held*: the mere fact that pltf. entered the name of the builder in their books as their debtor up to the date of his bkpcy. was not a sufficient election to preclude their having recourse to the building owner, & in substance the contract with pltf. was made with the builder acting as agent for deft., & pltf. were entitled to judgment.—*YOUNG & CO., LTD. v. WHITE* (1911), 76 J. P. 14; 28 T. L. R. 87.

Annotation:—*Dtd.* *Hampton v. Glamorgan County Council* (1915), 81 L. J. K. B. 1506.

360. — — — — —.]—A builder contracted with a county council to build a school in accordance with the specifications & directions of the council's architect for £13,600. The specification contained certain provisional items, including the following: "Provide £450 for a low pressure heating apparatus." A hot-water engineer submitted a scheme to the architect for the heating of the school for £391, & by the direction of the architect this scheme was accepted by the builder. During the progress of the work the builder paid to the engineer £200 on account, but he was unable to pay the balance. In an action by the engineer against the council as building owners for payment of the balance of his account:—*Held*: upon the construction of the building contract, the builder was to erect the school for a lump sum, including, if required, the heating apparatus up to a cost of £150, & the builder, in employing a specialist to put up the heating apparatus, was acting as a principal & not as the agent of the building owners, & the action failed.—*HAMPTON v. GLAMORGAN COUNTY COUNCIL*, [1917] A. C. 13; 80 L. J. K. B. 106; 115 L. T. 726; 81 J. P. 41; 33 T. L. R. 58; 15 L. G. R. 1, H. L.; *affg.* (1915), 84 L. J. K. B. 1506, C. A.

Annotation:—*Refd.* *Elliott v. Roberts*, [1916] 2 K. B. 518.

361. — For work outside original contract—Production of original contract—Proof of distinct contract.]—A sub-contractor, suing the employer for work extra the original contract, must put in that contract, if in writing, & also prove a separate & distinct contract with the employer to do the work sued for.—*ECCLES v. SOUTHERN* (1861), 3 F. & F. 142, N. P.

months from date, & if M. neglected to build the house deft. was to be at liberty to purchase material & employ workmen to finish it, & deduct the cost of the material, etc., out of the price.

Sect. 2.—Sub-contracts: Sub-sect. 1 & 2.]

362. Inference of ----- from conduct—Question of fact.]—Deft. having employed a builder to erect some houses, & given a guarantee for a supply of materials to the builder to a certain amount, & afterwards an order for the further supply to a certain amount, & more materials having been supplied on the order of the builder, deft. being constantly on the premises:—*Held*: it was for the jury whether he had so acted as to lead pltf. to believe that the latter supply was to be on his credit.—**SMITH v. RUDHALL** (1862), 3 F. & R. 143, N. P.

363. — Payment on architect's certificate.]—Deft. entered into a contract with a builder, by which the latter agreed to build a house for him, under the supervision of an architect. The contract provided that the provisional sums for goods to be ordered from special artists or tradesmen should, as the architect should certify, be payable by the builder or the building owner. Special goods according to a particular design were ordered by the builder from pltf., a metal worker, & the architect certified the sum for these goods as due from deft. to pltf., deducting the amount from the certificate given to the builder:—*Held*: deft. was liable to pltf.—**HOBBS v. TURNER** (1902), 18 T. L. R. 235, C. A.

Annotations:—**Fold**, *Crittall Manufacturing Co. v. L. C. C. & March* (1910), 75 J. P. 203. **Conad**, *Young v. White* (1911), 76 J. P. 14. **Distd**, *Hampton v. Glamorgan County Council*, [1917] A. C. 13.

364. — What certificate sufficient.]—Where, by the terms of a sub-contract, the sub-contractors are to be paid upon the certificates of the architect, & there is no power in the sub-contract to vary the work to be done by the sub-contractors, the only certificate that will entitle the sub-contractors to payment is a certificate relating to the work they have contracted to perform. If they vary the work on the architect's instructions no valid certificate for the final balance due under their contract can be given to them, although other work, equivalent in value to that specified in their contract, has been performed by them.—**ASHWELL & NESBIT LTD. v. ALLEN & Co.** (1912), 2 Hudson's B. C. 4th ed. 462, C. A.

365. Direct payment to sub-contractor—On delay by contractor—Contractor presenting own petition in bankruptcy.]—In Sept., 1903, A. signed a contract with a local authority to construct sewage works at a price to be paid to him by monthly instalments, less 10 per cent., on the

Pltf. agreed to supply M. with lumber to be used in the building, & M., after a portion of the lumber had been placed in the building, gave pltf. an order on deft. for \$351.46, expressed to be "for lumber used in your house one month after the building is finished," which deft. accepted. M. failed to complete the building, & deft. employed a third party to do so in accordance with the terms of the agreement:—*Held*: deft. was liable to pay pltf., notwithstanding that M. did not complete the building.—**GARNER v. HAYES** (1884), 10 A. R. 24.—**CAN.**

d. Employer taking assignment of contractor's rights against sub-contractor—Right to sue sub-contractor—Damages for defective work.]—**CONSTANT v. KINCAID & Co.** (1902), 4 F. (Ct. of Sess.) 901.—**SCOT.**

e. Right of sub-contractor to remove materials & plant—After directions to discontinue.]—**ASHFIELD v. EDGELL** (1891), 21 O. R. 195.—**CAN.**

f. Whether sub-contractor bound by forfeiture clause.]—Under the circum-

stances (*See p. 422, ante*):—*Held*: the sub-contractor was not bound by clauses contained in the original contract with the dismissed contractor, providing for forfeiture, etc.—**PERRIE v. HUNTER**, (**GUEST v. HUNTER** (1882), 2 O. R. 233; 10 A. R. 127.—**CAN.**

g. Lien of sub-contractor—As contractor.]—Under the circumstances (*See p. 422, ante*):—*Held*: the sub-contractor was entitled to a lien for all work done as a "contractor" & as to such work he was no longer in the position of a sub-contractor.—**PETRIE v. HUNTER**, (**GUEST v. HUNTER** (1882), 2 O. R. 233; 10 A. R. 127.—**CAN.**

h. — Completion by contractor's surety on abandonment.]—W. entered into a contract with M. to do certain carpenter work on buildings for a contract price of \$2,690, which was afterwards, after taking an account of the extras to & omissions from the contract, increased to \$2,781.85. M. proceeded with the contract, & did work to the value of \$2,350, and received on account \$2,125, when he failed & notified W. that he could not proceed

certificate of the engineer of the local authority, the 10 per cent. to be retained & paid to A. six months after completion of the works. The contract also provided that certain machinery for the works was to be supplied to A. by specified firms, & that (clause 54), "if the engineer shall have reasonable cause to believe that the contractor is unduly delaying proper payment to the firms supplying the machinery, he shall have power, if he thinks fit, to order direct payment to them." On Oct. 12, 1904, A. was adjudicated bkpt. on his own petition. At this date the contract was substantially completed, & there was then due under it £1,574 15s. 10d. only, of which £1,349 17s. 8d. was retention money & £224 18s. 2d. was a sum payable on the engineer's next certificate, & these two sums were claimed by the trustee in bkpcy. At the same date A. owed £836 8s. 9d. in various amounts to the specified firms for machinery supplied to him for the works, & subsequently the engineer in 1905 made two orders under clause 54 directing payment of the £836 8s. 9d. out of the £1,574 15s. 10d. to the firms in settlement of their accounts:—*Held*: (1) A. by presenting his own petition in bkpcy. "unduly delayed proper payment" to the machinery firms within clause 54; (2) the power conferred by that clause on the engineer was not annulled or revoked by A.'s bkpcy., & the firms by virtue of the two orders of the engineer were entitled to be paid the £836 8s. 9d. out of the £1,574 15s. 10d. in priority to the claim of the trustee.—*Re WILKINSON, Ex p. FOWLER*, [1905] 2 K. B. 713; 74 L. J. K. B. 969; 54 W. R. 157; 12 Mans. 377.

366. Money due to principal contractor in hands of employer—Right of sub-contractor to receive or injunction restraining employer from parting with money.]—**BURNAY v. AMBACA RY. CONSTRUCTION Co.** (1891), 7 T. L. R. 545.

367. Lien of sub-contractor—On purchase-price payable to principal contractor.]—**BELLAMY v. DAVEY**, No. 327, *ante*.

368. — — — — —.]—**PRITCHETT & GOLD & ELECTRICAL POWER STORAGE Co., LTD. v. CURRIE**, No. 328, *ante*.

SUB-SECT. 2.—RELATIONS BETWEEN PRINCIPAL CONTRACTOR AND SUB-CONTRACTOR.

369. How far terms of principal contract binding on sub-contractor—Express agreement to be bound—Proportionate application of provisions as to retention money.]—L. contracted to con-

with the contract. W. then entered into a contract with C., who was M.'s surety, to finish the work, which he did at an expense of \$525.88. Certain sub-contractors & employees of M. filed liens, & W. moved to have them vacated on the ground that he was entitled to apply the ten per cent. drawback in completing the contract:—*Held*: the amount upon which the ten per cent. drawback was to be calculated was not the whole amount of the contract price, but the amount of the work done by the contractor when he failed & abandoned the work.—*Re CORNISH* (1884), 6 O. R. 259; *overd.*, **RUSSELL v. FRENCH** (1897), 28 O. R. 215.—**CAN.**

PART XIII. SECT. 2, SUB-SECT. 2.

369 i. How far terms of principal contract binding on sub-contractor—Express agreement to be bound—Date of completion.]—A stipulation was contained in a sub-contract that the work done thereunder must be in accordance with the specifications & general conditions of the original contract, which empowered the architect to require the

struct a council chamber, etc., for an urban district council. G. was employed by L. as sub-contractor to do certain part of the work. The sub-contract provided (*inter alia*) that "the terms of payment for the work in question shall be exactly the same as those set forth in clause 30 of the conditions of contract." Clause 30 of the conditions of contract was as follows: "The contractor shall be entitled, under the certificates to be issued by the architect to the contractor, to be paid at the rate of 80 per cent. of the value of the work so executed in the building until the balance retained in hand amounts to £2,000, after which time the instalments shall be up to the full value of the work subsequently executed." When the works were practically completed & so certified by the architect, £1,500 was to become due, £300 more at the expiration of three months, & £200 at the expiration of twelve months from completion. The whole cost of the work was about £35,000, & the amount of G.'s sub-contract was about £1,050. After the completion of the work, K., the surveyor employed by the architect, wrote as follows: "[the architect] desires me to say that he has been through your accounts in this case, & allowed the repairs to the terrazzo in full, although he very much doubts the propriety of the charge, but that he entirely declines to allow the charge of repairs to wood-block flooring, which he says was badly laid in many places, & was continually complained of."

contractor to remove defective work & to replace the same; & the original contract provided that the works should not be deemed completed until the architect had given his final certificate:—*Held*: this did not postpone the date of the completion of the work done under the sub-contract until the original contract had been passed by the architect.—*KASSON (J. W.) & Co. v. MURRAY* (1904), 23 N. Z. L. R. 802.—N.Z.

369 ii. ——— *Whether arbitration clause incorporated—Disputes between contractor & sub-contractor.*—A contractor, who had contracted with a railway co. for the construction of certain works, entered into a sub-contract for the execution of part of the work. In the contract between the principal contractor & the sub-contractor it was stipulated that the work was to be executed "according to plans & specifications," which included a "general specification," forming part of the contract between the principal contractor & the railway co. This "general specification" contained a clause providing that disputes were to be submitted to arbn. In an action by the sub-contractor against the principal contractor for certain sums alleged to be due under the sub-contract, the principal contractor pleaded that the claims made in the action fell within the arbn. clause of the "general specification," which he maintained was imported into the sub-contract:—*Held*: the arbn. clause of the general specification, while it was incorporated in the sub-contract to the effect of making the decisions of an arbitrator in questions between the railway co. & the principal contractor binding upon the sub-contractor, was not incorporated in the sub-contract *quoad* matters which concerned only the rights *inter se* of the principal contractor & sub-contractor.—*GOODWINS, JARDINE & Co. v. BRAND* (1905), 7 F. (Ct. of Sess.) 995.—SCOT.

Arbitration clauses, generally, see Part XV., *post*.

369 iii. ——— *Defects remedied by contractor.*—Deft. who had the contract for the construction of a building sublet the lathing & plastering to pltf. The work as completed by pltf. was

not satisfactory to the architect in charge, & he, in accordance with the provisions appearing in the specifications, had the defects made good, & the expenses of so doing were paid by deft.:—*Held*: pltf. was bound by the plans & specifications since he was content to put in his tender in accordance with them, & deft. entitled to judgment on his counterclaim for making good defects in pltf.'s work.—*MITCHELL v. FLODDEN* (1906), 4 W. L. R. 194.—CAN.

369 iv. ——— *Conflict between contract & sub-contract—(Construction.)*—*PLACE v. REES & Co.* (1894), 13 N. Z. L. R. 610.—N.Z.

1. ——— *Alterations by employer—Covered by principal contract.*—Declaration, that a section was laid out on a certain portion of a railway, & deft. had contracted with the contractors with the co. for making the road; & in consideration that pltf. would do certain work on the section at certain prices & rates, deft. promised pltf. that he should, in a reasonable time after making his contract, have possession of the section, to enable him to go on with his work; that pltf. commenced the work & did a large portion thereof, & frequently requested deft. to put him in possession of the remaining portion of the section to enable him to complete his contract. Breach, that it was not in the power of deft. to give pltf. possession when so requested, & that the co. changed & altered the line of road, so that the section was located at a place & on a line different from that on which it had theretofore been:—*Held*: on demurrer, declaration bad, for it appeared that the change of line had been made by the co., & pltf.'s agreement with deft. was subject to the conditions of deft.'s original contract.—*SUMMERS v. GEARY* (1853), 11 U. C. R. 134.—CAN.

m. ——— *Measurements of engineer of employer—Binding.*—*JARVIS v. DALRYMPLE* (1853), 11 U. C. R. 393.—CAN.

n. ——— *Knowledge of terms.*—*CARROLL v. GILBERT* (1904), 3 O. W. R. 357.—CAN.

370 i. *Liability of contractor to pay sub-contractor—For extras—Work exe-*

L. retained part of the money payable to G., thereupon brought an action for the balance b the architect gave his certificate that the v was completed to his satisfaction. L. set up (*inter alia*) that clause 30 of the contract entitled him to do so, & that there was no certificate of the architect that the work was completed to his satisfaction:—*Held*: L. was justified in retaining a part of G.'s contract price proportional retained from his by the council.—*WALKER & Co., LTD. v. LAWRENCE & SON* (1906), 2 Hudson's B. C. 4th ed. 382, C. A.

370. *Liability of contractor to pay sub-contractor—For extras—Work executed under directions of engineer—Recovery by contractor for whole of extra work.*—A. having agreed with certain trustees to build a bridge, according to plans & specifications, it being stipulated that he should be paid for extra work directed by the engineer of the trustees, employed B. to execute the masonry & piling, & B. also entered into an agreement with C. for executing the piling. A. was present twice during the progress of the work; on the first occasion, he only looked on, but on the second he inquired of C. why the work was suspended, & C. told him that he wanted money to go on with the extra work directed by the engineer; A. said he should have money, & gave a bill of exchange to B., from whom he took a receipt, & B. passed it to C., also taking a receipt. In an action by B.

under directions of engineer—Reference to principal contract.—Pltf., a sub-contractor, was proceeding with the work when the engineer in charge decided upon having a description of mason work superior to & different from that specified in defts.' original contract with the co. who employed them; & one of defts. then desired pltf. to go on with the work as required, & promised to pay the additional expenses incurred by the change. Pltf. sued on the common counts for the value of the work done upon that undertaking, not under the contract:—*Held*: although it was stipulated that he should abide by the directions of the engineer, pltf. might refer to defts.' original contract with the co. to show what kind of work was contemplated by his agreement, & that he was entitled to recover under the common counts for extra work; for, as pltf.'s contract was evidently made with reference to that under which defts. were acting, it would be impossible, without looking at both, to put a just construction on their agreement.—*LOGAN v. STRANAHAN* (1854), 12 U. C. R. 15.—CAN.

370 ii. ——— *Plans defective as to site.*—A party sub-contracted to erect a lighthouse according to plans & specifications submitted. It was afterwards found that there were greater undulations & inequalities in the ground than could have been gathered from the plan, the contractor having taken this risk. The sub-contractor found it necessary to put in extra work to complete the contract. In an action by the sub-contractor for extras:—*Held*: the plan was part of the contract only in so far as it was expressly referred to & incorporated in the terms of the contract, & that unless there was something in the character of the ground of an unusual & extraordinary kind which should have been brought to the notice of the sub-contractor, he must be held to have taken the risk.—*BROWN v. COLEMAN* (1884), 7 Nfld. L. R. 38.—NFLD.

370 iii. ——— *Work omitted by change.*—Defts. were the contractors for a building, & pltf's sub-contractors for the stone & masonry work. Pltf's claimed payment for extra plastering, not originally provided for:—*Held*:

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whole against the trust for the work, including the extra piling, by C. against the trustees. On a reference of an action by C. against the trustees, A. to recover for the extra piling, the arbitrator awarded that a verdict should be for C. for his claim, deducting for that portion which had been paid to B. :—*Held*: there was sufficient evidence, in point of law, to support the award.—PEARSON v. GRAHAM (1834), 3 L. J. Ex. 175.

371. — Contract providing for payment of extra work—Immaterial alteration in contract by sub-contractor.—A. agreed to do for B. & Co. all the woodwork on an iron ship, which B. & Co. were building for M. & Co. according to a certain tender, the whole to be completed for £3,800. The contract or tender contained the following clause: "Any important work not mentioned in this tender that may be required to be done by the owners, to be paid for by them, in addition to the amount herein specified." The work was undertaken by A. for B. & Co. upon the faith of a guarantee by C. as follows: "In consideration of your contracting with B. & Co., for the woodwork of an iron ship now building by them for M. & Co., we hereby guarantee the payment to you according to the contract." The word "important" in the contract was inserted by A. with the consent of B. & Co. after the guarantee was signed by C. :—

although pliffs. did plastering not provided for, more plastering was omitted by the change, & pliffs.' claim failed.—WINNIEG STONE CO. v. SENECA (1910), 14 W. L. R. 570.—CAN.

370 iv. — Whether work comprised in sub-contract—Rate of payment.—SWANSON v. MCARTHUR (1914), 28 W. L. R. 870; 20 D. L. R. 454; 24 Man. L. R. 632.—CAN.

370 v. — Construction of agreement.—LAWSON v. BRUNER (1914), 14 E. L. R. 293.—CAN.

370 vi. — Set-off—Admissibility of evidence.—LEBLANC v. LUTZ (1917), 44 N. B. R. 398; 34 D. L. R. 454.—CAN.

372 i. — For goods supplied & used in building—Construction of contract.—L. advertised for tenders for an addition to a store, intending to furnish the bricks for the work himself. He afterwards decided that the contractor should furnish the bricks, & the architect notified the persons tendering by leaving a written notice on his desk where the specifications were put for their inspection, but no notice of the alteration was made in the specifications. Pltf., it was shown, tendered for the work, but deft.'s tender was accepted, & pltf. sub-contracted under him. Upon an action brought by the sub-contractor against the contractor for the price of the bricks :—*Held*: upon the ordinary reading of the contract pltf. was bound to furnish the bricks.—IRESON v. MASON (1862), 12 C. P. 475.—CAN.

p. — Completion after payment assured by surety—Parties liable.—A. contracted with a co. to make a highway, & B. became his security to them. A. then employed C. to cut out certain timber for him, & while C. was thus engaged A. failed in his contract with the co. B. told C. to go on & he would see him paid. Upon completing his work C. sued A. & B. jointly :—*Held*: there was no joint contract by A. & B. with C., but A. was primarily liable on his contract, & B. as a guarantor.—NICHOLAS v. KING (1849), 5 U. C. R. 321.—CAN.

Guarantees & sureties generally, see Part XIV., post.

q. — Amount received by contractor from owner—Further amounts not received owing to default.—Def. had a contract with a railway co. for the construction of about fifty miles of their railway, & pltf. was the assignee of a sub-contractor under def. for about four miles. Pltf.'s work was all completed, & accepted by the co., & he claimed for percentages retained by def. up to a certain date, which def. had received, & for work done after that date, for which def. had not been paid, the co. having put an end to deft.'s contract with them owing to his default :—*Held*: pltf. was entitled to recover the whole amount claimed by him.—MCBRIEN v. SHANLY (1874), 24 C. P. 28.—CAN.

r. — Approval of owner condition precedent—Formal approval not obtained.—In terms of a sub-contract for the erection of certain buildings it was a condition that the sub-contractor could not demand payment from the contractor until he obtained the building owner's approval of his work. The work done was unsatisfactory & the owner after making certain deductions paid the contractor for a portion of the work :—*Held*: the sub-contractor was entitled to claim from the contractor the amount so paid although the owner's approval had not been formally obtained.—COOPER BROTHERS v. HOWARD, [1918] T. P. D. 91.—S. AF.

s. — Completion by new contractor—On failure of original contractors.—TUCKER v. PUGET SOUND BRIDGE & DREDGING CO. (1910), 14 W. L. R. 468.—CAN.

t. — Agreement as to rate of payment—Extras.—NORDQUIST v. PETERSON (1910), 14 W. L. R. 397.—CAN.

a. — Whether sub-contract determined—Works taken over by employer—Implied undertaking by employer to complete.—Def. entered into a contract with the Crown for the construction of a tunnel. Def. subsequently

Held: the contract bound B. & Co. for extra work done, they being the persons referred to as "the owners."—ANDREWS v. LAWRENCE (1865), 19 C. B. N. S. 768; 144 E. R. 989.

Extras generally, see Part VI., ante.

372. — For goods supplied & used in building—Implied promise to pay.—Pltfs. were employed as specialists by the architect under a building contract to supply door handles & door furniture for the building, & shortly before the delivery of the goods he informed defts., the builders, that the goods were being supplied by pltfs. The goods were duly delivered & were used by defts. in the building. In an action by pltfs. to recover the price of these goods, from defts. :—*Held*: as the goods had been supplied to, & used by defts., an implied promise by defts. to pay for the goods ought to be inferred.—RAMSDEN & CARR v. CHESSUM & SONS & WARD (1913), 110 L. T. 274; 78 J. P. 49; 30 T. L. R. 68; 58 Sol. Jo. 66, H. L.

373. Defective work by sub-contractor—Liability limited—Successful counterclaim by employer against contractor for defects—Liability of sub-contractor for costs.—Pltfs. having undertaken the repairs of a steamship for the owners, employed defts., an engineering co., to construct a new crank shaft. Defts. agreed to do so, upon the terms of their not being responsible for failure of material or workmanship beyond the replacement of faulty work supplied by them. In an action by pltfs. against the shipowners to recover the price of the shaft which had been

entered into a sub-contract with pltf. whereby the latter agreed to cart the material for the contract, & (*inter alia*) deft. was to retain twenty-five per cent. of all moneys due under the sub-contract until after the expiration of thirty-one days after being notified by deft. that no more carting was required. When carrying out his contract deft. received a notice from the Minister of Public Works that, as he had failed to comply with certain requisitions as to employment of labour & otherwise to increase the rate of progress of the works, the Minister, in pursuance of the power vested in him by the contract, did take the works out of his hands, & did also give deft. notice of his intention to carry on the works under the direction of the resident engineer. Pltf. claimed that the effect of this was to determine the contract of deft. with the Crown, & to put an end to the sub-contract & so entitle him to sue deft. for the retention money :—*Held*: (1) the notice & taking-over of the works did not put an end to the contract of deft. with the Crown, & both the contract & sub-contract still subsisted; (2) the Minister was the agent of deft. & impliedly undertook to complete the works in terms of the contract.—MILLS v. MCWILLIAMS (1914), 33 N. Z. L. R. 718.—N.Z.

b. — Reference to master to ascertain amount—Allowances beyond scope of reference.—WEDDELL v. LARKIN & SANGSTER (1919), 17 O. W. N. 39.—CAN.

373 i. Defective work by sub-contractor—Contractor's right to damages.—A contractor can sue a sub-contractor for damages for work improperly done in a house where sub-contractor himself is responsible to the owner for all the work done.—RITCHIE v. PLAXTON (1907), 5 W. L. R. 414.—CAN.

c. Delay by sub-contractor—Measure of damages.—Where a sub-contractor failed to furnish the contractor the steel sash required for a large building, in time to enable the building to be closed in before the frost came, & the contractor was compelled

supplied by defts., the shipowners counterclaimed for damages for breach of contract in consequence of the shaft having broken down on a voyage. Pltfs., after communicating with defts., who repudiated all responsibility, defended the counterclaim, & the shipowners succeeded on their counterclaim, the shaft being found to have been of faulty workmanship. In an action by pltfs. to recover from defts. the costs of the shipowners' counterclaim, as damages resulting from defts.' breach of contract:—*Held*: the terms on which defts. had supplied the shaft did not relieve them from paying these costs, & pltfs. were entitled to recover the costs of the counterclaim, except so far as they were increased by any issue other than the faultiness of the material or workmanship of the shaft.—*PRINCE OF WALES DRY DOCK CO. (SWANSEA), LTD. v. FOWNES FORGE & ENGINEERING CO., LTD.* (1904), 90 L. T. 527; 9 Asp. M. L. C. 555, C. A.

SUB-SECT. 3.— COST AND PROVISIONAL SUMS.

374. Nature of & effect of inserting prime cost items.]—The term "prime cost" in a contract indicates that the item to which it relates will be

carried out by somebody other than the contractor himself. Entering an item as a "provisional item" has the effect that the contractor bases his contract upon the sum named of provisional cost of the article. In the case of items the contract made to procure point of fact a contract in which the good owner is the real principal, because, if it is a prime contract, he gets the benefit of it; if it is a provisional contract, he suffers the loss.—*CRITTALL MANUFACTURING CO. v. LONDON COUNTY COUNCIL & MARCH* (1910), 75 J. P. 203.

Annotations:—*Fold*. *Young v. White* (1911), 76 J. P. 14. *Obtd.* *Hampton v. Glamorgan County Council*, [1917] A. C. 13.

375. — No presumption that builder acting as agent of employer.]—There is no presumption in the case of prime cost or provisional items in a building contract that the building owner is liable upon the contract upon which the things in question are ultimately supplied, & that the builder is his agent in the matter.—*HAMPTON v. GLAMORGAN COUNTY COUNCIL*, [1917] A. C. 13; 80 L. J. K. B. 106; 115 L. T. 726; 81 J. P. 41; 33 T. L. R. 58; 15 L. G. R. 1, H. L.; *affg.* (1915), 84 L. J. K. B. 1506, C. A.

Annotation:—*Mentd.* *Elliott v. Roberts*, [1916] 2 K. B. 518. *See, further*, Nos. 358–360, *ante*.

Part XIV.—Guarantees and Sureties.

SECT. 1.—FOR DUE PERFORMANCE BY CONTRACTOR.

See, generally, GUARANTEE.

376. Whether surety discharged — Premature payments—Excessive advances—Nominal damages.]—By agreement between pltf. & S., S. was to perform certain works for pltf. for a certain sum, & to receive from time to time three-fourths of the cost of the part completed, the first payment to be made after one-eighth was performed, the remaining fourth part to be paid one month after the whole was completed, & if S. should fail to perform the work, pltf. might employ others to perform it, & deduct the expense from the sum payable to S. Deft. entered into a bond conditioned for performance of the agreement by S. S., after performing part of the works, abandoned the contract. Pltf., at the request of S., & upon new security given by him, had advanced to S., for assisting him in performing the works, a sum exceeding the whole cost of the works performed at the time of the abandonment, but less than the whole contract price. Pltf. had the works completed at an expense which, added to the cost of the part performed by S., was less than the whole contract price agreed on with S., but which,

added to the sum actually advanced to S., exceeded that contract price. Pltf. brought an action of debt on the bond, suggesting, as a breach, S.'s non-performance, & pltf.'s loss thereby. Deft. pleaded *non est factum*:—*Held*: pltf. was entitled to nominal damages only, the loss having arisen, not from the non-performance of S.'s contract, but from pltf. having advanced more than the contract required, especially as the sum advanced exceeded, not only the three-fourths, but the whole of the work completed, & as the advances had been made on a fresh negotiation with, & security taken from, S.—*WARRE v. CALVERT* (1837), 7 Ad. & El. 143; 2 Nev. & P. K. B. 126; Will. Woll. & Dav. 528; 6 L. J. K. B. 219; 1 Jur. 450; 112 E. R. 425.

377. — Advance of retention money.]—A contractor undertook to perform certain works, & it was agreed that three-fourths of the work, as finished, should be paid for every two months, & the remaining one-fourth upon the completion of the whole work:—*Held*: the sureties for the due performance of the contract were released from their liability, by reason of payments exceeding three-fourths of the work done having, without the consent of the sureties, been made to the

to enclose the building himself to avoid damage, the measure of damages is what would be a reasonable charge for doing that which the sub-contractor failed to do, not what the contractor suffered from imperfectly enclosing the building.—*NORCROSS BROTHERS CO. v. HOPE (HENRY) & SONS* (1916), 27 O. W. R. 451.—*CAN.*

d. — Whether contractor liable for damages.]—A sub-contractor who undertakes the construction of a section of a railway within a certain time, & only completes the same a year later than the date agreed upon, cannot maintain an action against the contractor for alleged damages caused by

the passage of the latter's trains during the period between the date when the work should have been finished & its actual completion.—*MCGREEVY v. MCCARRON*, [1885] 12 Q. L. R. 373.—*CAN.*

Damages for breach of contract, *see, generally*, Part VIII., Sect. 2, *ante*.

PART XIV. SECT. 1.

378 i. Whether surety discharged—Premature payments—Excessive advances.]—Payments were to be made according to architect's certificates, but the owner paid to the contractor before completion of the work more than the

amount of such certificates: the consent of the sureties, to such departure from the method of payment provided by the contract, had not been obtained:—*Held*: released from liability.—*SASKATCHEWAN MACKLIN SCHOOL DISTRICT NO. 2420 BOARD OF TRUSTEES v. SASKATCHEWAN GUARANTEE & FIDELITY CO.*, [1919] 2 W. W. R. 396.—*CAN.*

377 i. — Advance of retention money.]—Release of retention money without knowledge of the surety is a material alteration in the original obligation & the surety is discharged.—*NATHANSON v. DENNILL* (1904), T. H. 289.—*S. AF.*

Sect. 1.—For due performance of the whole work.

contractor before the completion of the whole work. —*CAIVERT v. LOND. DOCK CO.* (1838), 2 Keen. 638; 7 L. J. Ch. 90; 2 Jur. 62; 48 E. R. 774. *Annotations:—*33. *Distd. Bingham v. Corbitt* (1864), 12 W. R. H. & N. 353. *Refd. Newton v. Chorlton* (1853), 2 Drew. 333.

Advance of instalments not — Onus of proof as to sureties' knowledge.]—

A. contracted with B. to build for him a ship for a given sum, to be paid by instalments as the work reached certain stages; & C. became surety for due performance of the contract on the part of B., the builder. A. allowed B. to anticipate the greater portion of the last two instalments, & B., becoming bkpt. before the ship was finished, A. was compelled to expend a larger sum of money than the unpaid portion of the purchase-money in completing her. In an action by A. against C. to recover the excess, & also a stipulated sum by way of damages for the delay in the completion of the ship, C. pleaded that the prepayments were made to B. without the knowledge or consent of C., & that, by making such payments without his consent, A. materially & prejudicially altered his position as surety. To this A. replied that the advances so made by him to B. were made with the knowledge, authority, & consent of C., & at his request, or for his use & benefit, & on his account:—*Held*: the plea afforded a *prima facie* answer to the action, & the onus lay upon A. to prove that the advances were made with the knowledge & assent & at the request of the surety.—*GENERAL STEAM NAVIGATION CO. v. ROLT* (1858), 6 C. B. N. S. 550; 6 Jur. N. S. 801; 8 W. R. 223; 141 E. R. 572.

*Annotations:—*Fold. *Watts v. Shuttleworth* (1861), 7 H. & N. 353. *Mentd. Jonassolin v. Ransome* (1858), 3 C. B. N. S. 779; *Polak v. Everett* (1876), 24 W. R. 365.

379. — Contract to insure—Failure to insure.]—

Deft. became surety for the performance by H. of a contract with pltf. for the fittings of a warehouse at a fixed price. The contract between pltf. & H. contained a stipulation that pltf. should & might insure the fittings from fire at such time & to such amount as the architect might consider necessary, & deduct the insurance from the amount of the contract, & also that H. should & would provide to the satisfaction of the architect a dry & sufficient store for the reception of the fittings from time to time as such of them were completed, & until they could be received at the

warehouse. H. had completed two-thirds of the fittings, & they remained in his workshops to the knowledge & without the objection of pltf. or his architect. The workshops were accidentally burnt, & H. was unable to complete his contract:—*Held*: there was a contract by pltf. to insure, & by reason of his not insuring deft. was released in equity from the guarantee.—*WATTS v. SHUTTLEWORTH* (1861), 7 H. & N. 353; 5 L. T. 58; 7 Jur. N. S. 945; 10 W. R. 132; 158 E. R. 510, Ex. Ch.

*Annotations:—*Consd. *Lawrence v. Walmsley* (1862), 12 C. B. N. S. 799. *Refd. Re Barber, Ex p. Agra Bank* (1870), L. R. 9 Eq. 725; *Grant v. Budd* (1874), 30 L. T. 319; *Polak v. Everett* (1876), 24 W. R. 365; *Mansfield Union Grdns. v. Wright* (1882), 9 Q. B. D. 683; *Alliance & Dublin Gas Consumers' Co. v. Blott* (1886), 3 T. L. R. 111.

*380. — Misrecital of fact in contract.]—*By an indenture made between a local board, pltf., of the first part, certain contractors of the second part, & deft. of the third part, the contractors covenanted to do certain work upon the basis of a certain specification, & deft. covenanted to pay any loss that might be sustained from the non-performance of the work. The indenture recited that the specification had been signed by five members of the local board as was required by the local Act. In point of fact the specification had never been signed, although it had been acted upon:—*Held*: the mere fact of the specification not having been signed did not release the surety from his liability.—*RUSSELL v. TRICKETT* (1865), 13 L. T. 280; 30 J. P. 8.

*381. — Extension of work—Time for completion shortened—Separate conditions.]—*By agreement between pltf. & S., pltf. agreed to purchase of S. the ship *D.*, the price being a sum of money & the transfer to S. of pltf.'s ship the *L.* Pltf. also agreed to lend S. £6,000 on mtge. of the *L.*, & S. agreed to repair her, so as to class her eight years A1 at Lloyd's, & also to do anything remaining to be done to the *D.* within two weeks after that ship's arrival in London. Deft., as surety for S., gave his bond to pltf., conditioned to be void, if S. forthwith repaired the *L.*, & if S., within the two weeks mentioned, did all that remained to be done to the *D.* Pltf. & S. afterwards, without the knowledge of deft., made another agreement, whereby the time within which the *D.* was to be completed was shortened, & more was to be done to her than was included in the original agreement:—*Held*: the conditions in the bond as to the *L.* & the *D.* were separate &

*e. — Payments—On orders of contractor.]—*A surety was held not discharged by reason of payments made by the owner on contractor's orders to individuals to repay sums lent by them to the contractor to enable him to complete the work.—*CALGARY MILLING CO. v. AMERICAN SURETY CO. & TROMANHAUSER*, [1917] 2 W. W. R. 1253.—CAN.

*f. — Extending time for completion—Without surety's knowledge.]—*A surety is not discharged because the time fixed for completion of the work is extended without his knowledge.—*WRIGHT v. WESTERN CANADA ACCIDENT & GUARANTEE INSURANCE CO.* (1914), 29 W. L. R. 153; 20 D. L. R. 478; on appeal [1917] 3 W. W. R. 552.—CAN.

*g. — Non-compliance with specification—Without surety's knowledge.]—*A surety is not discharged from liability because disclosure was not made to him that cement called for by the specifications was not being used.—*FERRARA v. NATIONAL SURETY CO.*, [1917] 1 W. W. R. 719.—CAN.

*h. — Variation of contract—Compliance with local custom.]—*The surety is not discharged where, accord-

ing to the local custom or usage of the building trade, the additional cost of excavating when rock is unexpectedly struck is treated as an extra, & a new contract is made to cover the cost.—*WRIGHT v. WESTERN CANADA ACCIDENT & GUARANTEE INSURANCE CO.* (1914), 29 W. L. R. 153-4; 6 W. W. R. 1409; 20 D. L. R. 478; on appeal [1917] 3 W. W. R. 552.—CAN.

*k. — Contract abandoned before breach—Pleading.]—*PORT WHITBY & PORT PERRY RY. CO. v. DUMBLE (1871), 32 U. C. R. 36.—CAN.

*l. Liability for damage caused by contractor—Notice of action—Necessity of—Estoppel.]—*A contractor agreed to erect a building upon pltf.'s property. The agreement provided that the contractor should be solely responsible for damage caused to adjoining property, which should be made good at his expense. Deft. guaranteed the due fulfilment by the contractor of all conditions on his part to be performed. The contractor through negligence caused damage to the property of P., an adjoining owner: P. obtained judgment for £900 against the contractor & pltf. Pltf. satisfied the judgment & claimed from deft. £900.

Pltf.'s declaration did not allege that notice was given to deft. of the action of P. against the contractor & pltf.:—*Held*: (1) deft. had not discharged the onus of proving that by law notice of the action should have been given; (2) deft. was not precluded by the judgment in the previous action from questioning the amount claimed against him by pltf.—*SOUTH AFRICAN INDEPENDENT UNITED ORDER OF MECHANICS & FIDELITY BENEFIT LODGE v. GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPN., LTD.* (1916), C. P. D. 457.—S. AF.

*m. Right to complete contract & recover price—Or sue for damages for breach of contract.]—*Sureties have no legal right on failure of the principal to enter & complete the works.—*SLOWEY v. LODDER*, [1901] 20 N. Z. L. R. 321.—N. Z.

*n. — — — Apart from agreement.]—*A surety has no right, apart from agreement with the contractor, to complete the contract & sue for the contract-money or for damages for breach of contract.—*ROSS v. FRAIN* (1908), 27 N. Z. L. R. 970.—N. Z.

Insolvency of builder

distinct; & deft., though released, by the alteration made by the second agreement in the terms of the first, from his liability so far as related to the completion of the D., was not released from his liability in respect of the L.—**HARRISON v. SEYMOUR** (1866), L. R. 1 C. P. 518; Har. & Ruth. 567; 35 L. J. O. P. 264.

Annotations:—**Distd. Croydon Commercial Gas Co. v. Dickinson** (1876), 1 C. P. D. 707. **Refd. Polak v. Everett** (1876), 34 L. T. 128.

382. — Works made subject to supervision & approval of third party—Without knowledge of surety.—H. contracted with defts. to execute certain sewage works, for which he was to be paid upon the certificate of the surveyor of defts. On the same date H. as principal, & pltf. & another as sureties, entered into a bond to defts. for the due performance of the contract on or before a day fixed. H. failed to perform his contract, & became bkpt., & defts. then began an action against pltf. to enforce the penalty under the bond. Before the contract with H., defts. had entered into an agreement with a large owner of property in the neighbourhood, that the works should be executed at their joint expense, under the joint superintendence & control of his & their surveyor, but this agreement was never communicated either to H. or to pltf. On the failure of H. the works were placed in the hands of the landowner. Pltf. filed his bill against defts. only to restrain prosecution of the action, & the ct. awarded an injunction on the ground that the concealment of the last-mentioned contract was a circumstance which exonerated pltf. from all liability:—**Held**: as the landowner, who was virtually pltf. in the action, was not a party to the suit, & as the fact of the concealment could be raised by pltf. for his defence at law, the injunction must be dissolved.—**STIFF v. EASTBOURNE LOCAL BOARD** (1869), 20 L. T. 339; 17 W. R. 428, L. J.

383. — Alteration in position of surety due to fraud of contractor—Certificates fraudulently obtained.—By a contract for the construction of certain sewers for pltf., made between pltf., the contractors, & defts. as sureties for the contractors, the contractors covenanted that they would "well & truly" execute the works in question, & by a separate covenant the sureties covenanted that the covenant by the contractors should be "well & truly executed, performed, observed, fulfilled, & kept." The works & every

part thereof were to be conducted & completed under the superintendence of the pltf.'s engineer, whose decision as to the manner in which the work was executed was to be final & conclusive, & the contractors & defts. were not to be released from their obligations until after the expiration of six months from the engineer's certificate of completion, & the engineer had a certificate that all the conditions of the contract had been fulfilled to his satisfaction, after which the balance of 10 per cent. of the contract price of the works, which was to be retained by pltf., in their hands, was to be paid over to the contractors. The works were completed, & a certificate of completion was given by the engineer, & after the expiration of six months the engineer gave his final certificate, & the retention money was paid over to the contractors. It afterwards appeared that the works had not been executed in accordance with the contract, but had been executed in an improper & defective manner. In an action against the sureties to recover damages caused by the failure of the contractors to perform their contract, the jury found that the contract had not been complied with, that the work had been scamped & fraudulently done, that the certificates had been obtained by the fraud of the contractors, but that there was an omission on the part of the corp. to superintend the work properly, which led to the scamping of the work by the contractors:—**Held**: defts. were liable upon the contract of suretyship, & were not discharged upon the ground that a final certificate had been given under the contract, because upon the true construction of the contract, they were only to be discharged by a certificate valid & binding as against pltf., nor upon the ground that their position had been altered by the giving of the certificate & the payment over of the retention money, because these had been brought about by fraudulent acts of the contractors, against which defts. had guaranteed pltf., nor upon the ground of the omission of pltf. to superintend the works, because upon the true construction of the contract pltf. were merely given an option to superintend the works, but no duty to do so was imposed upon them.—**KINGSTON-UPON-HULL CORPN. v. HARDING**, [1892] 2 Q. B. 494; 62 L. J. Q. B. 55; 67 L. T. 539; 57 J. P. 85; 41 W. R. 19; 36 Sol. Jo. 624; 4 R. 7; *sub nom.* **KINGSTON-UPON-HULL CORPN. v. TURNER**, 8 T. L. R. 672, C. A.

—*Payment to his assignees.*—A surety cannot recover from the building owner expense of completing house where the owner has paid the builder's assignee in insolvency.—**PURCELL v. RAPHAEL** (1867), 7 N. S. W. S. C. R. 138.—**AUS.**

p. — & claim retention money.—A building contract contained the usual provisions for retention money. The contractor, after executing a certain portion of the work, abandoned the contract. The surety completed the building under the original contract, with the consent & at the desire of the building owner. The cost of so doing exceeded the amount of the retention money in the hands of the building owner when the contractor threw up the contract:—**Held**: the surety was entitled to be recouped out of the retention money for any loss incurred by him in completing the contract, & as such loss exceeded the amount of the fund, he was entitled to the whole of the retention money.—**CORRANS v. TRANSVAAL GOVERNMENT & COULL'S TRUSTEE** (1909), T. S. 605.—**S. AF.**

q. S. P. M'MAHON, LTD. v. O'NEILL (1915), 49 I. L. T. 129.—**IR.**

r. — Assignment of builder's rights—Preference.—**COLONIAL TRUST CORPN., LTD., OF GRAAFF-REINET v. SCHOOL BOARD OF PEARSTON** (1916), C. P. D. 275.—**S. AF.**

s. — Substituted contract—Whether entitled to payment according to original contract.—Pltf. were sureties to deft. for the performance by C. of an agreement to build cottages for £1,800, which deft. covenanted to pay to C., his exors., administrators & assigns, as follows: £800 to be advanced during the work, & the remaining £1,000 to be paid on completion by the conveyance to C. of specified premises. C. failed to perform his contract, & assigned it to pltf., having received £800 on account. Pltf. & deft. then entered into an agreement, to which C. was no party, reciting C.'s previous contract; pltf.'s liability as sureties for him; his non-performance & assignment to pltf.; that deft. at pltf.'s request, had agreed to give further time for completion, & that in consideration of the premises pltf. covenanted to finish the work according to the first agreement; & the parties mutually bound themselves in £1,000 for performance of this last

agreement:—**Held**: there was no covenant, either express or implied, on the part of deft. to convey to pltf., or to pay them £1,000.—**HALL v. GILMOUR** (1852), 9 U. C. R. 492.—**CAN.**

t. — Whether liable to subcontractor for extras.—L. agreed to construct a sewer according to plans & specifications prepared by an engineer. Part of the work was sub-let by L. to pltf. at an agreed price. After pltf. had commenced work, a new contract was made between the employers & L. & deft. became surety for L. Deft. was obliged to take over the work from L. In an action by pltf. for payment for extra work:—**Held**: deft. not liable.—**DRAKE v. CADWELL** (1910), 17 O. W. R. 539; 2 O. W. N. 282.—**CAN.**

u. — Misrepresentation of employer—Action for damages.—Pltf. became sureties to defts. for the completion by contractors of work, by a certain date. The contractors commenced the work, but did not complete it within the specified time, & abandoned the contract. Statements were then made by the clerk of defts. to pltf. in good faith, but erroneous either in law or in fact. Pltf.,

1. For due performance by contractor. Sect.
2. Part XV. See

384. Liability for costs to be paid by contractor—
Litigation not covered by contract.]—A contractor entered into a contract with pltfs. for the execution by him of certain works. The contract did not contain any agreement by the contractor at, in the event of litigation arising between him & pltfs. in connection with the performance of the contract & of his failing in that litigation & being ordered to pay the costs, he would pay them. Defts., as sureties for the contractor, gave a bond to pltfs. conditioned for the due performance by the contractor of his contract. Litigation having arisen between pltfs. & the contractor as to the performance of the contract, judgment was given against the contractor & he was ordered to pay the costs. Pltfs. sued defts. on their bond for the amount of the costs:—*Held*: as the liability of the contractor to pay the costs arose, not under the contract, but under the judgment, defts. were not liable.—*HOOLE URBAN DISTRICT COUNCIL v. FIDELITY & DEPOSIT CO. OF MARYLAND*, [1916] 1 K. B. 25; 85 L. J. K. B. 239; 114 L. T. 358; 80 J. P. 118; 60 Sol. Jo. 429; 14 L. G. R. 390; *affd.*, [1916] 2 K. B. 568, C. A.

SECT. 2.—FOR PAYMENT OF CONTRACTOR.

See, generally, GUARANTEE.

385. Whether surety discharged—Immaterial alteration in contract.]—A. agreed to do for B. & Co. all the woodwork on an iron ship which B. & Co. were building for M. & Co., according to a certain tender, the whole to be completed for £3,800. The contract or tender contained the following clause: "Any important work not mentioned in this tender that may be required to be done by the owners, to be paid for by them, in addition to the amount herein specified." The work was undertaken by A. for B. & Co. upon the faith of a guarantee by C., as follows: "In consideration of your contracting with B. & Co. for the woodwork of an iron ship now building by them for M. & Co., we hereby guarantee the payment to you according to the contract." The word "important" in the contract was inserted by A., with the consent of B. & Co., after the guarantee was signed by C.:—*Held*: the insertion of the word "important" had no material effect upon the liability of C. under the guarantee.—*ANDREWS v. LAWRENCE* (1865), 19 C. B. N. S. 768; 144 E. R. 989.

Part XV.—Arbitration Clauses.

SECT. 1.—IN GENERAL.

See, generally, ARBITRATION, Vol. II., pp. 347–355, 513.

386. Validity of arbitration clause—Exclusion of jurisdiction of ordinary tribunals—Till award made.]—Where there is an agreement to refer a question of amount due for work, etc., to an engineer, & to exclude the jurisdiction of the ordinary tribunals till an award shall be made by him, it will be valid.

Where all complaints as to delays of a vexatious kind are by the contract left to the absolute discretion of an engineer, a ct. of equity has no power to impose upon either of the parties to the contract any other terms than those which they have prescribed for themselves, & by which they

have agreed to be bound; but if the evidence establishes a case of gross misconduct in the engineer, or of wilful neglect or refusal or absolute incapacity in him to perform his duties, the case may be brought within the jurisdiction of the ct.

Where the engineer has not refused to discharge his duties according to the contract, & has done nothing to disqualify himself, but is still ready & willing to proceed to decide all matters between the parties to the contract, there remains no ground for the equitable interference of the ct.—*SCOTT v. LIVERPOOL CORPN.* (1858), 3 De G. & J. 334; 28 L. J. Ch. 230; 32 L. T. O. S. 265; 5 Jur. N. S. 105; 7 W. R. 153; 44 E. R. 1297, L. C.

Annotations:—*Expld.* *Ormes v. Beadel* (1860), 2 Giff. 166. *Refd.* *Bliss v. Smith* (1865), 34 Beav. 508; *Re Brighton Club & Norfolk Hotel Co.* (1865), 35 Beav. 204; *Goodyear*

believing in these statements, & in order to free themselves from liability, undertook completion of the contract. They proceeded with the work, & afterwards discovered that the statements made to them were untrue. Pltfs. thereupon abandoned the contract & brought an action claiming damages for loss sustained by them through misrepresentations of the clerk:—*Held*: there was no duty cast upon defts. to give pltfs. absolutely correct information; & as the statements complained of, though made without due inquiry, had been made in honest belief in their truth, defts. were not liable in an action of deceit.—*FARMER v. COOK COUNTY (CHAIRMAN, COUNCILORS, & INHABITANTS)* (1894), 13 N. Z. L. R. 311.—N.Z.

PART XIV. SECT. 2.

b. Whether surety discharged—Change of superintendent.]—Pltf. sued the sureties on a bond to him for the payment of the cost of a house, which pltf. was to build for the principal. The person who was to superintend the work was superseded by pltf. without the consent of defts.:—*Held*: the sureties could not be bound by the appointment of the new inspector,—

FELCH v. RITCHIE (1882), 3 R. & G. 407.—CAN.

c. Right to set off deductions for defects.]—A guarantor is entitled to set off any deductions for defects the owner would be entitled to make.—*DIEBEL v. STRATFORD IMPROVEMENT CO.* (1917), 38 O. L. R. 407; 33 D. L. R. 296.—CAN.

PART XV. SECT. 1.

d. Whether submission or not.]—It was provided that in case of difference between the contractor & the employer the written award of the architect should be final & conclusive, & that such award should be a condition precedent to legal proceedings in respect of a matter which might be the subject of award:—*Held*: a valid submission to arbn.—*STEIN v. OTTO* (1917), W. L. D. 2.—S. AF.

e. — Assessment of sums due under building contract.]—A covenant to construct, according to plan supplied by the engineer, at specified prices & that the work should be measured, calculated & determined by the engineer whose decision shall be final is not a covenant to refer to arbn. but to pay prices to be ascertained by the

engineer.—*CANTY v. CLARK* (1879), 44 U. C. R. 222.—CAN.

f. — Distinction between arbitration & valuation fixing price for work.]—A builder & employer agreed that E. was to inspect & value work done on the building up to the time of the agreement & his award was to be final:—*Held*: (1) the effect of the agreement was, that a price to be fixed by E. was to be paid for the work; (2) E. was not an arbitrator.—*Re LANGMAN & MARTIN* (1882), 46 U. C. R. 569.—CAN.

g. —It was provided that the contractor should complete works under the direction & to the satisfaction of the engineer, who should be sole arbiter as to the meaning of the contract & of the quantity, quality, or prices of any work or materials, & whose instructions on all subjects connected with the contract should be followed by the contractor:—*Held*: the engineer was not constituted an "arbitrator" by the contract, but the above provision merely made his decision in reference to the manner in which the work was to be carried out, & to all matters connected with the carrying out of the works, final.—*FRASER v. HAMILTON CORPN.* (1912), 32 N. Z. L. R. 205.—N.Z.

v. Weymouth & Melcombe Regis Corp. (1865), *Har. & Ruth*, 67; *Hood v. N. E. Ry.* (1870), 19 W. R. 266; *Wadsworth v. Smith* (1871), L. R. 6 Q. B. 332; *Larivière v. Morgan* (1872), 7 Ch. App. 554, n. **Mentd.** *Russell v. Sa Da Bandeira* (1862), 13 C. B. N. S. 149; *Stadhard v. Lee* (1863), 3 B. & S. 364; *Cooke v. Cooke* (1867), L. R. 4 Eq. 77; *Edwards v. Aberayron Mutual Ship Insee. Soc.* (1876), 1 Q. B. D. 563; *Hart v. Hart* (1881), 18 Ch. D. 670; *Botterill v. Ware Grdms.* (1886), 2 T. L. R. 621.

387. — Provisions against impeaching findings of arbitrator—Whether against public policy.]—A clause in a building contract providing that the valuations, certificates, orders, & awards of the arbitrator appointed thereunder should be final & binding, & should not be set aside for any pretence, charge, suggestion, or insinuation of fraud, collusion, or confederacy:—*Held*: not obnoxious to public policy, for, in the absence of fraud on the part of the parties to the contract, it was competent to them to agree not to raise any question of fraud in the arbitrator.—*TULLIS v. JACSON*, [1892] 3 Ch. 441; 61 L. J. Ch. 655; 67 L. T. 340; 41 W. R. 11; 8 T. L. R. 691; 36 Sol. Jo. 640.

Annotations:—**Mentd.** *Foster & Dicksee v. Hastings Corp.* (1903), 87 L. T. 736; *Pearson v. Dublin Corp.*, [1907] A. C. 351.

388. Award whilst action pending invalid—No application for stay.]—By a clause in a contract between plffs. & defts., a municipal corp., for the execution by the former of certain sewerage works, it was provided that, in case of any dispute, doubt, or difference arising or happening touching or concerning the works, or relating to quantities, qualities, description, or manner of work done, executed, or to be done & executed by the contractors, or in any wise whatever relating to the interests of the corp. or of the contractors, such doubts, disputes, or differences should from time to time be referred to & settled & decided by defts.' engineer, who should be competent to enter upon the subject-matter of such doubts, disputes, or differences with or without formal reference or notice to the parties to the contract or either of them, & who should judge, decide, order & determine thereon. Plffs. brought an action against defts. for sums which they alleged to have become due to them from defts. under the contract, & for damages for wrongful termination of the contract by defts. Defts. did not apply for a stay of proceedings in the action under Arbn. Act, 1889 (c. 49), s. 4. Subsequently to the commencement

of the action, defts.' engineer, under the before-mentioned clause, without giving notice to the parties, & without the knowledge or consent of plffs., made an award purporting to decide the matters which were the subject of the action, & defts. pleaded his award in bar to plffs.' claim in the action:—*Held*: it was not competent engineer to determine the matters in pending the action, & his award was no bar to plffs.' claim in the action.—*DOLEMAN & SONS v. OSSETT CORPN.*, [1912] 3 K. B. 257; 81 L. J. K. B. 1092; 107 L. T. 581; 76 J. P. 457; 10 L. G. R. 915, C. A.

SECT. 2.—WHAT DISPUTES WITHIN.

See, also, ARBITRATION, Vol. II., pp. 478, 479; Nos. 1229, 1230.

389. Disputes in relation to contract—Extras.]—By a contract for the building of a borough gaol, it was provided that, if any dispute or difference should arise with the contractors in any way relating to the contract, or if any question should arise between any of the several contractors relating to the proposed building, such dispute, difference, or question, should be settled by the architect, whose decision thereon should be absolute & final:—*Held*: this condition applied only to disputes as to the mode of carrying on the several works, & not to differences between the contractors & the corp. as to their claim for extras.—*PASHBY v. BIRMINGHAM CORPN.* (1856), 18 C. B. 2; 139 E. R. 1262.

390. ———.]—By a building contract it was provided that no extra work should be paid for unless the contractors should produce special & positive written instructions for it, signed by the engineer, & countersigned by the chairman of deft. co. The engineer was to furnish monthly certificates of the value of the work executed, including extra work, & the contractors were to be paid 85 per cent. of the amount forthwith, & the balance at the expiration of three calendar months after the certificate of the engineer of the satisfactory completion of the work should have been given, provided that within three months after the giving of such certificate the contractors should have delivered to the engineer a full account of all claims which they might have upon the co., & he should have given a certificate of the correctness

h. Whether arbitration clause in force & applicable.]—Defts. contracted with plff. for the erection of buildings: the agreement provided for progress payments, that if default should be made after the amount should have been certified plff. might suspend the works; & that a dispute between the parties as to a matter "arising in any way under or out of this contract," should be referred to arbn. without legal proceedings being first brought. Default was made in progress payments:—*Held*: the reference to arbn. was not a condition precedent to plff.'s right to sue for the amount of a certified progress payment.—*BELL v. KEESING* (1888), 7 N. Z. L. R. 155.—**N.Z.**

k. Stay of proceedings—Termination of arbitrator's authority.]—When the architect has given his certificate, the ct. will not stay proceedings in a suit by the contractor to charge the separate estate of a married woman with the amount certified to be due, for the purpose of the matter in dispute being referred to arbn., although the employer discharged the architect before the date of his certificate.—*MURRAY v. COHEN* (1888), 9 N. S. W. Eq. 124.—**AUS.**

l. ——— Variation of contract—Extension of time for completion—Contract determined by employer.]—A contract provided that any doubt, dispute, or difference arising or happening touching or concerning the works... or the meaning or intention of the contract or of the specifications or conditions or any other part thereof should be referred to & decided by the engineer. The employer extended the time for completion; but, before the new date, purported to determine the contract in pursuance of conditions in that behalf. An action was brought by the contractor claiming damages for breach of contract, for wrongful prevention of due & complete performance & for wrongful determination of the contract done:—*Held*: the action should not be stayed.—*BURTON v. BAIRNSDALE (SHIRE) (PRESIDENT)* (1908), 7 C. L. R. 76.—**AUS.**

m. Restraint of arbitration by injunction—Dispute not within statutory powers—Municipal Drainage Act, 1897.]—*MOORE v. MARCH* (1909), 14 O. W. R. 1060, 1104.—**CAN.**

n. Requisites of valid award—Whether within submission.]—Plff. built a house for deft. under a contract

which provided that all disputes arising thereout should be referred to arbn., except as to matters which, under certain clauses, were left to the discretion of the architect during the progress of the work. B. was appointed sole arbitrator to decide on all disputes & make a final award as to the amount due. The award was of a sum "in final settlement of all matters relating to the contract":—*Held*: the reference & award were not too wide although in terms including disputes expressly excluded from arbn.—*COX v. JOHNSON* (1914), 14 S. R. N. S. W. 240.—**AUS.**

o. Setting aside award—Award bad in part—Whether award severable.]—*Re KNOWLSEN & INGLIS* (1860), 7 U. C. L. J. O. S. 124.—**CAN.**

p. Reference by order of court—Confirmation of report—Effect—Practice on appeal.]—*POUPORE v. R.*, 24 C. L. T. 163.—**CAN.**

PART XV. SECT. 2.

q. As to meaning of contract & execution of work.]—It was provided that, in the event of extra work the prices to be affixed thereto should be "similar" to those by which the

Sect. 2.—What disputes &c.of such account. *within. Sects. 3 & 4.]*

arising upon any matter connected with the contract were to be referred to the engineer, whose certificate was to be conclusive. The engineer had done for, as extra, work which had not in fact been done at all, & work which, although extra, had not been done on signed & countersigned orders:—*Held*: the facts showed that differences had arisen, & the certificate of the engineer was a decision upon them within the contract.—**LIDLAW v. HASTINGS PIER CO.** (1874), 2 Hudson's B. C. 4th ed. 13, Ex. Ch.

Annotations:—**Reid**. *Lapthorne v. St. Aubyn* (1885), Cab. & El. 486; *Jackson v. Romford R. D. Co.* (1909), 73 J. P. 248.

391. ——— Express exclusion.—A building contract provided, by clause 31, that disputes between the building owner or his architect, & the contractor, "unless provided for in the foregoing clauses," should be referred to arbn. Clause 17 provided that extra work should be ordered in writing, that alterations of the works should not invalidate the contract, "but shall be measured & valued & certified for by the architect according to the annexed schedule of prices, or where same shall not apply, at fair measure & value, & the amount thereof added to or deducted from the amount due under the contract." Certain extras were ordered in writing, but when the architect measured them up & valued them, the contractor was dissatisfied with his measurement & valuation, & sought to have the dispute settled by arbn.:—*Held*: this dispute came within the exception in clause 31, as being provided for by clause 17.—**Re MEADOWS & KENWORTHY** (1897), 2 Hudson's B. C. 4th ed. 265, H. L.

392. ————A sewerage contract provided that no claim for extras should be allowed unless submitted to the engineers within a given time, that the engineers should be sole judges as to the method of carrying out the works & the materials to be used in the construction thereof, & that in case of any dispute arising at any time, whether during the progress of the works or after completion, as to certain specified matters not including extras, & as to all other matters therein left to the decision of the engineers, their decision should be final & binding on all parties to the contract:—*Held*: a claim for extras was not within the scope of the arbn. clause, & an action by the contractor for the amount of the claim ought to be allowed to proceed.—**TAYLOR v. WESTERN VALLEYS (MONMOUTHSHIRE) SEWERAGE BOARD** (1911), 75 J. P. 409, C. A.

393. ——— Power to dispense with written orders.—**BRODIE v. CARDIFF CORPN.**, No. 211, *ante*.
Written orders generally, *see* Part VI., Sect. 3, *ante*.

394. ——— Damages for delay in removing obstruction from site.—Pltf. contracted with defts. to remove a certain quantity of the bed of the river Mersey within a certain time, but in case a temporary staging erected in the river was not removed by defts. in sufficient time to enable pltf. to com-

estimates had been made up, & the whole should be "adjusted" by the architect, who was appointed sole arbiter for deciding questions between the parties as to the meaning of the contract, or as to the execution of the work:—*Held*: an adjustment of a claim for extra work did not fall within the clause of reference.—**BIRRELL v. DUNDEE GAOL COMRS.** (1859), 21 Dunl. (Ct. of Sess.) 640.—**SCOT.**

tion of the work."—A contract provided that any difference or dispute arising as to several enumerated sorts of matters or as to "any other matter or thing in connection with the execution of the works" should be referred to an arbiter whose decision should be final. The contractor sued the employer for breach of contract in that he did not give him possession of the ground on which he was to work within such time as the contract specified:—*Held*: the subject matter of the action was not a matter which

plete his contract within the time agreed upon, he was to be entitled to such extension of that time as the engineer should deem reasonable. Pltf. was to be paid 80 per cent. of the value of the work certified by the engineer as having been completed each month, & the balance when the work was finished, but if any "difference" arose between defts. & pltf. "concerning the work contracted for or concerning anything in connection with the contract, such difference" was to be "referred to the engineer, & his decision" was to be final & binding on the defts., & pltf. The work was not completed till some time after the date stipulated for by the contract, but this pltf. alleged to be due to the non-removal of the staging. The engineer admitted that pltf. was entitled to compensation for the time, thirty-eight days, during which he incurred expenses by the delay caused by the non-removal of the staging, but the full amount for extra work & expenses could not be agreed on between him & pltf. After some correspondence the engineer certified that the work was finished to his satisfaction & pltf. was entitled to £1,005 10s., which was paid, but pltf. claimed £2,489 13s. 11d. beyond that amount:—*Held*: (1) there was an implied contract that no unreasonable delay should occur in removing the staging, & if pltf. was in fact prevented from completing the contract in time by reason of any such unreasonable delay he was entitled to damages; (2) this was not a difference concerning a matter in connection with the contract such as to make the engineer's certificate final & binding, & in fact there had been no reference to, or award by, the engineer.—**LAWSON v. WALLASEY LOCAL BOARD** (1883), 48 L. T. 507; 47 J. P. 437, C. A.; *affg.* (1882), 11 Q. B. D. 229; 52 L. J. Q. B. 302; 47 L. T. 625, D. C.

Annotations:—**Consd.** *Porter v. Tottenham U. C.*, [1914] 1 K. B. 663. **Mentd.** *City of Dublin Steam Packet Co. v. R.* (1908), 24 T. L. R. 657.

395. ——— Wrongful withholding of certificate.—A contract for the sale of locomotives provided for payment of the price upon the certificate of the engineer that the locomotives were in perfect working order at C., & by a subsequent clause, that, "all disputes are to be settled by" arbn. The locomotives were delivered at C., but the engineer refused to certify, or to give his reasons for not certifying. The vendors thereupon proceeded under the arbn. clause, the purchasers taking part under protest, & an award was given in favour of the vendors:—*Held*: a dispute had arisen within the arbn. clause, & whether the arbitrator was right or wrong, as he had not exceeded his jurisdiction, the ct. would enforce the award.—**Re HOHENZOLLERN ACT. FÜR LOCOMOTIVBAU & CITY OF LONDON CONTRACT CORPN., & COMMON LAW PROCEDURE ACT, 1854** (1880), 54 L. T. 596; 2 T. L. R. 470; 2 Hudson's B. C. 4th ed. 100, C. A.

Annotation:—**Consd.** *Re Nott & Cardiff Corpn.*, [1918] 2 K. B. 146.

396. ——— Forfeiture—Exercise of right of.—**FOSTER & DICKSEE v. HASTINGS CORPN.**, No. 311, *ante*.

had been referred.—**ROY v. BOARD OF LAND & WORKS** (1865), 2 W. W. & A. B. 188.—**AUS.**

s. ————An arbn. clause referred all disputes about "the execution of the work" to an arbiter:—*Held*: a question as to the correctness of measurements, according to which the balance of the contract price was calculated, made by the superintending engineer was not within the clause.—**MACDONALD v. MALCOLM** (1855), 1 Dunl. (Ct. of Sess.) 1033.—**SCOT.**

397. Fraudulent misrepresentations inducing contract.]—Pltf., a contractor, entered into a written contract with defts. for the construction of certain sewerage works; the contract contained a clause that "if at any time any question, dispute or difference shall arise between the council or their engineer & the contractor upon or in relation to or in connection with the contract the matter shall be referred to & determined by the engineer." After he had done certain work under the contract pltf. refused to complete the work, alleging that he had been induced to enter into the contract by fraudulent misrepresentations made in the specification as to the nature of the subsoil of the ground where the work was to be done, & he brought an action to recover damages for the alleged misrepresentations & to have the contract declared void. Defts. having taken out a summons under Arbn. Act, 1889 (c. 49), s. 4, to stay the proceedings & refer the dispute to arbn. under the arbn. clause in the contract:—*Held*: the dispute was not a dispute "upon or in relation to or in connection with the contract" within the arbn. clause, & defts. were not entitled to have the proceedings stayed.—*MONRO v. BOGNOR URBAN DISTRICT COUNCIL*, [1915] 3 K. B. 167; 84 L. J. K. B. 1091; 112 L. T. 969; 79 J. P. 286, C. A.

398. Matters causing delay & other causes beyond builder's control—Delay due to default of owners.]—By a building contract certain matters causing delay & "other causes beyond the contractor's control" were to be submitted to the board of directors of the owners of the building, who were to "adjudicate thereon & make due allowance therefor if necessary, & their decision shall be final":—*Held*: the exclusive jurisdiction of the board did not extend to delay caused by interference by the building owners or their architect with the conduct of the works, by default in not giving the contractors possession of the premises, & in not providing plans & drawings in due time.—*WELLS v. ARMY & NAVY CO-OPERATIVE SOCIETY, LTD.* (1902), 86 L. T. 764.

SECT. 3.—DIFFERENCE BETWEEN ARBITRATION AND CERTIFYING.

See ARBITRATION, Vol. II., pp. 319–322, 420, Nos. 51–71, 793, 794.

SECT. 4.—DISQUALIFICATION OF ARBITRATOR.

399. Arbitrator agent of one party—Personal interest of engineer or architect—Secret agreement with employer limiting cost.]—An architect entered

into an undertaking his employer that a house should be erected sum not exceeding £15,000, including commission & all expenses, & engaged the services of a builder who, without being informed of the undertaking, gave an estimate based on quantities given him by the architect, & entered into a contract with the employer for the completion of the work from the architect's plans, & under his superintendence, for £13,690, with power for the architect to order extra works, & with a clause providing that all questions between the parties under the contract should be settled by the award of the architect. On a suit by the builder claiming to be entitled to be paid by the employer for all quantities executed by him beyond those included in his estimate, & for extra works:—*Held*: (1) the architect was the agent of the employer; (2) his undertaking having been concealed from the builder, the arbn. clause in the contract could not be enforced; (3) pltf. was entitled to an account of what was due to him for any works executed by him under the architect's direction not included in the contract, & for any works so executed under the contract the price for which was not therein included, & for any variations made under the architect's direction of works included in the contract.—*KIMBERLEY v. DICK* (1871), L. R. 13 Eq. 1; 41 L. J. Ch. 38; 25 L. T. 476; 20 W. R. 49.

Annotations:—*Refd.* *Larivière v. Morgan* (1872), 26 L. T. 339; *Sharpe v. San Paulo Ry.* (1872), 8 Ch. App. 605, n.; *Amos v. Herne Bay Pavilion Promenade & Pier Co.* (1886), 54 L. T. 264. *Mentd.* *Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha, & Telegraph Works Co.* (1875), 10 Ch. App. 520, n.

400. — Expressions of opinion on matters in dispute—Matters in dispute caused by arbitrator—Arbitrator disqualified.]—*HUGHES v. LIVERPOOL CORPN.* (1866), cited in *Annual Practice* for 1892 at p. 164.

See, also, ARBITRATION, Vol. II., pp. 369, 370, 379, 380, 392, 393, 400, 549; Nos. 360–367, 424, 425, 517, 518, 580, 1816.

401. Arbitrator acting unfairly—Or with partiality.]—Where by contract the award of the architect is final, & is fairly & impartially made, a ct. of equity will not relieve against it, however severe it may be in its effects; but, where the arbitrator is found guilty of unfairness or partiality, such ct. will relieve against his award.—*ORMES v. BEADEL* (1860), 2 De G. F. & J. 333; 30 L. J. Ch. 1; 3 L. T. 344; 6 Jur. N. S. 1103; 9 W. R. 25; 45 E. R. 649, L. C.

Annotations:—*Mentd.* *Ex p. Wyld* (1860), 2 De G. F. & J. 642; *Barnes v. Richards* (1902), 71 L. J. K. B. 341.

See, generally, ARBITRATION, Vol. II., pp. 547–551.

t. "In case of dispute regarding additional work," etc.—Clause in *exhaustive terms*.]—Pursuer in a petitory action contracted to build a railway line for defenders. The contract contained an arbn. clause of great width providing for arbn. in case of dispute regarding cost of additional work or alteration, or extension of time, or any matter arising out of or in connection with the contract whether during execution of the work, or after its completion. The work was to be completed in Mar. 1901, & was completed in 1906. Pursuer alleged that the work done was entirely different from the work contracted for & that certain facilities which were a condition precedent of his consent to the bargain had not been given him, & he was entitled to be paid on a *quantum meruit*:—*Held*: averments of pursuer were irrelevant, & action dismissed.—*SMELLIE v. CALDONIAN RY. CO.* (1916), 53 Sc. L. R. 336.—SCOT.

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PART XV. SECT. 4.

a. *Interested party — Engineer.*]—The rule that a contractor is bound by a condition making the employer's engineer the arbiter of all disputes arising under it, does not extend to a case where the named engineer, while in fact the engineer of the employer, is described in the contract as, & is supposed by the contractor to be, the engineer of a third person.—*GOOD v. TORONTO HAMILTON & BUFFALO RY. CO.* (1899), 30 S. C. R. 114.—CAN.

b. — — —.]—A contract provided that all works should be done to the engineer's satisfaction; that he was to be the sole judge of the work & materials, in respect both to quantity & quality; & that his decision on all questions in dispute was to be considered final & binding on all parties. After the work had been done, pltf. claimed a large sum for extra work, with which claim the engineer had

dealt:—*Held*: the engineer was not an impartial or indifferent arbitrator, & pltf. were entitled to recover for extra work.—*BRENNAN & HOLLINGWORTH v. HAMILTON CITY* (1917), 39 O. L. R. 367; 37 D. L. R. 144.—CAN.

c. — — —.]—The arbn. clause provided that the arbiter should not be disqualified from acting by being or becoming consulting engineer to the employer:—*Held*: not barred from acting as arbiter because he had revised the specifications & schedules upon which the works which formed the subject of the arbn. were performed.—*ADAMS v. GREAT NORTH OF SCOTLAND RY. CO.* (1889), 26 Sc. L. R. 765.—SCOT.

d. — — — *Architect — Examination as witness.*]—The question whether an architect's refusal to issue certificates is justified being material, it would be improper to allow the matter to be decided by the architect, whose cross-

F F

Part XVI.—Architects and Engineers.

SECT. 1.—EMPLOYMENT AND AUTHORITY.

402. *Authority as agent of building owner—Resident engineer—Approval not equivalent to that of "principal engineer."*—A railway co., having constructed a tunnel, proceeded to dispose of the ground under which the tunnel ran, & contracted on June 5 to sell a portion to B., subject to the condition that he was to erect no buildings nor make any excavations, etc., but according to a specification approved in writing by the principal engineer. B. entered immediately, & sent in plans in Aug. to the resident engineer, for the approval of the principal engineer. The resident engineer never submitted them to the principal, but told B. verbally that he might proceed. B. thereupon proceeded till Oct. 6, when the conveyance was completed, & the co.'s solr., finding him carrying on building operations, asked if he had the approval in writing of the principal engineer, & told him he must procure it. The principal engineer then for the first time saw the plans of the proposed buildings, & immediately condemned them as dangerous to the tunnel, & also dangerous to the proposed houses. B. insisting on proceeding, the co. caused an information to be filed to restrain him, on the ground of danger to the public. The fact of danger to the public by the continuation of B.'s plans was fully made out:—*Held*: the approval of the co.'s resident engineer was not binding on the co.—*A.-G. v. BRIGGS, A.-G. v. BIRMINGHAM & OXFORD JUNCTION RY. Co. (1855), 1 Jur. N. S. 1084.*

403. ——— *Not mere servant or agent of employer.*—A resident engineer was appointed to superintend the execution in Brazil of a works contract:—*Held*: he was not a mere servant or agent of the employers, but in an independent position, & the employers were not liable for any damage or delay caused to the contractors by an honest error made by him in the exercise of his duties, without any interference on the part of the employers.—*Re DE MORGAN, SNELL, & Co., & RIO DE JANEIRO FLOUR MILLS & GRANARIES, Ltd. (1892), 8 T. L. R. 292; 2 Hudson's B. C., 4th ed., 185, C. A.*

examination would be essential.—*HO TO SANG (trading as HO KIN TUCK) v. CHAK HOK TING (1918), 13 Hong Kong L. R. 45.—HONG KONG.*

PART XVI. SECT. 1.

a. *Appointment—Who may be appointed—How made.*—While it may seem undesirable to do so, there is no legal objection to the Govt. or a public body appointing its own officer as its engineer under a building contract. Such an appointment, unless otherwise specified, can take place by acts & conduct & mutual recognition by the parties.—*BOTHWELL v. UNION GOVERNMENT (MINISTER OF LANDS) (1917), App. D. 262.—S. AF.*

1. ——— *By corporation—Under seal.*—*SYDNEY MUNICIPAL COUNCIL v. McBEATH (1881), 2 N. S. W. L. R. 142.—AUS.*

See, further, Sect. 3, sub-sect. 1, post.

g. ——— *Disputed retainer.*—*BARBER v. ROYAL LOAN & SAVINGS Co. (1912), 23 O. W. R. 31; 4 O. W. N. 91 5 D. L. R. 885.—CAN.*

h. *Authority as agent of building owner—To decide details of construction.*—Tenements were erected under the supervision of applts.' architect, who during the course of erection

sanctioned certain deviations from the details set out in the estimate. The tenements were substantial, of good workmanship & good material, but certain rybats used in the building were not of the size proscribed & fixed by the contract. The size of the rybats was given in the schedule, but the plans did not in any way show it. The schedule contained a condition that the whole materials & workmanship were to be of the best description & completed in accordance with the drawings:—*Held*: the stipulations as to the dimensions of the rybats were not contractual; that the measurements were inserted as a basis for pricing & not as a contractual obligation as to exact size; the exact measurements & arrangement of the rybats was a matter of construction over which the architect had control; & it was within the authority of the architect to give directions as to construction in accordance with the contract plans.—*FORREST v. SCOTTISH COUNTY INVESTMENT Co., LTD. (1915), 53 Sc. L. R. 7, H. L.—SCOT.*

406 i. ——— *To waive.*—Certain work done by a contractor was not according to contract but was accepted by the architects:—*Held*: their acceptance bound the employer subject to any claim he might have against them for

404. *To order more expensive process than that contracted for—Knowledge of employer.*—*WALLIS v. ROBINSON, No. 198, ante.*

405. ——— *To order work outside contract.*—*KIMBERLEY v. DICK, No. 177, ante.*

406. ——— *To waive conditions.*—Where a contract for work to be done for a co. specified that written directions should be given, for the work so to be done by the contractor, by the engineer of the co.:—*Held*: it was not sufficient, to support a claim for such work done without the written authority of the engineer, that the engineer subsequently granted a certificate that such work had been done by virtue of the contract.

The engineer was not the agent of the co. for the purpose of dispensing with a provision in the deed which might be of vital importance to the interests of the co. (*WIGRAM, V.C.*).—*NIXON v. TAFF VALE RY. Co. (1849), 7 Hare, 136; 12 L. T. O. S. 347; 68 E. R. 55.*

Annotation:—Mentd. Padwick v. Hurst (1854), 18 Beav. 575.

407. ——— ———.]—*SHARPE v. SAN PAULO RY. Co., No. 194, ante.*

Written orders for extras, generally, *see Part VI., Sect. 3, ante.*

408. ——— *To contract against delay in removing obstruction to site.*—Pltf. contracted with defts. to remove a certain quantity of the bed of the river Mersey within a certain time, but in case a temporary staging erected in the river was not removed by defts. in sufficient time to enable pltf. to complete his contract within the time agreed upon, he was to be entitled to such extension of that time as the engineer should deem reasonable; & if any "difference" arose between defts. & pltf. "concerning the work contracted for or concerning anything in connection with the contract, such difference" was to be "referred to the engineer, & his decision" was to be final & binding, on defts. & pltf. The work was not completed till some time after the date stipulated for by the contract, but this pltf. alleged to be due to the non-removal of the staging. The engineer admitted

negligence in accepting it.—*MILLS v. SMALL (1908), 11 O. W. R. 1041.—CAN.*

408 ii. ——— ——— *Defective workmanship.*—*Held*: a clause giving engineers power to omit portions of the work contracted for & to make the consequent deductions did not authorise the acceptance of defective workmanship, even subject to deduction.—*MERRIAM v. PUBLIC PARKS BOARD OF PORTAGE LA PRAIRIE, [1912] 20 W. L. R. 603; 1 W. W. R. 1082; 2 D. L. R. 702.—CAN.*

408 iii. ——— ——— *Acceptance deferred for specified period.*—A clause in a contract declared the works contracted for would not be accepted by the engineer, in the name of the corpn., until one year after they should have been in operation:—*Held*: the clause did not mean that the corpn. should be irrevocably bound by his acceptance. In any event, the corpn. could not be held to an acceptance by the engineer of work which was defective, unfinished & not according to plan & specifications.—*DRUMMONDVILLE v. SIMONEAU (1912), Q. R. 23 K. B. 392.—CAN.*

k. ——— *To authorise deviations.*—*Held*: while engineers were placed in charge of the construction of work

that pltf. was entitled to compensation for the time, thirty-eight days, during which he incurred expenses by the delay caused by the non-removal of the staging, but the full amount for extra work & expenses could not be agreed on between him & pltf. After some correspondence the engineer certified that the work was finished to his satisfaction, & pltf. was entitled to £1,065 10s. which was paid; but pltf. claimed £2,489 13s. 11d. beyond that amount:—*Held*: the engineer had no authority to make an express contract on behalf of defts. that no unreasonable delay should occur in removing the staging.—*LAWSON v. WALLASEY LOCAL BOARD* (1882), 11 Q. B. D. 229; 52 L. J. Q. B. 302; 47 L. T. 625, D. C.; *affd.* (1883), 48 L. T. 507, C. A.

Annotations:—*Mentd.* City of Dublin Steam Packet Co. v. R. (1908), 24 T. L. R. 657; Porter v. Tottenham U. C., [1914] 1 K. B. 663.

Implied stipulations as to site, see Part II., Sect. 2, sub-sect. 2, A, *ante*.

409. — To pledge credit of building owner & of contractor.—*Semble*: neither an architect's order nor certificate *per se* binds a builder, even if he uses the goods on the building, to pay for them, since the architect has no authority to pledge the contractor's credit as he has that of the building owner.—*RAMSDEN & CARR v. CHESSUM & SONS & WARD* (1913), 110 L. T. 274; 78 J. P. 49; 30 T. L. R. 68; 58 Sol. Jo. 66, H. L.

410. Duration of employment—Right of employer to refuse permission to carry out works—On payment in full of sum stipulated.—On a contract by a board of health to employ pltf., an engineer, about certain works, & pay him £500, during two years, he undertaking to do his best to complete the works within that period:—*Held*: they were not liable for refusing to allow him to carry on the works beyond that time, even though the delay was caused by their fault or default, they paying him the whole £500.—*RUTLEDGE v. FARNHAM LOCAL BOARD OF HEALTH* (1861), 2 F. & F. 406, N. P.

Reference to principal engineer of company—Amalgamation of companies—Engineer retaining control.—A contract between the W. ry. co. & certain contractors for works upon the line contained a stipulation that any difference arising thereon should be referred to T., "if & so

long as he should continue to be the co.'s principal engineer." After the making of the contract the W. ry. co. became merged in & amalgamated with the N. B. ry. co., under an Act of Parliament, which provided that, notwithstanding the amalgamation, & the partial repeal of the special Act of the W. ry. co., all contracts should be with & enforced as if such repeal had not taken place, the N. B. ry. co. being in all respects with reference to such matters substituted for the W. ry. co.:—*Held*: T., who still continued to be the engineer of the W. portion of the railway, but was not the "principal engineer" of the amalgamated co., was the proper referee in cases of disputes arising out of the above contract.—*RE WANSBECK RY. CO. & TROWSDALE* (1866), L. R. 1 C. P. 269; 12 Jur. N. S. 740.

412. — Reference to "engineer for time being"—New engineer.—By the general conditions of a contract, disputes were to be referred to the engineer for the time being of the co. A dispute was so referred, but after the first day's hearing, C., the arbitrator, declined to proceed with the arbn., on the ground that he had resigned his post as engineer to the co., & was shortly to relinquish his duties. The contractor gave the co. notice to appoint an arbitrator under Arbn. Act, 1889 (c. 49), s. 5. The co. declined to do so, contending that the new engineer was the proper arbitrator, he being the engineer for the time being:—*Held*: the power of the ct. to appoint a fresh arbitrator arose at the moment when C. declined to act, & the co. was not entitled to a stay & reference to the new engineer.—*STRACHAN v. CAMBRIAN RYS.* (1905), 2 Hudson's B. C., 4th ed., 374, C. A.

SECT. 2.—DUTIES AND LIABILITIES.

SUB-SECT. 1.—TO THEIR EMPLOYERS.

A. In General.

413. Skill & care—Novel invention—Used at employer's instance.—Pltf. employed deft., an architect, to prepare plans for & superintend the erection of model lodging-houses after the latest improvements, & pltf. further instructed deft. to put in a new patent concrete roofing, which cost

which they had designed, they had no authority to depart from the designs.—*MERRIAM v. PUBLIC PARKS BOARD OF PORTAGE LA PRAIRIE* (1912), 20 W. L. R. 603; 1 W. W. R. 1082; 2 D. L. R. 702.—*CAN.*

l. ——*Circumstances in which*:—*Held*: the change made in the line of a sewer was within the power of the engineer under the contract, & the contract had not been abrogated or changed.—*BRENNAN & HOLLINGWORTH v. HAMILTON CITY* (1917), 39 O. L. R. 367; 37 D. L. R. 144.—*CAN.*

m. ——*Where a builder contracts to do work according to plans & specifications, & the specification bears that the work is to be done to the satisfaction of the architect in every respect, the architect is not entitled to sanction deviations from the plans.*—*RAMSAY v. BRAND* (1898), 25 R. (Ct. of Sess.) 1212.—*SCOT.*

n. ——*A. having contracted with B. to use cement mortar in building the walls of a house which he was erecting for B.*:—*Held*: B.'s architect had not authority, without B.'s consent, to sanction the use of milled lime instead of cement mortar.—*STEEL v. YOUNG*, [1907] S. C. 360.—*SCOT.*

o. — To bind Crown — To inspect material at particular place.—Under a contract to build a bridge for Govt., the timber required being only obtainable in C., the Govt. engineer agreed that it should be inspected there; no term of the contract could be altered so as to bind the Crown unless sanctioned by order in Council:—*Held*: the Govt. was not bound.—*MAYES v. R.* (1894), 23 S. C. R. 454.—*CAN.*

p. — To agree to assignment of part of price.—An architect sent a letter to C., a builder's merchant, stating that he had received & accepted an order from A., the builder, on him in C.'s favour, & undertaking otherwise to pay C. the amount of £200 out of the moneys otherwise to become payable to A. under the contract:—*Held*: (1) the architect had no authority express or implied to accept the order; (2) by the custom of the building trade an architect has not by virtue of his employment, authority to accept on behalf of his employer orders given by a contractor to merchants for materials supplied for the work.—*HYNE & SONS v. PODOSKY, LENNON (Claimant) v. HYNE & SONS*, [1905] S. R. Q. 147.—*AUS.*

q. — To dismiss contractor.—

Held: the architect had power under the contract to dismiss the contractor if the work did not proceed as quickly as he might deem right.—*SMITH v. GLINES* (1907), 5 W. L. R. 266.—*CAN.*

410i. Duration of employment—Right of employer to discharge.—Under the terms of an ordinary building contract, the employer is not at liberty to discharge the architect & substitute another in his place.—*MURRAY v. COHEN* (1888), 9 N. S. W. Eq. 121.—*AUS.*

r. — Whether contract continuing contract.—*HICKEY v. BROWNE* (1842), 4 I. L. R. 277.—*IR.*

PART XVI. SECT. 2, SUB-SECT. 1.—A.

413 i. Skill & care.—An architect as between himself & his employer is answerable for either negligence or unskilfulness in the performance of his duty as architect.—*BADGLEY v. DICKSON* (1886), 13 A. R. 494.—*CAN.*

413 ii. — Question of fact for court or jury.—An architect is bound to exercise reasonable care, skill, & diligence in preparation of plans & supervision of work entrusted to him, & whether he has failed or not in the exercise of those qualities, is a question of fact for the ct. or jury.—*RUSSELL v.*

Sect. 2.—Duties and C., D. & E.]

Sub-sect. 1, A.,

only a quarter of what a lead or slate roof would have cost. The concrete roof proved a failure, let in water, & had to be removed & replaced, & pltf. sued the architect for negligence:—*Held*: though failure in an ordinary building was evidence of want of competent skill, if out of ordinary course an architect was employed in some novel thing in which he had not experience, failure was consistent with skill.—*TURNER v. GARLAND & CHRISTOPHER* (1853), 2 Hudson's B. C., 4th ed., 1.

Arbitration.—See No. 411, & generally, cases in Part XV., ante.

B. Examination of Site, Foundations, etc.

414. Duty to ascertain nature of soil.—If an engineer is employed by a committee for erecting a bridge & forming a road to it to make an estimate of the expense of the works, he is bound to ascertain for himself, by experiments, the nature of the soil, although a person previously employed by such committee, having made the experiments, gives him, by their desire, information of the result.—*MONEYPENNY v. HARTLAND* (1826), 2 C. & P. 378, N. P.

Annotation:—*Mentd.* Wood v. Argyll (1844), 6 Man. & G. 928.

See, also, cases in Sect. 3, sub-sect. 3, post.

415. Duty to measure site—Plans defective by reason of neglect to measure.—Pltfs. employed deft. to prepare plans for a building to be erected on a site belonging to them. Deft. neglected to measure the site, & acting on information which was unauthorised by pltfs., prepared plans on the assumption that the site was smaller than it was in fact. Pltfs., having paid deft. for the plans,

McKERCHAR (1905), 1 W. L. R. 138. —CAN.

s. — Survey.—A surveyor in making a survey is under no statutory obligation to perform the duty, but undertakes it as a matter of contract & is only liable for want of reasonable skill or gross negligence.—*STAFFORD TOWNSHIP v. BELL* (1881), 6 A. R. 273. —CAN.

t. — Agreement not under seal — Agreement executed.—Pltfs., a corpn., agreed to employ M. as their architect by an agreement not under seal; the agreement had been executed & was within the scope of the corpn.'s authority:—*Held*: pltfs. could sue M. for negligence.—*SYDNEY MUNICIPAL COUNCIL v. McBEATH* (1881), 2 N. S. W. L. R. 142.—AUS.

a. Employed by both owner & contractor—Discharge of owner.—*TAHLERLAND v. RODIER* (1866), 16 L. C. R. 473.—CAN.

b. Unfavourable report on supervisor—Whether privileged.—*OLDHAM & COX v. BUSHBY* (1914), 16 W. A. L. R. 64.—AUS.

See, further, LIBEL & SLANDER.

c. Right to delegate.—The engineer has the right to delegate to qualified assistants matters of detail such as taking levels, preparation of plans, but not any requiring the exercise of judicial discretion.—*MOORE v. MARCH* (1909), 13 O. W. R. 692.—CAN.

PART XVI. SECT. 2, SUB-SECT. 1.—B.

414 i. Duty to ascertain nature of soil.—The failure of an engineer to make tests of the bearing capacity of the soil on which a building is to be erected does not necessarily constitute negligence, especially if he be familiar with the character of the soil in question.—*LEA v. MEDICINE HAT CITY*, [1917]

3 W. W. R. 467; 37 D. L. R. 1.—CAN.

PART XVI. SECT. 2, SUB-SECT. 1.—C.

d. Plans & documents—Duty to communicate.—An engineer hired by a corpn. to supervise the construction of certain works, in consideration of a percentage to be levied on the cost, does not violate his agreement by refusing to give communication of the plans & specifications prepared by himself.—*ADDIE v. THETFORD MINES* (1910), Q. R. 39 S. C. 412.—CAN.

416 i. — Property in employer—Identified by parties—Not forming part of the contract.—*MOFFATT v. SCOTT* (1863), 8 L. C. J. 310.—CAN.

416 ii. — Plans paid for by employer.—Where an architect has been employed & paid for the preparation of preliminary plans, the ownership in the plans belongs to the employer.—*CROMPTON v. UPTON*, [1903] 24 N. L. R. 500.—S. AF.

416 iii. — — — — ——In the absence of a special stipulation to the contrary, plans prepared by an architect & paid for by the employer become the property of the employer.—*BOCK v. WINDER* (1893), 7 E. D. C. 112.—S. AF.

e. — Preparation of — Degree of perfection.—Where an architect is employed to prepare plans & specifications for, & to superintend the work of restoration of an old building partly destroyed by fire, microscopical perfection of the architect's work is not required.—*MEREDITH v. MACFARLANE* (1915), 9 O. W. N. 160.—CAN.

d. care.—*MCDONALD v. DAVID* (1863), L. C. R. 31; 8 L. C. J. 44.—CAN.

f. — — — — — Plan entailing rights of light over adjoining property of

were unable to raise funds to build on the site, & ultimately parted with it, & then discovered the error in the plans. In an action to recover the money paid for the plans on the grounds of a total failure of consideration, or, in the alternative, for damages for negligence:—*Held*: there had not been a total failure of consideration, but as deft. had been negligent pltfs. were entitled to damages, although, as they had sustained no loss from his negligence, those damages would be only nominal.—*COLUMBUS Co. v. CLOWES*, [1903] 1 K. B. 244; 72 L. J. K. B. 330; 51 W. R. 366.

C. Plans, Specifications, etc.

416. Plans & documents—Property in employer—Custom of architects to retain—Where work not proceeded with.—Pltf. was an architect who had been employed by deft. to prepare plans & get tenders for a vicarage. The payment was to be 5 per cent. on money expended if the vicarage was completed; if tenders were obtained & work not commenced, 3 per cent. on the estimated cost; if no invitations for tenders issued, 2½ per cent. The plans were prepared, but deft. then changed his mind & declined to proceed, & wrote to pltf. offering to pay, & asking for the plans. Pltf. declined to give up the plans, but sued for payment & set up a custom among architects to retain their plans if the work was not proceeded with:—

Held: such custom, even if proved, would be unreasonable, & deft. need not pay for the plans unless he got them.—*EBDY v. M'GOWAN* (1870), 2 Hudson's B. C., 4th ed., 9.

Annotation:—*Apld.* Gibbon v. Pease, [1905] 1 K. B. 810.

417. — — — — — After completion of work.—An architect was employed by a building owner to carry out alterations in certain houses. He

owner.]—The architect employed by a landowner to design & superintend the construction of a house on a vacant site not subdivided into building lots for sale, incurs no liability from the fact that an oblique view is given through a window in the house designed by him, into a part of the land sold by the owner to a third party, after the inception of the building.—*SAINT JEAN v. STRUBBS* (1905), Q. R. 27 S. C. 266.—CAN.

h. — Prepared by other architect — Liable for defects.—*SCOTT v. CHRIST CHURCH CATHEDRAL (INCUMBENT & CHURCH WARDENS)* (1865), 1 L. C. L. J. 63.—CAN.

k. — Prepared by other surveyor — Not liable for defects.—A land surveyor is not answerable for errors in a plan, according to which he subdivided land, if the plan was not prepared by him.—*PARQUIN v. BOURGOIS* (1913), Q. R. 23 K. B. 494.—CAN.

l. Estimates — Preparation of — Degree of skill & care.—In making his estimates of the cost of a building an architect is only required to use a reasonable degree of care & skill, & if he does this he is not liable for any loss caused by error in the estimates.—*GRANT v. DUPONT* (1901), 8 B. C. R. 7, 223.—CAN.

m. — — — — ——Pltfs. undertook to rebuild deft.'s theatre & to secure proposals from contractors for materials, etc., such proposals not to exceed a given sum. The work was subsequently carried on, but at an expenditure exceeding that sum by 50 per cent.:—*Held*: pltfs., as skilled architects, must at their peril furnish a reasonably exact estimate, & had forfeited their right to remuneration by their negligence in underestimating the cost.—*MILLS v. SMALL* (1908), 11 O. W. R. 1041.—CAN.

prepared plans & superintended the execution of the work, which was completed, & his agreed remuneration at an inclusive percentage on the outlay was paid. The building owner then demanded the plans, which the architect refused to hand over. In an action by the building owner against the architect to recover the plans:—*Held*: a custom set up by deft. entitling him as architect to the property in the plans after the completion of the work was unreasonable, & afforded no answer to the action.—*GIBBON v. PEASE*, [1905] 1 K. B. 810; 74 L. J. K. B. 502; 92 L. T. 433; 69 J. P. 209; 53 W. R. 417; 21 T. L. R. 365; 49 Sol. Jo. 382; 3 L. G. R. 461, C. A.

418. Other documents—Architect must produce.—Pltf., the owner of an estate, appointed defts. receivers & surveyors. They also acted independently as architects to superintend repairs & alterations to the farmhouse for which they were paid separately. Pltf. discharged defts. & filed a bill for the delivery up of all documents relating to the estate. Defts. admitted the possession of certain documents connected with the property which they insisted were their own private memoranda:—*Held*: they were bound to produce them, in order to enable the ct. to judge whether they were of such a nature that they ought to be

n. — *Onus of proof.* — Where a civil engineer is called upon in his professional capacity to make investigations & estimates &, either from want of skill or negligence, his report or estimate is incorrect, he is liable to his employer for the unnecessary expense or injury thereby occasioned; it is no excuse that he relies upon the information & advice of another engineer who had made experiments & investigations of the kind required. If the actual cost of the work prove to be more than his estimates, he will be liable to his employer only if he omitted to apply to the preparation of the estimates the ordinary & reasonable degree of care & skill exercised in his profession. The onus is upon the employer to prove such negligence.—*LEA v. MEDICINE HAT CITY*, [1917] 3 W. W. R. 467; 37 D. L. R. 1.—*CAN.*

PART XVI. SECT. 2, SUB-SECT. 1.—E.

e. *Duty to supervise.*—*MITCHELL-TOWN UNION GUARDIANS v. DOHERTY* (1897), 31 I. L. T. Jo. 514.—*IR.*

p. — Failure to supervise building is a breach of an architect's contract implied from his employment.—*CAMPBELL FLOUR MILLS CO. v. BOWES, CAMPBELL FLOUR MILLS CO. v. ELLIS* (1914), 32 O. L. R. 270.—*CAN.*

q. — *Fraudulently passing work—Loss of right to remuneration.*—If an architect's attention is drawn by his employer to the fact that materials are being used which are not according to the contract & he knows that that is so & deliberately passes the work, there is a want of *bona fides* on his part which renders him guilty of fraud & disentitles him to recover remuneration on the contract.—*WILSON v. ROBERTS* (1911), T. P. D. 743.—*S. AF.*

See, further, Sect. 3, sub-sects. 3 & 4, post.

r. — *Extent of—Communication of plans.*—An engineer hired by a corpn. to supervise the construction of certain works, in consideration of a percentage to be levied on the cost, does not violate his agreement by refusing to give communication of the plans & specifications prepared by himself.—*ADDIE v. THETFORD MINES* (1910), Q. R. 39 S. C. 412.—*CAN.*

s. — *Building encroaching on street.*—In an action by an architect

for fees for drawing plans for & superintending the construction of a building, a counterclaim by the owner against the architect & the builder for negligence in letting the building encroach on the street was struck out, there being no allegation that the builder was the agent or acting under the instructions or directions of the architect, & the owner's right of action, if any, as against him, being, therefore, entirely distinct from his right of action against the architect.—*HOPKINS v. BROWN* (1914), 28 W. L. R. 276.—*CAN.*

t. — *Liability for trespass by contractor.*—Works were executed by the contractor under the personal superintendence of the engineer & his assistants, & according to plans & specifications prepared by the engineer, who directed & instructed the contractor, was frequently present on the ground, & saw the works in progress. Some of the works were executed on pltf.'s lands, & were admittedly acts of trespass:—*Held*: the engineer was liable to pltf. for the trespass so committed.—*MONKS v. DILLON* (1882), 10 L. R. Ir. 349; 12 L. R. Ir. 321.—*IR.*

a. — *Non-performance of contract by builder.*—On a counterclaim by an employer against an architect for negligence in supervision:—*Held*: an architect does not guarantee the performance of the builder's contracts.—*GOUINLOCK v. MACLEAN* (1918), 14 O. W. N. 142.—*CAN.*

b. — *Exercised in good faith—Liability.*—When an engineer, charged with the duty of superintending the execution of a contract, is empowered to pass upon the work done & the materials supplied, he is free from all liability for damages if, whether rightly or wrongly, but in good faith, he condemns either the work or the materials.—*AUDET v. QUINET* (1909), Q. R. 37 S. C. 385.—*CAN.*

419 i. Supervision must be thorough.—Pltf. had engaged B. to build a house for pltf. in accordance with certain plans. B. was to be paid on certificates by deft., pltf.'s architect, to the effect that the house was properly built in accordance with the plans. Deft. certified & B. received payment from pltf. Pltf. sued, alleging that the house was not properly built in accordance with the contract, & that the deft. was guilty of negligence in superintendence:—*Held*: deft. would

delivered up.—*BERESFORD (LADY) v. DRIVER*, L. J. Ch. 476; 17 (1851), 14 Beav. 387; 20 L. J. Ch. 1; subsequent proceedings (1852), 16 Beav. 134. *Annotations*:—*Mentd. Sellar v. Griffin* (1863), *Chichester v. Donegal* (1869), 4 Ch. App. 416.

D. Quantities.

See Part XVII., post.

E. Superintendence.

419. Must be thorough.—Owing to the death of one of his children pltf. decided to have the sewerage arrangements of his house examined & put into a state of complete repair, & deft. was employed for the purpose & to prepare designs & superintend the carrying out of the work. It was subsequently found that ventilating pipes had never been cemented, & also that one ventilating pipe had been carried through the nursery inside the wall & covered over by boarding & paper, & had not been cemented, & pltf.'s children had been frequently ill in consequence. Another contractor was called in to make the work good, & pltf. claimed against deft. the costs of repairs & also doctor's fees & other expenses:—*Held*: a formal verdict should be taken for pltf. & the matters in dispute referred to a barrister who

be responsible if the jury should find that the giving of the certificates arose from his negligence & want of caution in his duty of superintending the works; there was incumbent on deft. the duty of skilled superintendence.—*ARMSTRONG v. JONES* (1869), 2 Hudson's B. C. 4th ed. 6.—*IR.*

419 ii. — An architect employed by the owner to superintend the erection & completion of a building for him under the usual building contract, whereby the architect's certificates are made a condition precedent to the liability of the owner to make payments to the contractor, & his final certificate of completion is necessary to entitle the contractor to payment of the full price of the work, & is made final & conclusive between the parties, may be liable to the owner for damages caused by the issue of such final certificate if, in fact, the building has not been properly completed according to the plans & specifications, & it is shown that the architect, assuming that he was honest & desirous of being impartial, could not have given such certificate unless he had been negligent in discharging his duty of superintending the work for the owner & in making his final inspection of it.—*BRUCE v. JAMES* (1913), 24 W. L. R. 752; 4 W. W. R. 1019.—*CAN.*

419 iii. — An architect who, being paid to supervise the building of a house, & grants a certificate to contractors that work to a certain extent has been done, on the production of which they obtain payments, is liable to his employer, if the work so done is defective & he has failed to take proper precautions to supervise & prevent the defective workmanship.—*JAMESON v. SIMON* (1899), 1 K. (Ct. of Sess.) 1211; 7 S. L. T. 133; 36 Sc. L. R. 883.—*SCOT.*

419 iv. — Pltfs., whilst acting as architects for the erection of a certain building for deft. co., issued certificates to a contractor on the completion of the installation of an electric plant. Upon these certificates the contractor received payment from defts., but the installation was subsequently discovered to be defective & useless. The faults could only have been discovered by an expert. Pltfs., before granting the certificates, did not satisfy themselves as to the quality of the work:—*Held*: pltfs. were under a duty to have satisfied themselves, either by special

2.—Duties and liabilities: Sub-sect. 1, E., F. & G.; sub-sect. 2.]

was to be assisted by a surveyor to be agreed upon by both parties.—*ELLISEN v. LAWRIE* (1878), *Times*, Feb. 19th.

Measure of damages.]—Engineers in the employ of a local board were negligent in the design, construction & supervision of a drainage scheme entrusted to them:—*Held*: they were liable in damages for their neglect for the sum necessary to make good the defects of the scheme, & their liability was not limited to the amount of their professional charges.—*SAUNDERS & COLLARD v. BROADSTAIRS LOCAL BOARD* (1890), 2 Hudson's B. C., 4th ed., 164, D. C.

421. — Effect of final certificate.]—An architect was employed to design & superintend the erection of a house, & by the terms of the contract between the building owner & the builder the architect's decision in all matters between builder & building owner was to be final. The architect gave a final certificate, & brought an action for his fees. Deft., the building owner, counterclaimed for negligence by the architect in the supervision of the work. The architect in his defence to the counterclaim alleged that he had taken the defects into consideration in certifying the final amount due, & had allowed a sum in respect thereof. The jury found a verdict for pltf. on the claim for £58, & for deft. on the counterclaim for £90:—*Held*: the building owner was entitled to recover damages for the negligence in supervision, notwithstanding the certificate.—*ROGERS v. JAMES* (1891), 56 J. P. 277; 8 T. L. R. 67; 2 Hudson's B. C., 4th ed., 172, C. A.

Annotation:—Distd. Chambers v. Goldthorpe, Restell v. Nye, [1901] 1 K. B. 624.

knowledge, or by the report of an expert, as to the quality of the installation, before issuing the certificate, & having failed to do so, were liable for the damages suffered by defts.—*PHILIP & LESLIE v. TRANSVAAL GOLD FIELDS, LTD.* (1898), 5 O. R. 54.—S. AF.

419 v. —.]—It is the duty of an architect to discover bad work, materials, or defects at the time when the work is being done, or when the defects should have been patent to him as a person possessing skilled knowledge in the profession which he exercises; & if he passes or certifies as proper, complete, or satisfactory, work or materials which are improper, unsound, defective, or incomplete, & which he ought to have observed in the reasonable exercise of his profession, he will be liable in damages to his employer.—*PATTINSON v. WALKER* (1908), E. D. C. 266.—S. AF.

419 vi. — Work not in accordance with specifications—But better done.]—Under an issue whether defender, the overseer of a new line of road, had wrongfully failed to superintend the execution of the work, or wrongfully directed or permitted the contractor to deviate from the specifications, or wrongfully & falsely certified that the work was executed according to the specifications to the loss, injury, & damage of the pursuer:—*Held*: not relevant & not competent for defender to show by way of negating such loss, injury, & damage, that the work had been better executed than if it had been done exactly according to the specifications.—*GORDON v. MILLAR* (1839), 1 Dunl. (Ct. of Sess.) 832.—SCOT.

419 vii. — — Dry rot setting in.]—Where "dry rot" renders a building unsafe, & repairs become necessary, the costs thereof will fall upon the architect & contractor for using wood

other than the kind specified. In effecting such repairs other material may be used if there be no unnecessary expense entailed thereby. The liability of architect & contractor continues over 10 years from the delivery & acceptance of the work.—*CANADA SPOOL COTTON CO. v. LYALL (PETER) & SONS* (1916), Q. R. 51 S. C. 227.—CAN.

420 i. — Measure of damages.]—Deft. was employed by pltf. as the architect for the erection of a house. Pltf. sued deft. for damages for negligence for allowing the eave to overlap the eave of the adjoining building & for failing to compel the use of floor boards in accordance with the specifications:—*Held*: slight damages had been sustained; pltf. should be awarded the sum which was due to deft. for commission.—*McDONALD v. EDEY* (1912), 22 O. W. R. 664; 3 O. W. N. 1514; 3 D. L. R. 893.—CAN.

420 ii. — —.]—When, owing to negligent supervision of the architect (*see supra*), the owner by the terms of the contract, has no defence against the contractor's claim for the amount shown by the final certificate, the damages awarded to him against the architect should be the amount it would cost to put the building into the proper condition as called for by the plans & specifications. The fact that the owner has succeeded in compromising with the contractor & getting a settlement with him for less than the amount called for by the final certificate by reason of the imperfections in the work, does not affect his right to such damages against the architect, except that the amount saved by such compromise should be taken into account in favour of the architect.—*BRUCE v. JAMES* (1913), 24 W. L. R. 752; 4 W. W. R. 1019.—CAN.

Effect of final certificate generally, *see* Part III., Sect. 3, sub-sect. 2, *ante*.

422. — Delegation to clerk of works.]—Pltf. sued deft. to recover £80 3s. 9d. for work done & money expended as architects for deft. in connection with the renovation & restoration of the kitchen wing of, & sundry repairs to, a mansion house. The defence was that pltf., in not seeing that certain beams in the kitchen were renewed, had not performed their duty properly, & deft. counterclaimed £150 damages. The clerk of the works was selected by deft., & pltf. left it to him to decide whether new beams were required, & did not go down themselves to look at the beams, but adopted the view of the clerk of the works that new timbers were not necessary:—*Held*: although pltf. were not responsible for the negligence of the clerk of the works, the question whether new beams were required was one for pltf. & not for the clerk of the works.—*LEE v. BATMAN* (1893), *Times*, Oct. 31st.

423. — —.]—An architect, under contract to supervise work, is entitled to leave details to the clerk of the works, but is personally responsible for seeing that his design is carried out.

Where the clerk of the works fraudulently permitted a floor to be laid, otherwise than in the way, & without the precautions against damp, provided for in the specification, & the supervising architect failed to see that this part of his design was adhered to:—*Held*: the architect was personally responsible for the consequences resulting from dry rot in the floor.—*LEICESTER GUARDIANS v. TROLLOPE* (1911), 75 J. P. 197; 2 Hudson's B. C., 4th ed., 419.

F. Certificates and Measurements.

424. Over-certifying — Measure of damages.]—Engineers in the employ of a local board were

421 i. — Effect of final certificate.]—Pltf., an architect, sued for the balance due to him under an agreement with deft. for commission for his services in superintending the construction of a dwelling-house. The defence was that by his negligence & want of care & skill in the performance of his duties the contractor's work had been done in a defective & inferior manner. Pltf. contended that by the terms of the contract between deft., the building owner & the contractor, he had been made the authorised judge of the quality of the material used & of the time & manner of executing the works, & that having approved of the work & certified to its due performance no action lay against him:—*Held*: apart from the contract between the building owner & the contractor, pltf. was employed as a skilled professional person to perform services for reward & was subject to the usual obligations attaching to such a contract.—*BADGLEY v. DICKSON* (1886), 13 A. R. 494.—CAN.

421 ii. — —.]—*BRUCE v. JAMES, supra.*—CAN.

PART XVI. SECT. 2, SUB-SECT. 1.—F.

c. Duty to certify.]—*MITCHELSTOWN UNION GUARDIANS v. DOHERTY* (1897), 31 I. L. T. Jo. 514.—IR.

d. Duty to account — For amounts certified for.]—An architect is bound to render to the building owner an account of all moneys expended under the architect's certificate, notwithstanding that the certificate is made final as between the building owner & contractor.—*McDERMOTT v. COATES* (1913), 18 B. C. R. 439.—CAN.

424 i. Over-certifying—Measure of damages.]—In an action by pltf., an architect, on the common counts, for services in preparing plans & super-

negligent in certifying the due & satisfactory completion of a drainage scheme, & in over-certifying the amount of work done:—*Held*: they were liable to repay the amount by which the contractor was overpaid on their certificates, & their liability was not limited to the amount of their professional charges.—*SAUNDERS & COL-LARD v. BROADSTAIRS LOCAL BOARD* (1890), 2 Hudson's B. C., 4th ed., 164, D. C.

425. Architect as arbitrator—Liability for negligence in certifying.—A building owner employed an architect for reward to supervise the erection of certain houses by a contractor. The building contract provided for payments on account of the price of the works during their progress, & for payment of the balance after their completion, upon certificates of the architect, & that a certificate of the architect, showing the final balance due or payable to the contractor, should be conclusive evidence of the works having been duly completed, & that the contractor was entitled to receive payment of the final balance:—*Held*: the architect, in ascertaining the amount due to the contractor & certifying for same under the contract, occupied the position of an arbitrator, & was not liable to an action by the building owner for negligence in the exercise of those functions.—*CHAMBERS v. GOLDTHORPE, RESTELL v. NYE*, [1901] 1 K. B. 624; 70 L. J. K. B. 482; 84 L. T. 444; 40 W. R. 401; 17 T. L. R. 304; 45 Sol. Jo. 325, C. A.

intending the erection of a house for deft.:—*Held*: deft. was entitled to deduct from the amount which pltf. could otherwise claim, any loss which deft. had sustained through pltf.'s negligence, in certifying for too much for contractors who afterwards failed, in consequence of which deft. was compelled to have the work done by others at a much higher price.—*IRVING v. MORRISON* (1877), 27 C. P. 242.—**CAN.**

See, further, cases in Sub-sect. 1, E., ante.

e. Engineer as arbitrator—Duty in making award.—A contract provided that the cost of the labour expended on the works, & interest on the value of materials used in connection therewith, should be determined by the engineer:—*Held*: the engineer was entitled to arrive at his determination by whatever methods he chose, & was not bound to take evidence or hear parties.—*NORTH BRITISH RY. CO. v. WILSON*, [1911] S. C. 738; 1 S. L. T. **SCOT.**

PART XVI. SECT. 2, SUB-SECT. 1.—G.

1. Secret commission—Claimed by clerk of works from measurer—As condition of employment.—A clerk of works with full charge of certain buildings in course of erection, unknown to his principal, stipulated with a measurer, as a condition of the latter's employment, for a commission on the tradesmen's accounts as brought out in the measurements. The measurer having been employed, the whole contract being verbal, the clerk of works sought to recover his commission:—*Held*: the alleged contract for a commission was *pactum illicitum*, & action dismissed as irrelevant, with expenses to neither party.—*MAC-DOUGALL v. BREMNIER*, [1907] 44 S. L. R. 804.—**SCOT.**

g. Engineer becoming partner of contractor—Contract for other employer.—Pltf., an engineer, was a servant of the Govt.; it was his special duty to supervise on their behalf the proper performance by a contractor of the work contracted for. While occupying that position he entered into an agree-

ment of partnership with the contractor, whereby he was to receive a share in any profit under the contract:—*Held*: the contract was so tainted with illegality that the ct. would give pltf. no relief in respect of it.

Where pltf. was able to prove a partnership with the contractor in another contract apart from any evidence as to illegality:—*Held*: the defence of illegality had no applicability to such contract.—*NOBLE v. MADDISON* (1912), 12 S. R. N. S. W. 435.—**AUS.**

PART XVI. SECT. 2, SUB-SECT. 2.

h. To contractor—Whether privity of contract.—In a building contract, where certificates are to be given by the engineer of the building owner to the contractor, there is no privity of contract between the engineer & the contractor.—*COUGHLIN v. VICTORIA CITY* (1895), 4 B. C. R. 20.—**CAN.**

k. Claim in warranty against architect—Deviations from specifications.—A builder who has been condemned in damages by reason of defects in the construction of his works, has no claim in warranty against the architect where it appears that there were serious deviations from the specifications furnished by the architect, & that these deviations were the chief cause of the weakness of the construction. If a builder or contractor does not fully understand from the specifications what is required for the proper construction of the work according to the rules of art, it is his duty to consult the architect & follow his instructions in relation thereto.—*ROYAL ELECTRIC CO. v. WAND* (1895), Q. R. 9 S. C. 117.—**CAN.**

l. In granting certificate.—Under a contract with a public body, for the construction of certain works to the satisfaction of the engineer of such body, the engineer is not an arbitrator, but a skilled agent of the employer, his certificate being by mutual agreement a condition precedent to the contractor's obtaining final payment, he owes a duty to the contractor as well as to the employer, & is bound to act fairly towards both parties.—*YOUNG v. BALLARAT & BALLARAT EAST COMRS., MARTIN v. BOARD*

Annotations:—Reid. Kenned (1909), 2 Hudson's B. C., 4t
v. Tate, [1919] 1 K. B. 463.

Certificates generally, *see* I. ante
Sect. 2, sub-sect. 4, *ante*.

Arbitration clauses generally, *see* *ante*.

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411. *Mentd. Brightman*

III., Part VI.,

Part XV.,

G. Fraud and Secret Commissions.

426. Secret commissions—Liability to dismissal—Employer having means of ascertaining bribe.—Pltf. was employed by defts. as an architect to supervise erection of a building. Pltf. invited tenders for sub-contracts, asking for a commission from the persons tendering on the amount of the tender. After the tenders were accepted, defts. discovered that pltf. was to receive these commissions & at once dismissed him:—*Held*: (1) the dismissal was justifiable; (2) it was immaterial that existence of the commissions was not fraudulently concealed, & that officers of the co. had had the opportunity of discovering their existence.—*TEMPERLEY v. BLACKROD MANUFACTURING CO., LTD.* (1907), 71 J. P. Jo. 341.

See, generally, AGENCY, Vol. I., pp. 480–486.

SUB-SECT. 2.—TO CONTRACTORS, SUB-CONTRACTORS AND SPECIALISTS.

427. To contractors—Warranty of authority—Value of materials supplied—Costs.—A declaration

OF LAND & WORKS (1879), 5 V. L. R. 503.—**AUS.**

m. Right to certificate—How enforced.—A building contract had been substantially performed. The architects pointed out what had not been done, & the pltf. did it, but they omitted to refer to three trifling matters which had not in fact been attended to:—*Held*: that, as against the architects, pltf. was entitled to judgment directing them to hold an inquiry & issue a certificate.—*LAWRENCE v. KERN* (1910), 14 W. L. R. 337; 3 Sask. L. R. 253.—**CAN.**

n. — — — — ——*Held*: if a certificate was required, the architect could be forced, by *mandamus* or otherwise, to execute one.—*WATTS v. MCLEAY* (1911), 19 W. L. R. 916.—**CAN.**

o. No evidence that engineer satisfied.—*Re O'Rourke* (1886), 7 N. S. W. L. R. 64.—**AUS.**

p. — — — Measure of damages.—B. contracted with the Govt. of V. to construct a railway. The contract contained a covenant by the Govt. to pay the amount certified by the engineer to be due & that it should be obligatory upon the engineer either to certify or state in writing his reasons for not doing so. After the completion of the contract the engineer declined to certify & stated as his reason that by the terms of the contract B. was indebted to the Govt.:—*Held*: this was not a sufficient reason within the contract, & B. was entitled to substantial damages, the measure of damages being the amount which ought to have been inserted in the certificate, but without interest upon that amount.—*BRUCE v. R.* (1866), 2 W. W. & A. B. 193.—**AUS.**

q. Certificate fraudulently withheld—Right of action.—Under a contract making the certificate of the employer's engineer a condition precedent to the contractor's right to payment, an action will lie, at the suit of the contractor, against the engineer for fraudulently withholding his certificate; & it is not necessary for pltf. to allege in his declaration that the certificate was withheld by the engineer in collusion with the

Sect. 2.—Duties and liability

Sub-sect. 4.—Duties: Sub-sects. 2, 3 & 4.

stated that deft. by A. & other, who was employed as architect church, falsely to superintend the building of a tended & fraudulently represented & pretended that he was authorised by A. to order, & order, stone of pltf. for the building of the church for & on account of, & to be charged to, A., & that pltf. relying on that representation, & believing that deft. had authority from A. to order the stone on his account, delivered same, & same was used in the building of the church, whereas in truth & in fact deft. was not, as he well knew, authorised so to order the stone. It then went on to aver, that, A. refusing to pay for the stone, pltf. trusting in deft.'s representation sued A. for the price & failed in their action & had to pay A.'s costs & also the costs incurred by their own attorneys:—*Held*: the declaration sufficiently disclosed a cause of action, & it appearing that deft. had no such authority as he represented pltf. were entitled to recover not only the value of the stone, but also the costs they had incurred & paid in the former action.—*RANDELL v. TRIMEN* (1856), 18 C. B. 786; 25 L. J. C. P. 307; 139 E. R. 1580.

Annotations:—*Refd.* *Collen v. Wright* (1857), 7 E. & B. 301. *Mentd.* *Richardson v. Dunn* (1860), 8 C. B. N. S. 655; *Spedding v. Nevell* (1869), L. R. 4 C. P. 212; *Dickson v. Reuter's Telegraph Co.* (1877), 2 C. P. D. 62.

See, generally, AGENCY, Vol. I., pp. 664–667.

428. Certificate for insufficient amount—Refusal to reconsider—No proof of fraud.—[Claim, that pltf. contracted with a co. to build a hall, the plans, the bill of “quantities,” etc., for which had been prepared by deft. who was employed by the co., & named in the contract as their architect to carry out the works. The contract provided that the architect might order additions to or deductions from it, & that the amount of them should be ascertained by the architect in the same manner as the “quantities” had been measured, & at the same rate as they had been priced at; that the contractor & the co. would be bound to leave all questions or matters of dispute which might arise during the progress of the works, or in the settlement of the account, to the architect, whose decision should be final & binding upon all parties, & that the contractor would be paid on the certificate of the architect. The claim then alleged that the contract was signed by pltf. in the belief & expectation, as deft. well knew, that deft. would use due care & skill in ascertaining the amounts to be paid by the co. to pltf., that the work was done, that additions & deductions were ordered, & certificates given by deft., but that he did not use due care & skill in ascertaining the amounts,

& neglected & refused to ascertain them in the same manner as the “quantities” had been measured, & at the same rate, & knowingly or negligently certified for a much less sum than was the net balance payable to pltf., & refused to reconsider his final certificate, by reason whereof pltf. was unable to obtain payment from the co. of the balance:—*Held*: the functions of the architect in ascertaining the amount due to pltf. were not merely ministerial, but such as required the exercise of professional judgment, opinion, & skill, & he occupied the position of an arbitrator, against whom, no fraud or collusion being alleged, the action would not lie.—*STEVENSON v. WATSON* (1879), 4 C. P. D. 148; 48 L. J. Q. B. 318; 40 L. T. 485; 43 J. P. 399; 27 W. R. 682.

Annotations:—*Consd.* *Young v. Blake* (1887), 2 Hudson's B. C. 4th ed. 110; *Chambers v. Goldthorpe*, *Itestell v. Nye*, [1901] 1 K. B. 624. *Refd.* *Re Rio de Janeiro Flour Mills & Granaries & De Morgan*, *Snell* (1891), 8 T. L. R. 108.

— **Fraud in certifying.**—*See* Part III., Sect. 3, sub-sect. 4, *ante*; ARBITRATION, Vol. II., p. 430, No. 801.

429. To specialists—Personal liability—Special promise to pay.—[A declaration stated that H. was employed to do work on certain houses, & that deft. was employed as surveyor over him, & to receive money to be paid to H. for such work, that, in consideration that pltf. would provide & deliver to H. such materials as should be required to enable him to do the work, deft. promised pltf. to pay him for them, out of such money received by him as should become due to H. for the work, if H. would give him an order for that purpose. The declaration then averred that H. gave deft. such order, & that he required certain materials, which pltf. provided & delivered to him, to the value of £1,000, & that that sum became due to H. for the work, of all which deft. had notice, & was requested by pltf. to pay him for the materials out of such money received by him as were due to H. for the work. Breach, that, although deft. had received £1,000 to be paid & then due to H., & though the order had not been revoked, deft. refused to pay pltf. Plea, that the promise in the declaration mentioned was a special promise to answer for the debt to H. & that there was no memorandum or note thereof in writing:—*Held*: the plea was bad, for deft.'s promise was an original, & not a collateral one.—*ANDREWS v. SMITH* (1835), 2 Cr. M. & R. 627; 1 Gale, 335; Tyr. & Gr. 173; 5 L. J. Ex. 80; 150 E. R. 267.

Annotation:—*Refd.* *Sweeting v. Asplin* (1840), 7 M. & W. 165.

430. ——— Materials ordered without disclosing principal.—[Def., an architect, engaged by building owners for rebuilding two public-

employers.—*YOUNG v. OHLFSEN-BAGGE* (1878), 4 V. L. R. 516.—AUS.

r. ———.—[An action by a builder against an architect for fraudulently withholding his final certificate under the building contract is not an action founded on contract.—*WRIGHTWAY v. DUNN* (1892), 18 V. L. R. 705.—AUS.

s. ———.—[Where a contract requires a final certificate to be given by the engineer of the building owner to the contractor, the only cause of action by the contractor against the engineer, in the event of his withholding the certificate, is for damages for fraudulently, & in collusion with the building owner, refusing to grant the certificate.—*COUGHLIN & MAYO v. WILMOT & VICTORIA CITY CORPN.* (1895), 4 B. C. R. 20.—CAN.

— **No action at**

law for not certifying lies at the suit of a railway contractor against the engineer employed by the railway co., where the contractor's remuneration has been made by his contract contingent upon his obtaining the engineer's certificate, that the work bargained for has been executed, & the engineer has not been a party to the contract, although his refusal to certify has been the result of mere wantonness, of fraud, or even of collusion with the railway co.—*MURPHY v. BOWER* (1866), 1 R. 2 C. L. 506.—IR.

a. ——— Damage to adjoining buildings.—[By the specifications, pltf. were to be responsible for any damage done to adjoining property by reason of earth caving in or in any way caused by pltf.'s work, unless due to the negligence or lack of judgment of the architects:—*Held*: upon the evidence,

damage done to a neighbouring building was not due to the negligence or lack of judgment of the architects, & pltf. were responsible for it.—*GRACE v. OSLER* (1911), 19 W. L. R. 109, 326.—CAN.

427 i. ——— Warranty of authority.—[Pltf., stained glass manufacturers, sued deft., an architect, who had been employed by the trustees of the G. church to supervise the construction of a new church, for the price of work & material. The whole contract was let to one S. Deft. had no authority from S. or the trustees to contract for either of them. Deft. invited pltf.'s tender & held out that they would be paid by the trustees:—*Held*: he was liable on an implied warranty of authority, the goods having been accepted & there being no dispute as to their quality.—*HORWOOD v. MACLAREN* (1906), 8 O. W. R. 857.—CAN.

houses, invited pltf. to give estimates, referring in the letters to his "clients." Pltf. sent him estimates & in their letters referred to "your clients." Afterwards deft. ordered the goods without stating that he did so as agent:—*Held*: (1) deft., by making the contract in his own name, without naming his principals and without expressly excluding his liability, had made himself personally liable; (2) by endeavouring to get the money from the builders & the building owners to whom deft. had referred them, pltf. had made no election exonerating him.—*BEIGHTHEIL & YOUNG v. STEWART* (1900), 16 T. L. R. 177.

, generally, AGENCY, Vol. I., pp. 626–628.

SUB-SECT. 3.—LIABILITY TO PROSECUTION, ETC.

In general.—See CRIMINAL LAW & PROCEDURE.

Under Public Health Act, 1875 (c. 55).—See LOCAL GOVERNMENT.

Under Prevention of Corruption Act, 1906 (c. 34) & Public Bodies Corrupt Practices Act, 1889 (c. 69).—See CRIMINAL LAW & PROCEDURE; LOCAL GOVERNMENT.

SUB-SECT. 4.—LIMITATION OF ACTIONS.

In general.—See LIMITATION OF ACTIONS.

When officer of public body.—See PUBLIC AUTHORITIES & PUBLIC OFFICERS.

SECT. 3.—REMUNERATION.

SUB-SECT. 1.—IN GENERAL.

431 Employment by local board—Not under seal. Defts., who were a local board within Public Health Act, 1848 (c. 63), s. 85, and an urban authority within Public Health Act, 1875 (c. 55), s. 174 were found by a jury to have authorised their surveyor to employ pltf., an architect, to prepare certain plans for offices they intended to erect, but which they did not erect, & to have ratified the act of their surveyor in procuring them, & such offices were found also by the jury to be necessary for the purposes of defts., & the plans necessary for the erection of the offices. The plans were ordered when Public Health Act, 1848, was in force, but were not finished until that Act had been replaced by 1875 Act. There was no contract under seal with pltf., nor ratification under seal of any contract with him, & the value of the work done exceeded £50:—*Held*: as the enactments requiring a seal were compulsory, & not merely directory, defts. were not liable to pay for the plans. *Qu.*: whether they would have been so liable upon an

executed consideration, if they had made full use of the plans by having offices built in accordance with them.—*HUNT v. LONDON LOCAL BOARD* (1878), 4 C. P. D. 48; 48 L. J. 115; 43 J. P. 284; 27 W. R. 123, J. 115. *Annotations*:—*Apprvd.* *Young v. Royal Leamington Spa Corp.* (1883), 8 App. Cas. 517. *Distd.* *Boyle v. Comrs. v. Watts* (1884), 14 Q. B. D. 87. *Reid.* *Edwards v. Basker* (1881), 7 Q. B. D. 529; *Phelps & Woodford v. Upton Snodsbury Highway Board* (1885), Cab. & El. 524; *Spencer, Whatley & Underhill v. Southall-Norwood U. D. C.* (1905), 69 J. P. 308; *Hodge v. Matlock Bath & Scarthin Nick U. D. C. & Nuttall* (1910), 75 J. P. 65. *Mentd.* *Hoare v. Lewisham Corp.* (1901), 85 L. T. 281.

432. — — — *Where pltf. was appointed architect to a school board by resolution entered on the minutes & signed & countersigned in accordance with Elementary Education Act, 1870 (c. 75), sched. 3 (7), the instructions given him being entered, signed, & countersigned in like manner:—Held*: pltf. was entitled to recover his fees for work done in pursuance of the instructions, notwithstanding the fact that the board had not entered into a contract with him under their corporate seal.—*SCOTT v. GREAT & LITTLE CLIFTON SCHOOL BOARD* (1884), 52 L. T. 105; 33 W. R. 368; 1 T. L. R. 187.

433. — — — *Pltf., an architect, had been requested by deft. school board to prepare plans for the enlargement of the school, & to act as clerk of the works & superintend the construction of the building. Pltf. prepared plans, but the lowest tender was for a larger sum than was estimated. Another architect was engaged, who carried out the work. Pltf. sued the school board for remuneration for professional services rendered, & the jury found in his favour:—Held*: as the agreement was not under seal, pltf. was not entitled to recover.—*START v. WEST MERSEA SCHOOL BOARD* (1899), 63 J. P. 440; 15 T. L. R. 442.

434. — — — *Acceptance of benefit—Implied contract.*—A rural district council under the powers of Local Government Act, 1894 (c. 73), s. 56 (1), referred an application for the execution of sewerage works within a portion of their district to a committee. The committee requested an engineer to report what works were necessary & to give an estimate of the cost. On his report & estimate the committee recommended the council to carry out certain works. The council adopted the recommendation & confirmed the minutes of the committee:—*Held*: although there was no contract under seal between the council & the engineer, yet, the work performed by him being necessary for the purposes for which the council was created, an implied contract arose, upon the performance of the work by him & the acceptance of its benefit by the council, for the council to pay for the work.—*LAWFORD v. BILLERICAY RURAL COUNCIL*, [1903] 1 K. B. 772; 72 L. J. K. B. 554; 88 L. T. 317; 67 J. P. 245; 51 W. R. 630; 19

PART XVI. SECT. 3, SUB-SECT. 1.

b. No contract of employment—Invitation to prepare plans—At own risk.—Pltf. was told by defts.' general manager that he might prepare plans of a proposed factory, but at his own risk. The plans were prepared, but pltf. was not employed. Pltf. thereupon brought an action to recover \$2,000 remuneration for the preparation of the plans:—*Held*: the action must be dismissed.—*WOLFE v. EASTERN RUBBER CO.* (1914), 26 O. W. R. 11; 5 O. W. N. 979.—CAN.

c. — — — Joint enterprise.—In an action by architects to recover from a landowner fees for preparing plans & specifications for the

erection of an apartment house upon deft.'s land:—*Held*: the plans & specifications were prepared by pltf. at their own risk, as sharers with deft. & others, in a contemplated enterprise, & deft. was not liable to pltf.—*MELVILLE v. STIRRETT* (1910), 14 W. L. R. 557.—CAN.

d. — — — Onus of proof.—An architect prepared detailed plans for covering a piece of ground with buildings to be erected by the proprietor. The buildings were not proceeded with, but the proprietor used the plans to his advantage in dealing with a purchaser of the ground. In an action by the architect for payment of his account, the proprietor denied liability on the grounds that the plans

had been furnished upon the footing of there being a competition:—*Held*: assuming the fact as stated by the defender, it lay upon the employer to prove that the employment was gratuitous.—*LANDLESS v. WILSON* (1880), 8 R. (Ct. of Sess.) 289; 18 Sc. L. R. 206.—SCOT.

434 i. Employment by corporation—Not under seal—Acceptance of benefit.—Where work done for a corp. is such as was evidently contemplated by their charter, & they have accepted & availed themselves of it, they cannot refuse to pay on the ground that there was no contract under seal.—*CLARK v. HAMILTON & GORE MECHANICS' INSTITUTE* (1854), 12 U. C. R. 178.—CAN.

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Jo. 366; 1 L. G. R. 535,

C. A.

a. *Hodge v. Matlock Bath & Scarthin*0), 74 J. P. 374 (*see* 75 J. P. 65).Nick U. D. v. Rhyll U. C., [1913] 2 Ch. 407. *Fold.*Apld. *Dor Tamworth Union* (1917), 86 L. J. Ch. 436.

Yrre & Hollingsworth v. Marylebone B. C. (1908),

129; *Baker v. Holme Cultram U. C.* (1915), 85 B. 799.35. ———— **Right to quantum meruit.]**

—The preparation of plans by an architect for the erection of a kursaal for an urban district council under the special & cumulative powers conferred on such council by a local Act containing no provision similar to Public Health Act, 1875 (c. 55), s. 174 (1), & the acceptance of such plans by the council entitle the architect to recover upon a *quantum meruit* for work & labour done, although the contract for the work be not under the seal of the council, & the erection of the kursaal be optional on the part of the authority & ultimately abandoned.

In such a case, the local authority having received the benefit of the work, the purpose of the contract is to be regarded as a purpose for which a corporate body is created. The purposes for which a corporate body is created are not limited to those for which it was first created, but extend to purposes for which the corpn. is clothed with power to order work to be done of which it gets the benefit.—*HODGE v. MATLOCK BATH & SCARTHIN NICK URBAN DISTRICT COUNCIL* (1910), 74 J. P. 374; 26 T. L. R. 617; 8 L. G. R. 958; *affd.* 75 J. P. 65, C. A.

Annotations:— *Refd.* *Hoare v. Kingsbury U. D. C.* (1912), 107 L. T. 492; *Baker v. Holme Cultram U. C.* (1915), 85 L. J. K. B. 799.

436. ———— **Defts. as the successors of the R. Improvement Comrs., who were constituted a body corporate with a common seal by an Improvement Act, with which was incorporated the Comrs. Clauses Act, 1847 (c. 16), were proposing to buy, repair, & extend the pier under special powers in their improvement Acts, & definitely employed pltf., an engineer & expert in pier & harbour work, to make a certain valuation & estimates required by the Local Government Board to which body defts., under powers in their special Acts, had applied for sanction to borrow the money necessary for the proposed scheme. There was no contract under the seal of defts. relative to the employment of pltf., but he made the valuation & estimates of which defts. had the benefit & made use. Ultimately the scheme was not proceeded with. In an action by pltf. to recover his fees:—*Held*: Public Health Act, 1875 (c. 55), s. 174, did not apply to the contract, & pltf. was entitled to payment upon a *quantum meruit*.—*DOUGLASS v. RHYLL URBAN COUNCIL*, [1913] 2 Ch. 407; 82 L. J. Ch. 537; 77 J. P. 373; 29 T. L. R. 605; 57 Sol. Jo. 627; 11 L. G. R. 1162.**

437. ———— **Designs submitted in competition—Subsequent modification of scheme.]—**An urban district council issued under their seal conditions in accordance with which architects were

e. *Employment by Crown—Prescribed formalities not complied with—* 31 Vict. c. 12, ss. 7, 15.—*WOOD v. R.* (1877), 7 S. C. R. 634.—**CAN.**

f. *Right to remuneration—Delay in delivery of plans.]—* *RESTHER v. FRÈRES DES ÉCOLES CHRÉTIENNES* (1890), 19 R. L. O. S. 252.—**CAN.**

g. ———— *Errors in certificate.]—* Three years after a building was completed the architect granted his final certificate on which the contractor

sued & obtained a verdict: the certificate though containing errors was given in good faith:—*Held*: the architect was entitled to his fees subject to the employer's counterclaim on certain items for negligence.—*RICARDS v. KNIGHT* (1916), 12 Tas. L. R. 99.—**AUS.**

PART XVI. SECT. 3, SUB-SECT. 2.

h. *Plans prepared in accordance with instructions.]—*Pltf. prepared plans & specifications according to

to tender designs for the erection of municipal buildings. An assessor was to select the architect whose plans he considered best. The council were not expressly bound to appoint the assessor's choice. Pltf. was in fact selected by the assessor, & appointed by the council. He prepared plans, but the Local Government Board refused leave to borrow for the amount of the scheme. Accordingly pltf. prepared fresh plans at less cost under instructions from the council. This scheme was never carried out, & pltf. sued for his fees under the original agreement. Defts. objected that there was no contract under seal to satisfy Public Health Act, 1875, s. 174:—*Held*: these fees had been earned under a modification of the original scheme & not under a new scheme, & the sect. was satisfied by the original conditions of tender, & pltf. was entitled to recover.—*HUNT v. ACTON URBAN DISTRICT COUNCIL* (1908), 72 J. P. 345; 6 L. G. R. 957.

See, further, CONTRACT; CORPORATIONS; LOCAL GOVERNMENT; PUBLIC HEALTH & LOCAL ADMINISTRATION.

SUB-SECT. 2.—COMPLETED WORK.

438. **Probationary drawings—Remuneration subject to approval.]—**A declaration in *assumpsit* against deft., sued as clerk to a committee of visitors appointed pursuant to 8 & 9 Vict. c. 126, for the regulation, etc., of a county lunatic asylum, stated that it was agreed by & between pltf. & the committee of visitors, that, in consideration that pltf. would render his services as an architect in examining the site for a proposed lunatic asylum, & preparing the requisite probationary drawings for the approval of the committee of visitors, & all other drawings & documents required to be submitted to the comrs. in lunacy, & afterwards to the Secretary of State, pursuant to the statutes, & subsequently would prepare the whole of the working-drawings, estimates, & specifications for an asylum to contain 200 patients, the committee agreed that £437 10s. should be paid to pltf. The declaration then alleged that pltf. did render his services in examining the site, & did prepare the requisite probationary drawings for the approval of the committee, & had always been ready & willing to prepare all other drawings & documents required to be submitted to the comrs. in lunacy, & Secretary of State, & subsequently to prepare the whole of the working-drawings, estimates, & specifications, of which the committee had notice, but that they refused to permit him to complete the agreement, & wrongfully discharged him from the further performance thereof. Second plea, that pltf. did not prepare the requisite probationary drawings in the count mentioned. Fifth plea, that a reasonable time had elapsed after the making of the agreement, & before pltf. was discharged from the further performance thereof, for pltf. to prepare the requisite probationary drawings for the approval of the com-

missions received from deft., he was entitled to remuneration.—*SMITH v. CZERWINSKI* (1906), 4 W. L. R. 563.—**CAN.**

k. *Plans approved or used by employer.]—*In the absence of special agreement, an architect employed to design a building is not entitled to remuneration for his plans & specifications unless the employer has approved or in any way utilised them.—*DE WITT v. CAPE CANNING CO.* (1894), 11 S. C. 116; 4 C. T. R. 116.—**S. AF.**

PART XVI.—ARCHITECTS AND ENGINEERS

mittee, that pltf. prepared certain drawings, which the committee disapproved of & rejected, & that, save as aforesaid, pltf. did not prepare any probationary drawings for the approval of the committee, & that they discharged him from the further performance of the agreement, as they lawfully might:—*Held*: (1) the plea was proved, by showing that a reasonable time for preparing the requisite probationary drawings had elapsed, & that none were prepared by pltf. except certain drawings which the committee disapproved of & rejected; (2) upon the true construction of the contract, pltf. was entitled to recover nothing until the drawings had been approved by the several parties whose approval was by statute required, & the subsequent drawings & estimates were all completed.—*MOFFATT v. DICKSON* (1853), 13 C. B. 543; 22 L. J. C. P. 265; 17 Jur. 1009; 1 C. L. R. 294; 138 E. R. 1311.

Annotations:—*Consd.* *Moffatt v. Laurie* (1855), 15 C. B. *Refd.* *Kendall v. King* (1856), 17 C. B. 483.

SUB-SECT. 3. —WORK NOT COMPLETED.

439. Negligence — Incorrect estimates.]—An engineer was employed to form plans & make estimates for the erection of a bridge. He intrusted another to examine the bed of the river, who reported it to consist of hard marl rock. On that report the engineer made his estimates. It turned out that the bed of the river was not hard marl rock, but that an additional expense for piles was necessary:—*Held*: the engineer was not entitled to anything for his work & labour, inasmuch as by his negligence the party had been deceived in the matter.—*MONEYPENNY v. HARTLAND* (1821), 1 C. & P. 352; 3 L. J. O. S. K. B. 66; *subsequent proceedings* (1826), 2 C. & P. 378, N. P.

Annotations:—*Mentd.* *Wood v. Argyll* (1844), 6 Man. & G. 928; *Day v. Sharp* (1846), 7 L. T. O. S. 62; *Smith v. Archibald* (1849), 14 L. T. O. S. 174.

440. — — —.]—If an engineer, employed by a committee for erecting a bridge & forming a road to it to make an estimate of the expense of the works, makes a low estimate, & thereby induces persons to subscribe for the execution of the work, who would otherwise have declined it, & it turns out afterwards that such estimate is

incorrect, either from negligence or want of skill, & that the work cannot be done but at a much greater expense, he is not entitled to recover anything for his trouble in making such estimate.—*MONEYPENNY v. HARTLAND* (1826), 2 C. & P. 378, N. P.

Annotation:—*Refd.* *Wood v. Argyll* (1844), 6 Man. & G. 928.

441. Prevention by employer—Failure to accept lowest tender—Remuneration subject to special condition.]—A church having been destroyed by fire, a subscription was opened for rebuilding it, and a committee for that purpose formed, deft. being a member of it. Pltf. sent in a design, which was approved. The committee advertised for tenders for building the church according to pltf.'s design, imposing the condition upon him, that although pltf. was to make the necessary plans & specifications for carrying out his design, yet, in case the estimate for building should exceed £4,700 exclusive of commission & the salary of the clerk of the works, pltf. was not to be paid anything for his labour & trouble, & the committee were to be at liberty to decline pltf.'s design. Estimates were sent in by four different builders, but one only below £4,700, & the committee not pledging themselves to accept the lowest tender, refused to proceed, & ultimately nothing further was done, & the church remained unbuilt. The jury found that the lowest estimate was one that a man might have prudently acted upon:—*Held*: pltf. was entitled to recover for work & labour, in drawing the plans & specifications.—*CLARK v. WINDHAM* (1851), 18 L. T. O. S. 64.

442. — — — Plans for works for specified sum—Tenders in excess.]—In an action by architects, whose plans, after having been accepted, are rejected, on the ground that the work cannot be done for the amount of their estimates, it is for the jury whether it is an express or implied condition of the contract, that the estimates shall be reasonably near the actual cost.—*NELSON v. SPOONER* (1861), 2 F. & F. 613, N. P.

443. — — —.]—Where an architect was instructed to prepare plans for a building, the costs of which were not to exceed a specified amount, & all the tenders were above that amount:—*Held*: the question whether the employer could repudiate the contract & refuse to pay the architect was a question of fact for a jury.—*BURR v. RIDOUT* (1893), *Times*, Feb. 22nd.

PART XVI. SECT. 3, SUB-SECT. 3.

1. Negligence of engineer or architect—Cost of work limited—Plans exceeding limit.]—Where an architect is instructed to prepare designs for a building, & a certain sum is named as the limit of cost, he is not entitled to recover commission in respect of designs which could not be carried out for such sum.—*FLANNAGAN v. MATE* (1876), 2 V. L. R. 157.—*AUS.*

m. — — —.]—Pltf., an engineer, had prepared a scheme the cost of which exceeded the cost fixed upon by the parties:—*Held*: he was entitled to no remuneration.—*GELLATLY v. BURGHESDORP MUNICIPALITY* (1917), E. D. L. 289.—*S. AF.*

n. — — — Neglect to obtain exact limit from owner.]—Deft. intended to build a house at a cost of from \$3,000 to \$4,000, & instructed pltf., an architect, to draw plans, which pltf. did, but for a house to cost \$7,000. Pltf. did not inquire what price deft. wished to pay, but he had the information from an intermediary that \$4,200 was the amount which deft. had to finance the building:—*Held*: pltf. was negligent in that he did not acquaint himself with the price which deft. was willing to pay, & as he had

prepared plans which were of no value to deft., he could not recover.—*HUTCHCROFT v. LETCH* (1913), 25 W. L. R. 609.—*CAN.*

o. — — — Tenders exceeding limit.]—An architect is not, in the absence of any agreement relating thereto, entitled to any remuneration whatever for making plans & specifications & calling for tenders, at the request of his employers, when the lowest tender exceeds the price initially fixed between architect & employer as the limit of cost for the building contemplated, & the latter decides on that account not to proceed with the work.—*PEARCE & PEARCE v. WALKER* (1905), 19 E. D. C. 80.—*S. AF.*

p. — — — Excess caused by compliance with bye-law.]—Where an architect is instructed to prepare plans for a building to cost not more than a certain sum, but which building must also comply with other conditions as to accommodation under a municipal bye-law, then although, in order to comply with such other conditions, the tenders sent in are in excess of the sum mentioned, the architect cannot recover for his services.—*WILSON v. WARD* (1908), 14 B. C. R. 131; 9 W. L. R. 481.—*CAN.*

See, further, cases in Sub-sect. 4, post.

from estimate of cost.]—There is a distinction between an undertaking to supply plans & specifications of a building at a cost not to exceed a specified amount, & an undertaking to supply plans & specifications of a specified building over a specified area with an estimate of the probable cost. The former undertaking in regard to the amount makes it a condition, compliance with which is necessary to entitle the architect to recover for his work, because the non-compliance is a complete failure to carry out the contract, & goes to the root of the matter; but in the latter, the estimate, is not a condition, but merely the expression of his professional opinion on the probable cost of the building to be erected, which may be correct or under or over estimated, but which, even if incorrect, could not deprive him of payment for his services, though possibly it might justify a deduction in the value of his services, & possibly a right of cross-action if the wrongful estimate arose through want of skill or negligence resulting in damage to the owner.—*HARVEY v. BROWN (THOMAS) & SONS, LTD.*, [1920] Q. S. R. 25.—*AUS.*

444. Building not erected.]—An architect brought an action for his charges for preparing plans, taking on for his charges for preparing which defts. put out quantities, etc., for a house not in fact had designed to build but which had in fact been built:—*Held*: it was for the jury the work was done on the retainer & employment of deft.—*SPRATT v. DORNFORD* (1862), 2 Hudson's B. C. 3rd ed. 7.

445. — Commission on estimated expense.]—An architect is not entitled to recover commission on the estimated expense of a building, which ultimately is not erected.—*FARTHING v. TOMKINS* (1893), 9 T. L. R. 566.

446. Refusal to deliver plans unless paid more than due—Whether bar to claim for amount due.]—Where A. contracts to do work on materials supplied to him by B., as where he contracts to survey a parish, & to set down the results of such survey in a map, upon paper furnished to him by B., his right to sue for work & labour is complete as soon as he has finished the work, & has given B. a reasonable opportunity of ascertaining its correctness; & if, there being no contract for a specific price, he demand more for the work than a reasonable price, & refuse to deliver it except upon payment of such larger price, that does not preclude him from suing for & recovering a reasonable price.—*HUGHES v. JENNY* (1839), 5 M. & W. 183; 2 Horn. & H. 13; 8 L. J. Ex. 177; 151 E. R. 79.

447. Payment conditional on disposal of land for building—Whether implied contract not to sell for other purposes.]—A declaration stated that L., being possessed of land, agreed with M., an architect, that he should lay out the land for building purposes, & make surveys, etc., that he should make no charge for the above services, but in the event of the land being disposed of for building purposes, M. should be appointed architect on L.'s behalf, & the parties building should pay him a percentage on the outlay, provided they did not employ him as their own architect, but in the event of L., or his exors., wishing to dispense with M.'s services, he or they should remunerate him for his services in making the preparations. L. made the surveys, etc., the land was not disposed of for building purposes, and L.'s exors. dispensed with M.'s services, & put it out of their power to dispose of the land for building purposes, & thereupon L. claimed remuneration for the preparations:—*Held*: he was not entitled to recover, the disposing of the land for building purposes

445 i. Building not erected—Commission on estimated expense.]—Pltf. was engaged by defts. to prepare plans & specifications for a building to cost not more than a fixed sum, for which he was to receive a commission on the cost. The plans were approved by defts., & tenders called for, & the work proceeded with. Owing to an advance in the price of materials, the work was stopped:—*Held*: pltf. was entitled to recover from defts. the stipulated commission on the estimated cost of the building.—*HUTCHINSON v. CONWAY* (1900), 34 N. S. R. 554.—*CAN.*

r. — Ultra vires of municipality.]—A municipality being granted a sum of money for the erection of a public library was authorised by an Act of the colonial Legislature to spend the sum required for purchase of the site & an annual sum for its support. Pltfs., architects, were employed to prepare plans. The project was abandoned & pltfs. claimed a percentage on the estimated cost for work done by them:—*Held*: the city had no authority to enter into any contract

involving the expenditure of municipal funds in respect of the building, & pltfs.' action was dismissed.—*SYDNEY v. CHAPPEL* (1910), 43 S. C. R. 478.—*CAN.*

See, further, cases in Sub-sect. 4, post.

s. Plans not approved or used by employer.]—In the absence of special agreement, an architect employed to design a building is not entitled to remuneration for his plans & specifications unless the employer has approved or in any way utilised them.—*DE WITT v. CAPE CANNING CO.* (1894), 11 S. C. 116.—*S. AF.*

t. One of two engineers going abroad—Whether contract for joint employment.]—An agreement was made that B. & E. should be the engineers of a co., to superintend the construction of tramways; E. prepared various plans & drawings, but in consequence of the work not being proceeded with at once, went abroad, & took no further part in the construction of the line; the work was subsequently completed by B. in conjunction with another engineer. In an action by B. & E. for remunera-

being the event in which he was to have any remuneration, & even if the declaration could be taken as charging the exors. with wrongfully putting it out of their power to dispose of the land for building purposes, no contract could be implied from the agreement that L. or they should not dispose of the land otherwise than for building, in which case M. was not entitled to anything.—*MOFFATT v. LAURIE* (1855), 15 C. B. 583; 24 L. J. C. P. 56; 24 L. T. O. S. 259; 1 Jur. N. S. 283; 3 W. R. 252; 139 E. R. 553.

Annotation:—Mentd. Inchbald v. Western Neillgherry Coffee, Tea, & Cinchona Plantation Co. (1864), 17 C. B. N. S. 733.

448. Death of engineer—Payment by instalments—Instalment due at death.]—Defts. employed S. as consulting engineer for fifteen months to complete certain works. S. was to be paid £500 for his services in equal quarterly instalments. Before the work was finished, & whilst two quarterly instalments which were due to him were still unpaid, he died:—*Held*: his personal representative was entitled to recover them.—*STURBS v. HOLYWELL RY. CO.* (1867), L. R. 2 Exch. 311; 36 L. J. Ex. 166; 16 L. T. 631; 15 W. R. 869.

Annotation:—Distd. Krell v. Henry, [1903] 2 K. B. 740.

SUB-SECT. 4.—AMOUNT.

449. No special agreement—Whether entitled to 5 per cent. commission.]—Pltf. claimed £511 3s. as the balance due to him for work & labour as an architect. The bill of particulars set forth the work which pltf. had done, & the estimated expenditure for the buildings of which he had superintended the erection, & distinctly claimed 5 per cent. commission thereon, as the proper & customary reward of such professional services. Proof having been given of the sum on which the commission would be chargeable if pltf. was entitled to charge it, it was contended by pltf. that he was entitled to charge 5 per cent. commission, according to the custom of the profession:—*Held*: (1) such a claim could only be established by proof of an express contract to pay such a commission; (2) although the particulars claimed a commission on the amount expended, it was open to pltf. to prove the value of his services, for the statement of the services was the essential portion of the list of particulars, & all that was said about the commission was an unnecessary specification of the mode in which it was proposed to calculate the value of the work & labour; (3) the jury having given a verdict for pltf. for the amount

tion under the agreement:—*Held*: it was not a contract for joint employment, & so long as the work was efficiently done, it could competently be executed by either of the associated parties.—*BEATTIE v. EDINBURGH NORTHERN TRAMWAY CO.* (1891), 28 Sc. L. R. 763.—*SCOT.*

PART XVI. SECT. 3, SUB-SECT. 4.

449 i. No special agreement—Basis of remuneration.]—An architect is entitled to a fair & reasonable reward for the amount & quality of his work, but, apart from agreement, the percentage scale upon which that remuneration is customarily calculated by the profession, affords no measure of what is reasonable remuneration. Where there is no such agreement it is the duty of the ct. to inquire into the amount & quality of the work actually done.—*LUBKE v. KEGEL* (1913), W. L. D. 91.—*S. AF.*

449 ii. — — —.]—*FOOTNER v. JOSEPH* (1860), 5 L. C. J. 225; 11 L. C. R. 94.—*CAN.*

PART XVI.—ARCHITECTS AND

to which he would have been entitled had there been an express contract to pay him 5 per cent. commission, but expressly rejected a finding of that amount as commission, there was no ground for a new trial.—*MAYER v. WARD* (1846), 7 L. T. O. S. 4; *sub nom. MAYOR v. WARD*, 10 Jur. 796.

450. — — —.]—An architect:—*Held*: entitled to a commission of 5 per cent., in the absence of evidence of a special bargain for less.—*PATTERSON v. TUBBS* (1895), 11 T. L. R. 251.

451. Professional scale—Royal Institute of British Architects—Fees & percentages settled by—Not recoverable in absence of agreement.]—*BURR v. RIDOUT* (1893), *Times*, Feb. 22nd.

452. — — — **Rules as to remuneration—Not binding—May be taken into account.]—***WHIPHAM v. EVERITT* (1900), *Roscoe's B. C.* 4th ed. 171.

453. Work as surveyor—Payment according to work done.]—A surveyor is to be paid according to his labour, & not according to the amount of the bills he looks over & settles.—*UPDELL v. STEWART* (1793), *Peake*, 255, N. P.

454. — — — **5 per cent. on sum laid out.]—**Commission of 5 per cent. on the sum laid out, allowed to a surveyor on a *quantum meruit*.—*CHAPMAN v. DE TASTET* (1817), 2 Stark. 294, N. P.

455. — — — **Ryde's scale.]—**There is no custom

between surveyors & their clients, by which the former can base their account on Ryde's scale, & a surveyor, in the absence of a special agreement, is only entitled to charge a fair & reasonable sum for his services.—*DEBENHAM v. KING'S COLLEGE, CAMBRIDGE* (1884), 1 Cab. & El. 438; 1 T. L. R. 170, N. P.

456. — — —.]—*Held*: though the evidence did not establish a custom between surveyors & their clients to charge according to Ryde's scale, there was evidence that defts.' agent had employed pltf. on Ryde's scale.—*BUCKLAND & GARRARD v. PAWSON & Co.* (1890), 6 T. L. R. 421.

457. — — — **Held applicable in circumstances.]—***STENNING v. MITCHELL & Co.* (1904), *Emden's B. C.* 4th ed. 662.

458. — — —.]—Upon the formation of the B. union embracing (*inter alia*) some parishes formerly belonging to a dissolved union of which the properties & liabilities were transferred to B. union, a parish, S. C., formerly part of the dissolved union was added to T. union, & financial adjustments between B. union & T. union became necessary. T. union requiring to know the value of the former interest of their new parish, S. C., in the properties transferred to B. union, entered into an agreement under seal with F., a surveyor,

451 i. Professional scale—Quebec Association of Architects.]—An architect, in order to avail himself of the tariff of the Province of Quebec Association of Architects, in support of a claim for services as architect, must establish that he is registered as a member of the association under 61 Vict. c. 33.—*BEAULIEU v. LAPIERRE* (1903) Q. R. 26 S. C. 1.—CAN.

451 ii. — — — **Alberta Architects' Association.]—**Pltfs., a firm of architects, sued for the preparation of plans. The plans were prepared by pltf. V., who was not, at the time deft. instructed him to prepare the plans, registered under Alberta Architects' Association Act, 1906:—*Held*: the scale of fees prescribed by the Act could not be invoked by pltfs.—*CAUCHON & VAN TYNE v. MACCOSHAM* (1914), 28 W. L. R. 500; 19 D. L. R. 708.—CAN.

a. Percentage on cost—How calculated.]—Percentage of cost of a building means percentage of the actual cost, not percentage of an estimated cost at the time of the engaging of the architect.—*SHAWINIGAN FALLS SCHOOLS COMRS. v. LAFOND* (1911), Q. R. 23 K. B. 193.—CAN.

b. — — —.]—Def't. requested pltf. to prepare plans for a building to cost \$1,800; the plans, as finally prepared & approved, were for a building which would cost \$25,000:—*Held*: pltf. was entitled to be paid a percentage on the latter amount.—*CHAFFIELD BROTHERS & Co. v. NOLAN* (1905), 38 N. S. R. 74.—CAN.

c. — — — **Architect dismissed before work completed.]—**Pltf. was engaged by def't. as architect for the erection of a building. Pltf.'s remuneration was to be 5 per cent. of the cost of the building. During the course of the work of erection def't. became dissatisfied & took the superintendence out of pltf.'s hands:—*Held*: pltf. was entitled to 5 per cent. on the value of the work done before the building was taken out of his hands & 2½ per cent. on the value of the work done afterwards.—*GOVINLOCK v. MACLEAN* (1918), 14 O. W. N. 142.—CAN.

d. — — — **Whether interest allowable.]—**In an action by a consulting engineer to recover the commission agreed upon as his remuneration for his services installing a water-works plant:—*Held*: pltf. was entitled to the commission, but not to interest on

it.—*LEA v. MEDICINE HAT CITY*, [1917] 3 W. W. R. 467; 37 D. L. R. 1.—CAN.

e. — — — **Or quantum meruit.]—**Pltf. was employed by def't. to design & supervise the construction of certain work at a reasonable rate of remuneration, & alleged the usual & reasonable rate of remuneration was 7½ per cent. upon the total cost of such work & that by reason of def't.'s refusal to continue the said employment he had sustained damages in a certain sum, being 7½ per cent. upon the cost:—*Held*: pltf.'s claim was not one on a *quantum meruit* for work actually done, but was a demand for compensation for the total agreed remuneration in respect of an employment contracted for but not carried out.—*SALISBURY MUNICIPALITY v. MACMULDROW* (1916), App. D. 252.—S. AF.

f. Quantum meruit—Plans not completed to employer's satisfaction.]—It no defence to an action by an architect for payment for his services in preparing plans, etc., for a building, to say that the plans were never completed to def't.'s satisfaction. The architect is entitled to be paid for work he has done at the request of def't.—*MACLURE v. CUSACK* (1912), 20 W. L. R. 611.—CAN.

g. — — — **Defective plans.]—**Defts., the employers, counterclaimed against pltfs., the architects, for their negligence in the preparation of plans, which resulted in a serious defect in the building:—*Held*: pltfs. could not recover anything for the preparation of the plans as they had not supplied proper ones.—*CAUCHON & VAN TYNE v. MACCOSHAM* (1914), 28 W. L. R. 500; 19 D. L. R. 708.—CAN.

h. — — — **Plans rendered useless change of scheme.]—**Pltfs. prepared plans for certain work on defts.' instructions, but were stopped & asked to prepare plans for a second scheme. They were again stopped, & the process was repeated a third time. None of the plans under the first three schemes were submitted for approval, the stoppage in each case being due to alteration in defts.' minds as to what was required. Plans for a fourth scheme were approved, but the work was not proceeded with:—*Held*: pltfs. were entitled to reasonable remuneration for the preparation of the three earlier sets of plans in addition to their claim for the fourth set.—

ACKERMANN & ADAMSON v. COLONIAL GOVERNMENT (1902), 19 S. C. 274.—S. AF.

k. — — — **No evidence of negligence.]—***Held*: pltfs., architects, were entitled to recover the value of services rendered in making plans & specifications for a building, the evidence negating charges of negligence made against them by defts.—*MUNRO & MEAD v. YORKTON AGRICULTURAL & INDUSTRIAL EXHIBITION ASSOC., LTD.* (1913), 26 W. L. R. 513.—CAN.

l. — — — **Work abandoned.]—**To an action by pltfs., architects, to recover for preliminary plans & drawings defts. set up a special agreement that preliminary plans for alterations, if the alterations were not proceeded with, should be paid for only to the extent of the draftsman's actual work upon them:—*Held*: not an unconscionable or unreasonable agreement, & pltfs. were entitled to recover on a *quantum meruit*.—*BOND & SMITH v. COLONIAL INVESTMENT & LOAN Co.* (1908), 11 O. W. R. 617.—CAN.

m. — — —.]—The council of D. advertised for competitive plans for a school house, & pltf.'s plans were accepted. On a vote of the electors of the town a scheme to raise a sum to pay for the school house was defeated. Pltf. claimed remuneration on a percentage basis:—*Held*: pltf. was entitled to remuneration on a *quantum meruit*.—*ERB v. DRESDEN* (1909), 13 O. W. R. 503.—CAN.

n. — — —.]—An architect who is employed to prepare designs for a proposed structure, & with proper skill complies with his instructions, is entitled, if the employer decides not to proceed further, to a reasonable remuneration for his work, unless the evidence clearly shows a contrary understanding between the parties.—*DE ZWAAN v. NOURSE* (1903), T. S. 814.—S. AF.

See, further, cases in Sub-sect. 3, ante.

o. — — — **Lowest tender exceeding alleged limit of price.]—**It was disputed whether the price of a building for which plans were prepared had been limited or not. Tenders were called for, & pltf., the architect, claimed £320, being commission on the lowest tender, which far exceeded the alleged limit of price. The jury found a verdict for £200:—*Held*: there was evidence

Sect. 3.—Remuneration: Sub-sects. 4 & 5. Part XVII. Sect. 1.]

to value these properties & to be paid a percentage of the value of the interests of the T. union therein. F. mistakenly thought that the agreement entitled him to be paid the proper percentage of the whole value of the properties. His mistake was innocently induced by correspondence & negotiations between him & the T. union before the agreement:—*Held*: as there was no mutual mistake & the parties were never *ad idem*, the agreement could not be rectified, but it must be rescinded, & F. was entitled to remuneration on a *quantum meruit*, but not necessarily according to Ryde's scale.—**FARADAY v. TAMWORTH UNION** (1916), 86 L. J. Ch. 436; 81 J. P. 81; 15 L. G. R. 258.

459. — Particulars of demand—Sufficiency of.]—In an action by an engineer, for work & labour & materials, a bill of particulars giving a general account of the nature of his demand is sufficient, as that he claims in respect of certain surveys, stating the number of miles & branches.—**HIGGINS v. EDE** (1846), 15 M. & W. 76; 4 Ry. & Can. Cas. 126; 3 Dow. & L. 470; 15 L. J. Ex. 77; 6 L. T. O. S. 375; 10 Jur. 76; 153 E. R. 767.

Annotations:—Distd. Berkley v. De Vere (1846), 15 L. J. Q. B. 323. *Consd. Irving v. Baker* (1846), 15 L. J. Q. B. 322. *Dbtd. Prichard v. Nelson* (1847), 16 M. & W. 772.

that defts. had promised to pay pltf. such a sum as would remunerate him for his work, & the verdict ought not to be disturbed.—**SPENCER v. HARRIS** (1890), 11 N. S. W. L. R. 21.—**AUS.**

See, also, cases in Sub-sect. 3, ante.

p. — Work not completed according to plan—Negligent supervision.]—An agreement whereby an architect undertakes to prepare the plans & specifications, receive tenders & award the contracts, direct the contractors & superintend the work of erecting two houses, creates a divisible obligation which is capable of being executed by parts, & the absence of the architect from the work during the course of its completion merely gives the proprietor the right to reduce the salary agreed upon in proportion to the damages he has suffered.—**MANN v. RUDOLPH** (1909), 9 Q. R. 37 S. C. 299.—**CAN.**

q. — — —.]—An architect who through negligence in supervising work for the owner & in making his final inspection gives his final certificate when the work has in fact not been properly completed according to the plans & specifications is nevertheless entitled to be paid for his services *quantum meruit*, when he has been employed on the usual terms.—**BRUCE v. JAMES** (1913), 24 W. L. R. 752; 4 W. W. R. 1019.—**CAN.**

—.]—Pltf., architect, was engaged by defts. in connection with the erection of a building. The contractors for the roof were very faulty in their work, & it proved a failure. Unknown to defts., pltf. attempted unsuccessfully to make good the roof & ultimately defts.' agent removed the roof & erected another:—*Held*: pltf. was entitled to his fees but he must pay or indemnify defts. against the expense of the abortive attempt to patch up the roof.—**MEREDITH v. R. C. EPISCOPAL CORPN. OF OTTAWA** (1914), 7 O. W. N. 550.—**CAN.**

s. — Work partly unauthorised—No intention of employer to complete.]—Pltf. sued for the preparation of plans, etc. for a building. Deft. never had an intention of procuring plans & specifications; his purpose was to carry on meetings & interviews in such a way as not to commit himself, while gathering as much information &

advice as he could from pltf. without having to pay for it:—*Held*: most of the pltf.'s work was unauthorised & useless, but a certain part being authorised for this part the deft. must pay.—**LACHANCE v. WILSON** (1908), 7 W. L. R. 646.—**CAN.**

t. Amount claimed—Sole evidence of value.]—In an action by architects for fees for preparing plans for a building which was never erected, there being no evidence as to the value of their services, of any weight as opposed to the testimony of pltfs. themselves:—*Held*: pltfs. were entitled to recover the amount which they claimed.—**SMITH v. CRUMP** (No. 2) (1910), 14 W. L. R. 207.—**CAN.**

a. — Ditches & Watercourses Act, s. 29—Claim *prima facie* valid—Onus of proof.]—Under Ditches & Watercourses Act, s. 29, an engineer certified that he was entitled to \$45 for fees & charges for his services:—*Held*: his certificate established *prima facie* the validity of his claim, & the onus was on pltf., objecting to show its incorrectness.—**CUDDAHEE v. MARA** (1906), 12 O. L. R. 522; 8 O. W. R. 423.—**CAN.**

b. — Not supported by contract—Amount paid into court.]—**WARR v. HITCHCOCK** (1919), 16 O. W. N. 355.—**CAN.**

c. — Exceeding employer's intentions.]—Pltf., an architect, was instructed by deft. to give an estimate for a proposed building. Pltf. prepared drawings, plans & an estimate & delivered them to deft., who protested that he did not know pltf. was going to take so much trouble:—*Held*: in an action for the payment of his fees that the pltf. was entitled to recover.—**CHISHOLM v. WODLENGER** (1913), 26 W. L. R. 274.—**CAN.**

d. Extra services—Justified deviations.]—**SAMWELL v. KINDT** (1914), 28 W. L. R. 347.—**CAN.**

e. — Building enlarged after fees agreed.]—Dft. entered into a contract with a co., called in the contract "the builder," for the construction of a theatre; the builder was to provide drawings & specifications, secure proposals from contractors, & supervise the work; the cost of the building was not to exceed a stipulated sum, & the builder was to receive a stipulated sum

460. — Reasonable time—Right of employer to revoke.]—A. employed B. to make certain surveys, etc., but did not stipulate that they should be ready within any specified time. Some months after the agreement had been entered into, A. gave B. notice that he would no longer require his services. B., notwithstanding the notice, proceeded with the work, & brought an action for a *quantum meruit*:—*Held*: if a reasonable time had not elapsed for B., considering his character & engagements to have done the work when the notice was given, B. was entitled to recover.—**BRAITHWAITE v. CRAWSHAY** (1850), 16 L. T. O. S. 81.

461. Qualifying as witnesses—Ryde's scale.]—On an arbn. to settle the amount of compensation due to A. & Co. the taxing master did not allow the costs of certain architects & surveyors called during the arbn., on the ground that their charges were too high. The fees were in accordance either with Ryde's scale, or with the scale of charges adopted by the Liverpool Architectural Society. The ct. reversed the decision of the taxing master on another ground, but said that nothing in their judgment must lead to the supposition that they gave any approval to such scales of charges.—**BROCKLEBANK v. LANCASHIRE & YORKSHIRE RY. CO.** (1887), 3 T. L. R. 575, C. A.

for full profit, commission & compensation for performance of the work. The contract also provided that no alterations should be made in any contractor's work except upon the written order of the owner. After contracts were let deft. directed an increase in the size of the building:—*Held*: "the builder" was really the architect, & he was entitled to a reasonable sum for the service rendered in connection with the increased size of the building.—**MILLS v. SMALL** (1907), 9 O. W. R. 893; 10 O. W. R. 499.—**CAN.**

f. — Supervision—Dismissal before work completed.]—Pltf. was instructed by deft. to prepare plans & specifications for some houses for a stated sum. The plans were prepared & paid for. A question subsequently arose as to the fees paid for inspection & superintending the work under construction. Deft. dismissed the pltf., but he continued to superintend some of the work. In an action for services rendered:—*Held*: pltf. was entitled to recover except for the work he had superintended after being dismissed.—**SCHWAB v. SURAGGE** (1906), 3 W. L. R. 463.—**CAN.**

461 i. Qualifying as witness.]—Qualifying expenses ought to be allowed to all witnesses who testify as to value, etc., where it is necessary for them to make valuations & calculations.—**KE LAING'S CLAIM** (1907), 26 N. Z. L. R. 703.—**N.Z.**

g. Competitive plans—Not accepted—Destroyed in transit—Measure of damages.]—Architectural plans of a building submitted in competition & not accepted, were in the course of transit destroyed by fire:—*Held*: the proper measure of damages was the value of the plans to the architect for exhibition purposes, & not the cost of their reproduction.—**NICOLAIS v. DOMINION EXPRESS CO.** (1914), 20 B. C. R. 8.—**CAN.**

h. — — — Quantum meruit.]—**HOPKINS v. THOMPSON**, 3 L. C. L. J. 36.—**CAN.**

k. Assistants—Employed by engineer.]—The amount to be paid to assistants employed by an engineer in matters of detail such as taking levels, preparation of plans, etc., is a matter of *quantum meruit*.—**MOORE v. MARCH** (1909), 13 O. W. R. 692.—**CAN.**

PART XVII.—BILLS OF QUANTITIES AND QUANTITY SURVEYORS.

SUB-SECT. 5.—BY WHOM PAYABLE.

462. Whether builder liable—Employment by owner.]—An architect employed by a building owner to superintend building operations, the contract for which was silent as to who was to pay the architect's commission, sought to recover his

commission from the builder, not do so, unless the builder had amount of the commission from owner in addition to what was due the contract.—*LOCKE v. MORTER* (1885), 13 Q. B. 101.

Part XVII.—Bills of Quantities and Quantity Surveyors.

SECT. 1.—BILLS OF QUANTITIES.

463. Whether implied warranty as to accuracy—Architect taking out.]—Deft. employed an architect to prepare plans & a specification for a house, & to procure a builder to erect it for him. The architect took out the quantities, & represented to pltf., a builder, that they were correct, & pltf. thereupon made a tender, which was accepted. The quantities proved to be incorrect, & pltf. expended upon the building a much larger amount of materials than he contemplated:—*Held*: there was no evidence that the architect acted as deft.'s agent in taking out the quantities, or that deft. guaranteed their accuracy, & pltf. could not recover more than his contract price.—*SCRIVENIER v. PASK* (1866), L. R. 1 C. P. 715; Har. & Ruth. 834, Ex. Ch.

*Annotations:—*Consd. *Young v. Blake* (1887), 2 Hudson's B. C. 4th ed. 110. Refd. *Re Ford & Bemrose* (1902), 18 T. L. R. 443. Mentd. *Pope & Pearson v. Buenos Ayres New Gas Co.* (1892), 8 T. L. R. 758.

464. — Whether builder bound — Right to sue for extras.]—A builder is bound by his special contract, however improvidently entered into, & he cannot, in the absence of fraud or waiver, sue for extra work on the ground that the quantities are grossly erroneous & misled him.—*SHERREN v. HARRISON* (1860), 2 Hudson's B. C. 4th ed. 5, N. P.

465. — Quantities not made basis of contract — Action for negligence in taking out.]—A firm of architects took out quantities & supplied them to the builders, & were paid by them. In an action by the builders against the employer & his architect for damages occasioned to the builders by alleged errors in the bills of quantities:—*Held*: (1) there was no warranty by employer or architect of the accuracy of the quantities; (2) no action lay for negligence in taking out the quantities; (3) the quantities were not made the basis of the contract.—*YOUNG v. BLAKE* (1887), 2 Hudson's B. C. 4th ed. 110.

PART XVI. SECT. 3, SUB-SECT. 5.

462 i. Whether builder liable—Employment by owner.]—*POTTRAS v. DESLAURIERS* (1872), 4 R. L. O. S. 375.—CAN.

1. Whether landowner liable—Lessor of proposed employer.]—Pltfs., architects, prepared plans for a theatre to be erected on deft.'s land, receiving instructions from C., deft.'s agent, who collected rents & looked after her real estate:—*Held*: deft. was not liable for pltfs.' services in preparing the plans; the theatre was not to be built for her, but for a co., of which C. & one of pltfs. were promoters, & her only connection with the co. was as a subscriber for shares & lessor of the proposed site.—*SMITH v. CRUMP* (No. 1) (1910), 14 W. L. R. 295.—CAN.

m. Whether company-promoter liable — Instructions given by co-promoter — Conduct amounting to adoption.]—Pltf. was instructed by deft. B. to prepare plans for a building to be used in connection with a co. which defts., M. & B., were engaged in promoting.

The plans were prepared & examined by deft. M. In an action by pltf. for his fees:—*Held*: M. was not liable; examining plans could not be considered adoption or ratification, but that the pltf. was entitled to recover against the deft. B.—*ARMES v. MANCILL* (1912), 23 O. W. R. 50; 4 O. W. N. 93; 5 D. L. R. 885.—CAN.

PART XVII. SECT. 1.

463 i. Whether implied warranty as to accuracy—Architect taking out—Custom.]—In a contract for the execution of works by a contractor in Hong Kong, it being found by the assessor that it is a well-ascertained practice for the tenderers to rely on the architect's figures in the bill of quantities:—*Held*: the ct. will give effect to that practice.—*LAN YEONG WOOD v. STANDARD OIL CO. OF NEW YORK* (1908), 3 Hong Kong L. R. 53.—HONG KONG.

466 i. — Quantities merely estimate.]—Contractors alleged that they were put to large expense & compelled to do much extra work, in consequence

466. Quantities merely estimate—Custom contradicting contract.]—An architect on behalf of a building owner invited tenders for the erection of a building upon plans & a specification & conditions of contract, & a bill of quantities attached to the specification. A builder sent in a tender for the work, together with a schedule of prices for the purpose of determining the amount to be paid or allowed in respect of any alterations or deviations from the original plans, & his tender was accepted. A contract was entered into, which referred to the schedule of prices as the prices upon which the contract was based, for the execution of the works in accordance with the plans & specification for a lump sum, the bill of quantities not being mentioned in the contract. The quantities set out in the bill of quantities were in material & substantial respects insufficient, & the actual quantities required for carrying out the works exceeded those there set forth. There was a general usage in the building trade that where tenders were invited for the erection of works in accordance with plans, & a bill of quantities was furnished, a person making a tender was entitled to assume the correctness of the quantities, & if they proved to be greater or less than the actual quantities, the price was to be reduced or increased accordingly:—*Held*: (1) the bill of quantities was merely an estimate, & did not amount to a warranty by the building owner that the quantities were correct, & the builder was not entitled to be paid beyond the fixed lump sum for the work done; (2) the custom contradicted the contract & could not be relied on.—*Re FORD & Co. & BEMROSE & SONS, LTD.* (1902), 18 T. L. R. 443; 2 Hudson's B. C. 4th ed. 324, C. A.

467. — Protection only against honest mistakes.]—A contractor having sued the other party to the contract (a public authority) in an action of deceit, for damages for fraudulent

of misrepresentations in plans & bills of works exhibited at the time of letting. On the profile plan & in the bill of works, the quantities were described as probable & approximately accurate but it was expressly stated that they were not guaranteed or warranted accurate. The contract was for a lump sum for all work involved, except in the case of alterations in the grade or line of location:—*Held*: there was no guarantee, express or implied, as to the quantities, nor any misrepresentation respecting them.—*JONES v. R.* (1877), 7 S. C. R. 570.—CAN.

467 i. — Honest mistake.]—A railway co. invited tenders for the construction of a line of railway &, for the information of intending offerers, exhibited what purported to be a journal of bores taken along the proposed line. The so-called journal was not the actual record kept by the borers, who were not professional borers but were ordinary servants of the co., but was compiled by the cos'.

to take out quantities; the work went to tender, but none being accepted, pltf. sued defts., who set up that they never authorised R. to employ pltf., & that as a corpn. they must contract under seal:—*Held*: as defts. had instructed R. to get tenders, they impliedly authorised him to get quantities taken out, & the objection as to the necessity of sealing must be overruled.—*WAGHORN v. WIMBLEDON LOCAL BOARD* (1877), 2 Hudson's B. C. 4th ed. 52, N. P.

Annotation:—*Reid. Hunt v. Wimbledon L. B.* (1878), 3 C. P. D. 208.

474. To measure up deviations—Custom.]—Custom of the building trade for an architect to call in a quantity surveyor at the employer's expense.—*BIRDSEYE v. DOVER HARBOUR BOARD COMRS.* (1881), 2 Hudson's B. C. 4th ed. 76, N. P.

475. — Dispute between architect & employer.]—An architect was employed by a building owner to direct alterations in a theatre, & a certain builder was intrusted with the work. The architect having employed a quantity surveyor to measure up all the work which had been done upon the theatre for the purpose of a final settlement of accounts with the building owner, the surveyor sued the building owner for the amount of his charges. Previous to the employment of the surveyor the building owner had expressed his dissatisfaction with the builder's charges & the amounts certified by the architect, & said he intended to have the work measured by an independent surveyor, when the architect suggested that, as the building owner had questioned the charges which he had certified for, it would be well that his surveyor should go over the work with those appointed by the building owner, whom he should charge with all the expenses that would be incurred in vindicating the correctness of the accounts. It was proved that by the general usage or practice of the building trade an architect was authorised to employ a quantity surveyor to measure up the work which had been executed for the purpose of a final certificate, but that where a dispute had arisen between a building owner on one side & his architect & builder on the other, it would make a difference in the operation of the custom:—*Held*: (1) the general usage of which evidence had been offered would be unreasonable as applied to the circumstances, & a jury would hesitate to establish it, as it must often prejudice a building owner; (2) the surveyor was employed by the architect as his own surveyor in view of the differences which had arisen between him & the

building owner.—*PLIMSAUL v. KILMOREY* (LORD) (1884), 1 T. L. R. 48.

SUB-SECT. 2.—LIABILITIES.

476. To contractor—Inaccurate quantities—Payment by successful tenderer.]—Deft., an architect, took out quantities which were appended to the tenders, & it was stipulated that the successful tenderer should pay deft.:—*Held*: pltf., the successful tenderer, could sue deft. for negligence in furnishing inaccurate quantities.—*BOLT v. THOMAS* (1859), 2 Hudson's B. C. 4th ed. 3, N. P.

477. — Employment by architect or building owner.]—There is no privity of contract between a quantity surveyor, employed by the architect of a building, & a builder tendering for the construction of the building, so as to enable the latter to sue the surveyor for negligence or breach of contract in preparing inaccurate bills of quantities.—*PRIESTLEY v. STONE* (1888), 4 T. L. R. 730; 2 Hudson's B. C. 4th ed. 134, C. A.

Annotation:—*Distd. North v. Bassett*, [1892] 1 Q. B. 333.

478. To employer—Clerical error by skilled clerk.]—Pltfs., who had employed defts., as quantity surveyors & measurers, on buildings of the value of £12,000, which had been completed & measured up, sued for negligence in a clerical error in the calculation, whereby they had overpaid two sums of £118 & £15 15s.:—*Held*: defts. having employed a competent skilled clerk who had carried out hundreds of intricate calculations, were not liable for negligence in respect of these two clerical errors.—*LONDON SCHOOL BOARD v. NORTHCROFT* (1889), 2 Hudson's B. C. 4th ed. 147.

SUB-SECT. 3.—REMUNERATION.

A. Amount.

479. Percentage rate.]—Deft., intending to erect a warehouse, employed S., an architect, to prepare plans, & S. employed pltf. to take out quantities. Tenders were sent in, but none accepted, & no building erected. Pltf. sued deft. for 2½ per cent. on the lowest tender. Deft. set up that the architect had only a limited authority:—*Held*: (1) it was for the jury to say whether the architect's authority was so limited, & if not, deft. was liable to pay pltf. reasonable remuneration; (2) a 2½ per cent. on the lowest tender set up as customary was unreasonable, & pltf. awarded damages

PART XVII. SECT. 2, SUB-SECT. 2.

476 i. To contractor—Inaccurate quantities—Payment by successful tenderer—Plea of negligence.]—Pltfs., quantity surveyors, supplied their plans & specifications of certain quantities to the successful tenderer for the work. Not being paid, they brought an action against him in a common court for work done, & deft. pleaded never indebted:—*Held*: under that plea deft. could not give evidence that the work was negligently done; such evidence could only be given under a plea of cross action.—*ANDERSON v. WADEY* (1899), 20 N. S. W. L. R. 412.—**AUS.**

476 ii. — — — — —.]—Pltf., being a builder & desiring to tender for the building of a house for W., received certain bills of quantities & draft of contract from deft., an architect & quantity surveyor, employed by W. The draft contract contained a provision that a percentage should be allowed by the builder for the bill of quantities, & that the amount should be paid by pltf. to deft., but that pltf.

was to satisfy himself as to their correctness, & that no allowance should be made for shortcomings. The fees were paid by pltf. to deft., but the amount of the tender had been increased accordingly. Owing to an under-calculation of the bill of quantities by deft. pltf. suffered damage:—*Held*: in the absence of proof that deft. had been employed by pltf., had knowingly made any false representations to pltf., or had guaranteed the accuracy of the measurements, he was not liable to pltf. for the said damages.—*SKIPPOON v. DE WITT*, [1904] 21 S. C. 505; 14 C. T. R. 747.—**S. AF.**

476 iii. Right of set-off.]—An architect who is also a quantity surveyor, & is employed & paid by a builder for taking out quantities for the construction of a building, is liable for any loss caused to the builder owing to his negligence in taking out the quantities. But against such loss he may set off any profit which has accrued to the builder through the miscalculations.—*HOOPER & SON v. REID*, 9 C. T. R. 637.—**S. AF.**

n. Sums wrongfully charged to building owner.]—Where in the accounts drawn up by an architect & quantity surveyor, who had been employed to take out quantities by the builder, the building owner was charged with certain sums occasioned by the architect's errors in the quantities, & he had paid the same:—*Held*: the builder could not recover damages from the architect for such errors, as none had been suffered by him.—*HOOPER & SON v. REID*, 9 C. T. R. 637.—**S. AF.**

PART XVII. SECT. 2, SUB-SECT. 3. —A.

o. Fees as quantity surveyor—Plans prepared as architect not approved.]—In the absence of special agreement, an architect employed as surveyor is entitled to remuneration for taking out quantities at the request of the employer, even although the plans & specifications prepared by him as architect have not been approved of.—*DE WITT v. CAPE CANNING CO.* (1894), 11 S. C. 116.—**S. AF.**

Sect. 2.—Quantity surveyors: Sub-sect. 3, A., B. & C.

at 1½ per cent.—*GWYTHER v. GAZE* (1875), 2 Hudson's B. C. 4th ed. 34.

B. Lithographers' Charges.

480. Employment by quantity surveyor—Right to retain cash discount.]—Pltfs., who had employed defts., as quantity surveyors & measurers, on buildings of the value of £12,000, which had been completed & measured up, sued for money had & received in respect of £74 charged by defts. for lithography:—*Held*: as to a sum of 15 per cent. allowed by the lithographer to the quantity surveyor, although defts. being pltfs.' agents, the payment of any commission to defts. was illegal & improper, yet, as it was agreed that defts. should employ their own lithographer, they might retain this, which was really a discount for cash.—*LONDON SCHOOL BOARD v. NORTHCROFT* (1889), 2 Hudson's B. C. 4th ed. 147.

C. By whom payable.

481. Employer—Work not carried out—Stopped by employer.]—Defts. employed K. to draw a specification of a building proposed to be erected. K. employed pltf. to make out the quantities, which work was to be paid for by the successful competitor for the building contract. Defts. having refused to allow the building to proceed:—*Held*: they were liable to pltf. for making out the quantities.—*MOON v. WITNEY UNION GUARDIANS* (1837), 3 Bing. N. C. 814; 3 Hodg. 206; 5 Scott, 1; 6 L. J. C. P. 305; 132 E. R. 624.

Annotations:—*Consd. Moffatt v. Laurie* (1855), 15 C. B. 583. *Distd. Scrivener v. Pask* (1865), 18 C. B. N. S. 785; *Young v. Smith* (1879), 2 Hudson's B. C. 4th ed. 70.

482. ——— Custom.]—An architect, who had made out the quantities on a building contract which was not carried out, allowed to recover from the employer on a custom known to the parties.—*LANSDOWNE v. SOMERVILLE* (1862), 3 F. & F. 236.

483. ——— Employment to reduce quantities.]—An architect was employed to make plans for a theatre. The employer objected to the cost of the theatre as planned, & the architect employed a quantity surveyor to reduce the quantities, but the employer ultimately decided not to build:—*Held*: the quantity surveyor could recover his charges against the employer, only upon evidence of actual instructions, & not by virtue of any cus-

tom.—*EVANS v. CARTE* (1881), 2 Hudson's B. C. 4th ed. 78, D. C.

484. ——— Bankruptcy of contractor.]—Pltf., a quantity surveyor, was employed by A., the architect of S., who wished to erect a house at L., to take out quantities, which he did in consideration of a payment calculated at 2½ per cent. on the accepted tender & £18 15s. 6d. for lithography. The work went to tender & C.'s tender was accepted, pltf.'s charges being expressly included in it. The work was commenced, but when it was partly finished & partly paid for, C., the builder, became bkpt., & S. took the work out of his hands. Pltf. sued S. for his charges:—*Held*: as there was an accepted tender & deft. had found a builder, pltf. had no cause of action against deft.—*YOUNG v. SMITH* (1879), 2 Hudson's B. C. 4th ed. 70; *affd.* (1880), 2 Hudson's B. C. 4th ed. 75, C. A.

Annotation:—*Reid. North v. Bassett*, [1892] 1 Q. B. 333.

485. Contractor—Successful tenderer—Custom.]—Pltf., a quantity surveyor, was employed by an architect to take out the quantities for a building about to be erected; deft., a builder, tendered for the work upon the basis of a specification, containing the following clause: "To provide for copies of quantities & plans, 25 guineas to be paid to the surveyor" (naming pltf.) "out of the first certificate." Deft.'s tender was accepted, & he received the first instalment of the price of his work from the building owner. In an action by pltf. to recover the 25 guineas according to the specification, evidence was given that, by the usage of the building trade, the builder whose tender was accepted was liable to the quantity surveyor for the amount due for the quantities, but if no tender was accepted, the building owner or architect was liable:—*Held*: the usage was reasonable & valid, & there was evidence of a contract with pltf., upon which he was entitled to recover.—*NORTH v. BASSETT*, [1892] 1 Q. B. 333; 61 L. J. Q. B. 177; 66 L. T. 189; 56 J. P. 389; 40 W. R. 223; 36 Sol. Jo. 79, D. C.

486. ——— Out of first money received—What amounts to receipt.]—Pltf., a quantity surveyor, was employed by the architect of a building owner to prepare a bill of quantities for tenders. The bill as prepared contained an item for the quantity surveyor's charges & a memorandum to the effect that they should be payable out of the first money received by the builder:—*Held*: (1)

PART XVII. SECT. 2, SUB-SECT. 3.
—C.

481 i. Employer—Work not carried out—Work abandoned by employer.]—Pltf., a quantity surveyor, was employed by deft.'s architect to take out quantities for some buildings to be erected for deft. for which tenders were required. Pltf. took out quantities; in the invitation to tender it was provided that the successful tenderer should pay the quantity surveyor. Deft. subsequently changed his mind & abandoned his intention to build:—*Held*: deft. was liable to pay the quantity surveyor.—*GRIBBON v. MOORE* (1869), 2 Hudson's B. C., 3rd ed. 12.—*IR.*

p. Contractor—Successful tenderer—Variation of plans.]—The owner of a house, desiring to make alterations employed an architect to prepare plans. The architect having done so, employed pltf., a surveyor, to take out the quantities, which were lithographed, & sent to various builders, including deft., to invite tenders, the circular informing them that the builder whose contract was accepted should pay pltf.'s fees. Deft. had themselves previously to the employment of an architect, prepared

a plan for the owner, but one with which he was not satisfied. The tender of deft. was the lowest; but, it being greatly in excess of the expenditure contemplated by the owner, pltf. prepared a bill of reduction, but this reduced plan the owner also considered too expensive, & then employed deft. to execute a modification of the original plan prepared in his office. The works were eventually executed by deft. under a contract, in which it was agreed between the owner & deft. that deft. should not be liable for pltf.'s fees. Pltf. now brought an action for his fees against deft., relying on a custom of the building trade, by which the builder whose tender is accepted, or who is employed to carry out the plans, or any modification of them, is directly liable for the surveyor's fees, the owner being liable, if the work is abandoned altogether, or he adopts an entirely independent plan. Deft.'s foreman stated that the works were carried out according to deft.'s own original plan, & that pltf.'s calculations were not used at all for them. Pltf.'s witnesses stated that there was the strongest similarity between the work as carried out & pltf.'s reduced

plan:—*Held*: pltf. was entitled to recover.—*TAYLOR v. HALL* (1870), 1 R. 4 C. L. 467; 1 R. 5 C. L. 477.—*IR.*

485 i. ——— Custom.]—In an action by a surveyor against a contractor for joinder work on a building for payment of his fee as measurer, on the grounds (1) that he had acted on the employment of the contractor; & (2) that it was the universal practice for the contractor to pay the measurer's fee:—*Held*: the contractor was not liable.—*BEATTIE v. GILROY* (1882), 10 R. (Ct. of Sess.) 226; 20 Sc. L. R. 162.—*SCOT.*

q. ——— Contract abandoned.]—Def., a builder, contracted with pltf., a building surveyor, that if pltf. would supply the quantities for a certain projected building, deft. would, if he was accepted as the building contractor, pay pltf. out of the first instalment: pltf. furnished the quantities, but deft. subsequently abandoned the building contract:—*Held*: performance of deft.'s contract with pltf. having been rendered impossible by his own act, he was bound to pay pltf. for the quantities furnished.—*M'CONNELL v. KILGALLAN* (1878), 2 L. R. 1r. 119.—*IR.*

the builder whose tender on the quantities was accepted was liable to the quantity surveyor for the charges specified in the bill out of the first instalment received under the contract; (2) the taking over by the builder of a mtge. on the building *bond fide* to protect his claim under the building contract was not such a receipt of money under the contract as to entitle the quantity surveyor

to recover, nor such a prevention of his receipt of the instalment as to entitle the quantity surveyor to sue for his charges.—*CAMPBELL & SON v. BLYTON* (1893), 2 Hudson's B. C. 4th ed. 234.

487. ——— Building agreement assigned by building owner to contractor—Contractor liable.]—*MELLOR v. BRITTON* (1900), 16 T. L. R. 165.

Part XVIII.—Injuries to Persons or Property.

See HIGHWAYS, STREETS, & BRIDGES; MASTER & SERVANT; NEGLIGENCE; NUISANCE.

Part XIX.—Stamp Duties.

See, generally, CONTRACT; REVENUE.

488. **Necessity of stamping — Admissibility in evidence.**—A. had built a house for B. under a written contract, not admissible in evidence for want of a stamp. A. sued B. for the value of certain works about the house, alleging them to be extras, & not included in the contract:—*Held*: the ct. could not look at the unstamped contract to ascertain whether those works were included in it or not, & plff. must be nonsuited.—*VINCENT v. COLE* (1829), 3 C. & P. 481; Dan. & Ll. 284; Mood. & M. 257; 7 L. J. O. S. K. B. 130.

Annotations:—*Folld.* *Burton v. Cornish* (1844), 1 Dow. & L. 585. *Refd.* *Fielder v. Ray* (1829), 6 Bing. 332; *Parton v. Cole* (1841), 11 L. J. Q. B. 70. *Mentd.* *R. v. Ayrton* (1844), 2 L. T. O. S. 309.

489. **Work for sum to be fixed by architect—Value not indicated.**—A written undertaking by a builder to do certain works for "a sum to be fixed by the architect," the value not appearing on the face of it:—*Held*: not to require a stamp.—*ROWLAND v. LAZARUS* (1859), 1 F. & F. 466.

490. ——— **Specifications signed by builder only.**—On a building contract whereby additions & alterations were not to avoid it, but to be allowed for at amounts to be named by the employer's surveyor, the contract being made up of a tender framed on quantities calculated by the surveyor, & specifications referred to them, & signed by the builder alone:—*Held*: the specifications required a stamp, as a minute or memorandum of agreement.—*COKER v. YOUNG* (1860), 2 F. & F. 98, N.P.

BUILDING DISPUTES.

See BOUNDARIES, FENCES, AND PARTY-WALLS ; BUILDING CONTRACTS, ENGINEERS AND ARCHITECTS.

BUILDING LEASES.

See LANDLORD AND TENANT.

BUILDING LINE.

See HIGHWAYS, STREETS, AND BRIDGES ; METROPOLIS.

BUILDING OWNER.

See BOUNDARIES, FENCES, AND PARTY-WALLS.

BUILDING REGULATIONS.

See METROPOLIS ; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

BUILDING RESTRICTIONS AND BUILDING SCHEMES.

See EQUITY ; SALE OF LAND.

BUILDING SOCIETIES.

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Co-operative Building Societies See INDUSTRIAL, PROVIDENT & SIMILAR SOCIETIES.

Friendly Societies „ FRIENDLY SOCIETIES.

Industrial Societies

Loan Societies „

Provident Societies

See INDUSTRIAL, PROVIDENT & SIMILAR SOCIETIES.

„ LOAN SOCIETIES.

„ INDUSTRIAL, PROVIDENT & SIMILAR SOCIETIES.

NOTE.—The following Acts now in force in England relating to Building Societies, viz., *Building Societies Acts, 1836 (c. 32), 1874 (c. 42), 1875 (c. 9), 1877 (c. 63), 1884 (c. 41), & 1894 (c. 47)*, are herein referred to as *1836 Act, 1874 Act, 1875 Act, 1877 Act, 1884 Act, & 1894 Act*. In considering the cases set out in this title regard must be had to their date, & the effect of the above Acts & of *Friendly Societies Acts, 1829 (c. 56), & 1834 (c. 40)*, incorporated in *1836 Act* by s. 4 thereof.

Part I.—Nature and Objects.

1. Nature of building societies.]—This [society] is not a joint stock co.; still less is it a common law partnership, but it is a society of a special kind formed & regulated under particular Acts of Parliament for special purposes (LORD SELBORNE, C.).—BROWNIE v. RUSSELL (1883), 8 App. Cas. 235; 48 L. T. 881; 47 J. P. 757, H. L.
*Annotations:—*Reid. Tosh v. North British Bldg. Soc. (1886),

11 App. Cas. 489; Buckle v. Lordonny (1887), 56 L. J. Ch. 437. *Mentd.* Re Middlesbrough, Redcar & Saltburn Bldg. Soc. (1889), 58 L. J. Ch. 771; King v. Rawlings (1890), 54 J. P. 613; Re Sunderland 36th Universal Bldg. Soc. (1890), 24 Q. B. D. 394; Re Britannia Permanent Bldg. Soc. (1891), 65 L. T. 196; Durham & Northumberland Working Men's Permanent Bldg. Soc. v. Davidson (1892), 61 L. J. Q. B. 473; London Provident Bldg. Soc. v. Morgan, [1893] 2 Q. B. 266; Barnard v. Tomson, [1894] 1 Ch. 374; Re West London & General Permanent Benefit

PART I. SECT. 1.

1 i. Nature of building societies.]—Building societies are societies for the purpose of raising, by subscription of the members, a stock fund for the purpose of making advances to members out of the funds of the society upon mtge.—COLONIAL INVESTMENT Co. v. BORLAND (1911), 19 W. L. R. 588; 22 W. L. R. 145; 1 W. W. R. 171; 2 W. W. R. 960; 6 D. L. R. 211; 5 Alta. L. R. 71.—CAN.

1 ii. — Not a partnership.]—A building society being an assocn. of persons subscribing to a common fund to be advanced on interest to some of the members on the security of landed property, does not constitute a partnership.—Re CAPE OF GOOD HOPE PERMANENT BUILDING SOCIETY (1898), 15 S. C. 323; 8 C. T. R. 360.—S. AF.

1 iii. Carrying on lottery.—Cash prizes instead of loans.]—The objects of a society registered under 1886 Act

were, according to its rules, to raise a fund by payments, subscriptions, or contributions made by its members, to apply such fund in assisting its members to obtain freehold or leasehold property, to make loans or advances to its members & to other persons, & to afford means for the profitable investment of small savings. Under these rules, it was provided that the society's capital was to consist of any number of shares of a nominal value; that such portion of the society's funds, as the

Bldg. Soc., [1894] 2 Ch. 352; *Re Ambition Investment Bldg. Soc.* (1895), 73 L. T. 508; *Kemp v. Wright*, [1895] 1 Ch. 121; *Sixth West Kent Mutual Bldg. Soc. v. Hills*, [1899] 2 Ch. 60; *Re Counties Conservative Permanent Benefit Bldg. Soc.*, *Davis v. Norton*, [1900] 2 Ch. 819.

2. Unincorporated societies — General objects.]

—The object of [benefit building] societies is to raise a fund by means of which the members may be enabled to purchase land or houses. The mode by which this is to be done is by investing the subscribed moneys upon very advantageous terms under powers given them by statute.—*ARMITAGE v. WALKER* (1855), 2 K. & J. 211; 26 L. T. O. S. 182; 20 J. P. 53; 2 Jur. N. S. 13; 69 E. R. 756. *Annotations*.—*Mentd.* *Callaghan v. Dolwin* (1869), L. R. 4 C. P. 288; *Walker v. General Mutual Bldg. Soc.* (1887), 36 Ch. D. 777; *Davies v. Second Chatham Permanent Bldg. Soc.*, *Mackenzie v. Everton & West Derby Permanent Bldg. Soc.* (1889), 61 L. T. 680.

3. ——— Distinguished from freehold land society.]—There is great distinction between a freehold land society & a benefit building society. A freehold land society buys land with the funds subscribed by the members, & then divides that land among them; but a benefit building society advances to members, out of the subscriptions made by the members, sums of money to be laid out in the purchase of land or buildings, which are then mortgaged to the society (*ROMILLY, M.R.*).—*GRIMES v. HARRISON* (1859), 26 Beav. 435; 28 L. J. Ch. 823; 33 L. T. O. S. 115; 23 J. P. 421; 5 Jur. N. S. 528; 53 E. R. 966; *subsequent proceedings*, 27 Beav. 198.

Annotations.—*Refd.* *Re Kent Benefit Bldg. Soc.* (1861), 1 Drew. & Sm. 417; *Laing v. Reed* (1869), 39 L. J. Ch. 3, n. *Mentd.* *Hughes v. Layton* (1864), 33 L. J. M. C. 89; *Thompson v. Planet Benefit Bldg. Soc.* (1873), L. R. 15 Eq. 333; *Murray v. Scott*, *Agnew v. Murray*, *Brimelow v. Murray* (1884), 9 App. Cas. 519.

4. ———.]—The 1836 Act recited that certain societies, commonly called building societies, had been established in different parts of the kingdom, principally amongst the industrial classes, for the purpose of raising by small periodical subscriptions money to assist some of the members in obtaining small freehold or leasehold properties. That was only one of the objects of the societies. It must have been well known to the Legislature that the other object was that the investing members should get a high rate of interest for their money, & that it was known is obvious from another sect. It was the object to assist, therefore, some of the members to obtain freehold or leasehold property, & some a high rate of interest (*JESSEL, M.R.*).—*Re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY* (1882), 23 Ch. D. 440; 52 L. J. Ch. 857; 48 L. T. 134; 32 W. R. 73, C. A.; *varied S. C. sub nom.* *MURRAY v. SCOTT*, *AGNEW v. MURRAY*, *BRIMELOW v. MURRAY* (1884), 9 App. Cas. 519, H. L.

Annotations.—*Refd.* *Re Mutual Aid Permanent Benefit Bldg. Soc.* (1885), 30 Ch. D. 434; *Sheffield & South Yorkshire Permanent Bldg. Soc. v. Aizlewood* (1889), 44 Ch. D. 412. *Mentd.* *Brooks v. Blackburn Benefit Soc.* (1884), 9 App. Cas. 857; *Small v. Smith* (1884), 10 App. Cas. 119; *Blackburn & District Benefit Bldg. Soc. v. Cunliffe Brooks* (1885), 29 Ch. D. 902; *Re Middlesbrough, Redcar, Saltburn-by-the-Sea & Cleveland District Permanent Bldg. Soc.* (1885), 53 L. T. 203; *Re West London & General Permanent Benefit Bldg. Soc.*, [1894] 2 Ch. 352; *Amalgamated Soc. of Ry. Servants v. Osborne*, [1910] A. C. 87; *Sinclair v. Brougham*, [1914] A. C. 398.

5. ———.]—The [1836 Act] was not artificially drawn. It is obvious that those who promoted it were influenced mainly by a wish to help the industrious classes to obtain dwelling-

houses or small plots of land, & probably supposed that by limiting the maximum of a share to £150 they had secured that the shareholders should use the society only for the purpose of obtaining mtges. not above the value of £150. It was very soon found out that there was nothing to prevent a person who wished, as a speculative builder, to borrow £15,000 from taking 100 shares if he could find a society willing to lend so much on mtge., & societies were formed & registered under the Act as building societies on a very large scale (*LORD BLACKBURN*).—*MURRAY v. SCOTT*, *AGNEW v. MURRAY*, *BRIMELOW v. MURRAY* (1884), 9 App. Cas. 519; 53 L. J. Ch. 745; 51 L. T. 462; 33 W. R. 173, H. L.; *varying S. C. sub nom.* *Re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY* (1882), 23 Ch. D. 440, C. A.

Annotations.—*Mentd.* *Brooks v. Blackburn Benefit Soc.* (1884), 9 App. Cas. 857; *Small v. Smith* (1884), 10 App. Cas. 119; *Blackburn & District Benefit Bldg. Soc. v. Cunliffe Brooks* (1885), 29 Ch. D. 902; *Re Middlesbrough, Redcar, Saltburn-by-the-Sea & Cleveland District Permanent Benefit Bldg. Soc.* (1885), 53 L. T. 203; *Re Mutual Aid Permanent Benefit Bldg. Soc.* (1885), 30 Ch. D. 434; *Sheffield & South Yorkshire Permanent Bldg. Soc. v. Aizlewood* (1889), 44 Ch. D. 412; *Re West London & General Permanent Benefit Bldg. Soc.*, [1894] 2 Ch. 352; *Amalgamated Soc. of Ry. Servants v. Osborne*, [1910] A. C. 87; *Sinclair v. Brougham*, [1914] A. C. 398.

6. ——— Mode of transacting business.]—Building societies exist under the provisions of the 1836 Act; the principle is this, members subscribe monthly sums which are accumulated till the fund is sufficient to give a stipulated sum to each member & then the whole is divided amongst them (*LORD CRANWORTH, C.*).—*FLEMING v. SELF* (1854), 3 De G. M. & G. 997; 3 Eq. Rep. 14; 24 L. J. Ch. 29; 24 L. T. O. S. 101; 18 J. P. 772; 1 Jur. N. S. 25; 3 W. R. 89; 43 E. R. 390, L. C.

Annotations.—*Refd.* *Sheffield & South Yorkshire Permanent Bldg. Soc. v. Aizlewood* (1889), 44 Ch. D. 412. *Mentd.* *R. v. Trafford* (1854), 4 E. & B. 122; *R. v. Trafford* (1855), 24 L. J. M. C. 20; *Archer v. Harrison* (1857), 7 De G. M. & G. 404; *Farmer v. Smith* (1859), 4 H. & N. 196; *Smith v. Pilkington* (1859), 1 De G. F. & J. 120; *Hack v. London Provident Bldg. Soc.* (1883), 23 Ch. D. 103; *Municipal Bldg. Soc. v. Kent* (1884), 9 App. Cas. 260; *Buckle v. Lordonny* (1887), 56 L. J. Ch. 437.

7. ——— Not within provisions of friendly & industrial societies Acts.]—Benefit building societies are not within the provisions of the Acts regulating friendly societies and industrial and provident societies (*TURNER, L.J.*).—*Re No. 3 MIDLAND COUNTIES BENEFIT BUILDING SOCIETY* (1864), 4 De G. J. & Sm. 468; 33 L. J. Ch. 739; 29 J. P. 613; 11 Jur. N. S. 229; 13 W. R. 399; 46 E. R. 1000, L. J.

Annotation.—*Mentd.* *Re London & Suburban Bank*, [1892] 1 Ch. 604.

8. ——— Not justified in acting as freehold land society.]—A society whose rules are certified under 1836 Act is not justified in acting as a freehold land society.—*GRIMES v. HARRISON* (1859), 26 Beav. 435; 28 L. J. Ch. 823; 33 L. T. O. S. 115; 23 J. P. 421; 5 Jur. N. S. 528; 53 E. R. 966; *subsequent proceedings*, 27 Beav. 198.

Annotations.—*Refd.* *Re Kent Benefit Bldg. Soc.* (1861), 1 Drew. & Sm. 417; *Laing v. Reed* (1869), 39 L. J. Ch. 3, n. *Mentd.* *Hughes v. Layton* (1864), 33 L. J. M. C. 89; *Thompson v. Planet Benefit Bldg. Soc.* (1873), L. R. 15 Eq. 333; *Murray v. Scott*, *Agnew v. Murray*, *Brimelow v. Murray* (1884), 9 App. Cas. 519.

9. ——— Without fresh enrolment.]—A society enrolled as a benefit building society cannot act as & assume the functions of a freehold land society without a fresh enrolment.—*Re KENT*

board on the application of such member, should purchase the appropriation. A drawing by the society was held, & certain persons became entitled to borrow, each of whom chose to take cash.—*Held*: the real object of the society was to carry on an

illegal "sweep" under the protection which it was supposed would be conferred by registration under 1836 Act.—*COLLIS v. MACGROARTY & O'SULLIVAN*, *Ex p. MACGROARTY & O'SULLIVAN*, [1913] S. R. Q. 25.—*AUS.*

BENEFIT BUILDING SOCIETY (1861), 1 Drew. & Sm. 417; 30 L. J. Ch. 785; 4 L. T. 610; 25 J. P. 805; 7 Jur. N. S. 1045; 9 W. R. 686; 62 E. R. 439.

10. — **Date of existence—Framing of certified rules.**—A building society is duly constituted, & entitled to all the advantages conferred upon

such societies, from the time when the certified rules are framed, & not from the date of the certificate.—**WILLIAMS v. HAYWARD** (1855), 25 L. J. Ch. 289; 26 L. T. O. S. 134; 19 J. P. 788; 1 Jur. N. S. 1128.

Legality of unregistered building societies.—*See COMPANIES.*

Part II.—Incorporation.

See 1874 Act, ss. 9–12, 20.

11. **Power of court to declare certificate void—On grounds of irregularity.**—The ct. has no power to declare the certificate of incorporation of a building society, given by the registrar under

1874 Act, void on the ground that it had been obtained irregularly.—**GLOVER v. GILES** (1881), 18 Ch. D. 173; 50 L. J. Ch. 508; 45 L. T. 344; 29 W. R. 603.

Annotation :—**Mentd.** Hill v. Hill (1886), 55 L. T. 769.

Part III.—Rules.

SECT. 1.—INCORPORATED SOCIETIES.

See 1874 Act, ss. 16–21; 1877 Act, s. 2; 1894 Act, ss. 1, 12.

12. **Alteration of rules—Extent of power to alter—Statutes applicable.**—The power of altering the rules of a building society established under 1836 Act, & subsequently incorporated under 1874 Act, now depends on 1874 Act, s. 18, & 1894 Act, s. 1.—**STROHMENGER v. FINSBURY PERMANENT INVESTMENT BUILDING SOCIETY**, [1897] 2 Ch. 469; 66 L. J. Ch. 708; 77 L. T. 235; 46 W. R. 69; 13 T. L. R. 531; 41 Sol. Jo. 676, C. A.

Annotation :—**Consd.** Sixth West Kent Mutual Bldg. Soc. v. Hills, [1899] 2 Ch. 60.

Sums standing to credit of unadvanced members reduced—Resolution passed by majority at ordinary meeting.—The rules of a benefit building society under 1874 Act provided that the unadvanced members might withdraw the sum at their credit in the society's books after certain notice. The society's property fell in value, and a majority of the members passed a resolution that 7s. 6d. per pound should be deducted from the amounts at the credit of the members and placed to a suspense account. No proceedings for winding up the society had been commenced; and there was no rule as to the manner in which losses were to be borne :—**Held** : the resolution was *ultra vires*; and members who had given notice of withdrawal after the resolution were entitled to be paid the whole amount at their credit.—**AULD v. GLASGOW WORKING MEN'S BUILDING SOCIETY** (1887), 12 App. Cas. 197; 56 L. J. P. C. 57; 56 L. T. 776; 35 W. R. 632; 3 T. L. R. 378, H. L.

Annotations :—**Consd.** Walker v. General Mutual Bldg. Soc. (1887), 36 Ch. D. 777. **Refd.** Davies v. Second Chatham Permanent Bldg. Soc., Mackenzie v. Everton & West Derby Bldg. Soc. (1889), 61 L. T. 680; Durham & Northumberland Working Men's Permanent Bldg. Soc. v. Davidson (1892), 61 L. J. Q. B. 473; Pepe v. City &

Suburban Bldg. Soc. (1893), 37 Sol. Jo. 355; R. v. Braubrook (1893), 69 L. T. 718; Kemp v. Wright (1894), 64 L. J. Ch. 59. **Mentd.** Re Smith & Galloway (1897), 67 L. J. Q. B. 15; McEllistram v. Ballymacelligott Co-op. Agricultural & Dairy Soc., [1919] A. C. 548.

Resolution duly passed by majority at special meeting.—A resolution duly passed by a majority of three-fourths of the members present at a special meeting for making a rule that the amount due from the society to each member in respect of any share or shares held by him on Dec. 1, 1896, should be deemed to be & taken as thirty-three-fiftieths of the net amount paid on such share or shares is not *ultra vires*.—**STROHMENGER v. FINSBURY PERMANENT INVESTMENT BUILDING SOCIETY**, [1897] 2 Ch. 469; 66 L. J. Ch. 708; 77 L. T. 235; 46 W. R. 69; 13 T. L. R. 531; 41 Sol. Jo. 676, C. A.

Annotation :—**Refd.** Sixth West Kent Mutual Bldg. Soc. v. Hills, [1899] 2 Ch. 60.

15. — **Society known to be insolvent—New rule altering rights of members in winding up.**—A building society under its rules issued three classes of shares—A., B., & C. Of these the C. shares were preferential, the holders being entitled to be paid interest in lieu of bonus & other periodical payments. In Oct., 1889, the society passed a rule that after Dec. 31, 1890, no further advances should be made upon shares then existing, and that from & after the passing of the rule the withdrawal of shares, other than C. shares, by priority of notice should cease, & that the funds of the society should be applied, amongst other things, to the payment of capital & interest on the C. shares. At the time of passing the rule, & thenceforward, the society was known both to its officers & members to be insolvent in the sense that the assets of the society were not sufficient to repay in full the sums due to members on their shares, but there were no outside creditors :—**Held** : the new rule was invalid in so far as it varied any then subsisting

PART II.

a. **Power to incorporate—Provincial legislature—Right to operate outside province.**—A building society may be incorporated, under R. S. Ont. 1887, c. 169, & is not limited by B. N. A. Act to operations in the province.—**Re YORK COUNTY LOAN & SAVINGS Co.** (1908), 11 O. W. R. 507.—**CAN.**

See, generally, DEPENDENCIES, COLONIES & BRITISH POSSESSIONS.

b. **Limitation on choice of name—Discretion of Registrar.**—Where the Registrar refuses to register a society, being of opinion that its name so nearly resembles that of another as to be calculated to deceive, the ct. will not review his decision where it is based upon a real & genuine opinion.—**Re FOURTH SOUTH MELBOURNE BUILDING**

SOCIETY'S APPLICATION (1883), 9 V. L. R. 54.—**AUS.**

PART III. SECT. 1.

12 i. **Alteration of rules—Extent of power to alter.**—A rule made with the object of interfering with the rights under the rules of a particular member of the society is *ultra vires*.—**SYME v. UNITED VICTORIA PERMANENT BUILDING SOCIETY** (1904), 29 V. L. R. 671, 917.—**AUS.**

rights of members.—**SIXTH WEST KENT MUTUAL BUILDING SOCIETY v. SHOVE** (1895), [1899] 2 Ch. 64, n.; 68 L. J. Ch. 482, n.; 81 L. T. 87, n.; 39 Sol. Jo. 601.

Annotation:—**Refd.** *Sixth West Kent Mutual Bldg. Soc. v. Hills*, [1899] 2 Ch. 60.

16. — New rule to facilitate realisation of assets.—It is competent for a building society, even when in a state of insolvency, to pass a new rule for the purpose of facilitating the realisation of the assets of the society, provided that such rule is *bond fide* passed for such purpose & does not affect the rights of the members of the society *inter se* in respect of their liability or in respect of the distribution of assets.—**SIXTH WEST KENT MUTUAL BUILDING SOCIETY v. HILLS**, [1899] 2 Ch. 60; 68 L. J. Ch. 476; 81 L. T. 86; 47 W. R. 647.

17. — Registration of alteration—Certificate by registrar—Conclusive as to validity of proceeding.—The registrar's certificate is conclusive as to the validity of the proceedings taken by a society for the passing of new rules.—**ROSENBERG v. NORTHUMBERLAND BUILDING SOCIETY** (1889), 22 Q. B. D. 373; 60 L. T. 558; 37 W. R. 368; 5 T. L. R. 265, C. A.

Annotations:—**Refd.** *Souter v. Davies* (1895), 39 Sol. Jo. 264; *Osborne v. Amalgamated Soc. of Ity. Servants*, [1909] 1 Ch. 163. **Mentd.** *Bradbury v. Wild*, [1893] 1 Ch. 377; *Pepo v. City & Suburban Permanent Bldg. Soc.*, [1893] 2 Ch. 311; *Kemp v. Wright*, [1894] 2 Ch. 462; *Strohmenger v. Finsbury Permanent Investment Bldg. Soc.* (1897), 77 L. T. 235.

18. — Grounds for refusal—Rule retrospective in operation.—A building society by resolution duly made an alteration in one of their rules giving members the power to withdraw any shares held by them subject to certain regulations which were made to apply to all withdrawals of which notice had been given before the date of the resolution, & one of the regulations provided that in case the society should be dissolved, withdrawing members, whose withdrawal notices had then expired, should lose their priorities and be paid *pari passu* with the other members. The registrar of building societies having refused to register this alteration of rules on the grounds that it was retrospective in its operation, & that it purported to prescribe the matters which, by 1874 Act, s. 32, are directed to be provided in an instrument of dissolution:—**Held**: mere retrospectiveness is not of itself a sufficient reason to entitle the registrar to refuse to register, & he was bound to register the alteration, his duty being confined to considering whether the rule was bad or not for non-conformity with the terms of the Act.—**R. v. BRABROOK** (1893), 69 L. T. 718; 58 J. P. 117; 37 Sol. Jo. 747; 10 R. 1, D. C.

19. — Effect of—On right of redemption—Covenant to pay according to “rules for time being.”—Pltf., an advanced member of deflt. society, claimed to redeem a mtge. which he had given to the society to secure the repayment of an advance made by them to him in respect of his shares. The society was registered under 1874 Act. By one of the rules the sum advanced was to be repaid with interest in the course of twenty-two years, by a series of monthly subscriptions consisting of principal & interest. By another

rule a member who had received an advance secured by mtge. was entitled to redeem the mtge. before the expiration of the term for which the advance was made in manner provided by the rules. By the rules which were in force at the date of pltf.'s mtge. advanced members were not bound to contribute to losses of the society. Pltf.'s mtge. contained a covenant by him to pay to the society “all subscriptions & contributions, interest, fines, premiums of insurance, & other moneys, & to do & perform all acts & things, which, according to the rules for the time being of the society, & the provisions herein contained, shall from time to time become due & payable & which ought to be done & performed by the mtgor.” The proviso for redemption was expressed in similar terms. Before pltf. gave notice to redeem his mtge. the rules of the society had been altered, & the altered rules provided that the board of directors should have power to charge to a member paying off any share or shares in respect of which an advance had been made such a sum or sums in respect of such share or shares as would, *pro rata* with the other subscriptions & paid-up shares in the society, in the opinion of the board be sufficient to cover any loss or anticipated loss of the society:—**Held**: pltf.'s mtge. was subject to the altered rule, pltf. could redeem only on the footing of that rule.—**WILSON v. MILES PLATTING BUILDING SOCIETY** (1887), 22 Q. B. D. 381, n.; 60 L. T. 558 n.; 37 W. R. 369, n., C. A.

Annotations:—**Folld.** *Rosenberg v. Northumberland Bldg. Soc.* (1889), 22 Q. B. D. 373. **Apld.** *Bradbury v. Wild*, [1893] 1 Ch. 377. **Distd.** *Pepo v. City & Suburban Permanent Bldg. Soc.*, [1893] 2 Ch. 311. **Refd.** *Davies v. Second Chatham Permanent Bldg. Soc.*, *Mackenzie v. Everton & West Derby Bldg. Soc.* (1889), 61 L. T. 680; *Strohmenger v. Borough of Finsbury Permanent Investment Bldg. Soc.* (1897), 13 T. L. R. 484. **Mentd.** *Smith v. Galloway* (1897), 77 L. T. 469.

20. — — — — ——An advanced or borrowing member of a building society executed a mtge. to the society to secure an advance made by them to him. The mtge. contained a covenant by the mtgor. to pay to the society all subscriptions, fines, & other moneys which, according to the rules for the time being of the society, should from time to time become due & payable by him in respect of the security or the shares by virtue of which the advance was made to him. The proviso for redemption was expressed in similar terms. The rules in force at the date of the mtge. did not render advanced members liable to contribute to the losses of the society. The rules were afterwards altered by the introduction of a provision that an advanced member should not be entitled to redeem his mtge. without paying, in addition to what would have been due from him under the original rules, his proportion of the losses of the society. The altered rules were certified by the registrar of building societies, as provided by 1874 Act:—**Held**: the new rules applied to the mtge., & pltf. desiring to redeem his mtge. must do so in accordance with those rules.—**ROSENBERG v. NORTHUMBERLAND BUILDING SOCIETY** (1889), 22 Q. B. D. 373; 60 L. T. 558; 37 W. R. 368; 5 T. L. R. 265, C. A.

Annotations:—**Consd.** *Bradbury v. Wild*, [1893] 1 Ch. 377; **Distd.** *Pepo v. City & Suburban Permanent Bldg. Soc.*, [1893] 2 Ch. 311; **Refd.** *Kemp v. Wright*, [1894] 2 Ch.

19 i. — Effect of—On priority.—The fact that the interests of a particular member are more seriously affected with respect to priority of payment by an alteration in the rules than those of other members does not make the altered rules invalid.—**SYME v. UNITED VICTORIA PERMANENT BUILDING SOCIETY** (1904), 29 V. L. R. 671, 917.—**AUS.**

19 ii. — — — — — On mortgage liability.—A member of a building society mortgaged his land to the society; after execution of the mtge. changes, which would increase his liability under it, were made in the rules:—**Held**: without express stipulation to that effect, the mtgor. could not be affected by the alteration.—**HODGINS v. ONTARIO LOAN & DEBEN-**

TURE CO. (1882), 7 A. R. 202.—**CAN.**

c. When rules cease to operate.—Rules may, for certain purposes, be considered as ceasing to operate from the time, when there is a stoppage of the society's business or a knowledge that it must be stopped, even where no winding up takes place.—**SYME v. UNITED VICTORIA PERMANENT BUILDING SOCIETY** (1904), 29 V. L. R. 671.—**AUS.**

Sect. 1.—Incorporated societies. Sect. 2.]

402; *Strohmenger v. Finsbury Permanent Investment Bldg. Soc.* (1897), 77 L. T. 235; *Osborne v. Amalgamated Soc. of Ry. Servants*, [1909] 1 Ch. 163. **Mentd.** *Souter v. Davies* (1895), 39 Sol. Jo. 264.

See, further, Part VII., Sect. 4, post.

21. ——— After notice of withdrawal—On settlement of disputes.]—Pltf. became a member of deft. society in 1883, and in Mar., 1887, gave a notice of withdrawal to the society. More than a month after this notice had been served the society was incorporated under 1874 Act, certain alterations were made in the rules, &, in July, 1887, a certificate of registration of the alteration of the rules was granted. It was provided by the original rules of the society that the rules might be added to, repealed, or altered & amended. By the rules of 1887 it was provided that all disputes between the society & members should be settled by reference to arbitration:—**Held:** pltf., although she had given notice of withdrawal, remained a member of the society, & the dispute between her & the society must be referred to arbitration.—*DAVIES v. SECOND CHATHAM PERMANENT BENEFIT BUILDING SOCIETY, MACKENZIE v. EVERTON & WEST DERBY PERMANENT BENEFIT BUILDING SOCIETY* (1889), 61 L. T. 680, D. C.

Annotation:—*Apld.* *Pepe v. City & Suburban Permanent Bldg. Soc.*, [1893] 2 Ch. 311.

See, generally, Part X., post.

22. ——— On right of withdrawal.]—Pltf. was the holder of four fully paid-up shares in a building society. By one of the rules of the society a member on giving one month's notice in writing might withdraw his shares. The rules also provided that they might be altered by a majority of three-fourths of the members. Pltf. gave the requisite notice of withdrawal; but after such notice & before he was repaid the above rule was altered by giving the directors power to pay off in priority members holding less than £50 in the society:—**Held:** although pltf. had at the date of his notice of withdrawal under the rule then in force a vested right to be paid the amount due on his shares, he was still a member of the society, & as such was liable to have this right divested by a subsequent alteration in the rule duly made; he was therefore bound by the altered rule.—*PEPE v. CITY & SUBURBAN PERMANENT BUILDING SOCIETY*, [1893] 2 Ch. 311; 62 L. J. Ch. 501; 68 L. T. 846; 41 W. R. 548; 37 Sol. Jo. 355; 3 R. 471.

Annotations:—**Consd.** *Sixth West Kent Mutual Bldg. Soc. v. Hills*, [1899] 2 Ch. 60. **Refd.** *Barnard v. Tomson*, [1894] 1 Ch. 374; *Botten v. City & Suburban Permanent Bldg. Soc.*, [1895] 2 Ch. 441; *Souter v. Davies* (1895), 39 Sol. Jo. 264; *Strohmenger v. Finsbury Permanent Investment Bldg. Soc.* (1897), 77 L. T. 235; *Allen v. Gold Reefs of West Africa, Same v. Same*, [1900] 1 Ch. 656.

23. ———.]—A building society having suffered loss, passed a resolution in 1889 to reduce the shares from £12 to £10. The rules then in force entitled any unadvanced member to withdraw his payments on account of shares by giving one month's notice, such withdrawing members to be paid in rotation, but not more than one withdrawing member was entitled to be paid at each monthly meeting. In Feb., 1890, altered rules were adopted entitling members to withdraw amounts standing to their credit by giving one month's written notice, the amount due in respect of shares to be five-sixths of the net amount paid

on them. In 1892 an instrument of dissolution, under 1874 Act, s. 32, was executed & registered; some members had given notice of withdrawal before the losses were known, others before the reduction of the shares, others after the reduction. One member had not assented to the reduction. Other members had not given notice of withdrawal:—**Held:** all the members were bound by the reduction.—*BARNARD v. TOMSON*, [1894] 1 Ch. 374; 63 L. J. Ch. 488; 70 L. T. 306; 8 R. 585.

Annotations:—**Mentd.** *Re Ambition Investment Bldg. Soc.*, [1896] 1 Ch. 89; *Sixth West Kent Mutual Bldg. Soc. v. Hills*, [1899] 2 Ch. 60.

See, generally, Part VI., Sect. 3, post.

Validity of rules as to borrowing.]—*See Part VIII., post.*

SECT. 2.—UNINCORPORATED SOCIETIES.

See Friendly Societies Act, 1829 (c. 56), ss. 2–10; Friendly Societies Act, 1834 (c. 40), ss. 4, 5; 1836 Act, ss. 1, 3; 1874 Act, s. 7.

24. Validity of rules—Rule authorising advances—Secured only on members' shares.]—Building societies, under 1874 Act, have no power to advance the funds of the societies upon any other securities than those specified in sects. 13 & 25 of that Act, nor had building societies under 1836 Act power to advance the funds of the societies upon any other securities than those specified in that & the incorporated Acts, & such societies have no power to make advances to their members upon the security of their shares only, & a rule of a building society, though certified by the Registrar of Friendly Societies, or a resolution of directors of a building society, authorising advances upon the security of members' shares only or upon any other security than those specified by the respective Acts of Parliament, is invalid.—*CULLERNE v. LONDON & SUBURBAN GENERAL PERMANENT BUILDING SOCIETY* (1890), 25 Q. B. D. 485; 59 L. J. Q. B. 525; 63 L. T. 511; 55 J. P. 148; 39 W. R. 88; 6 T. L. R. 449, C. A.

Annotations:—**Mentd.** *Re Sharpe, Re Bennett, Masonic & General Life Assce. v. Sharpe*, [1892] 1 Ch. 154; *London Trust Co. v. Mackenzie* (1893), 62 L. J. Ch. 870; *Lucas v. Fitzgerald* (1903), 20 T. L. R. 16; *Young v. Naval Military & Civil Service Co-op. Soc. of South Africa*, [1905] 1 K. B. 687; *Peel v. L. & N. W. Ry.*, [1907] 1 Ch. 5.

— As to borrowing.]—*See Part VIII., post.*

25. Validity of rules—Effect of certificate—Whether conclusive.]—The certificate of the barrister appointed to certify rules under 1836 Act is not conclusive as to the legality of a rule.—*LAING v. REED* (1869), 5 Ch. App. 4; 39 L. J. Ch. 1; 21 L. T. 773; 34 J. P. 134; 18 W. R. 76, L. C. & L. J.

Annotations:—**Mentd.** *Re National Permanent Benefit Bldg. Soc., Ex p. Williamson* (1869), 5 Ch. App. 309; *Allan v. Miller* (1870), 22 L. T. 825; *Moye v. Sparrow* (1870), 18 W. R. 400; *Re Victoria Permanent Benefit Bldg. Investment & Freehold Land Soc., Hill's Case, Jones' Case* (1870), L. R. 9 Eq. 605; *Chapleo v. Brunswick Benefit Bldg. Soc.* (1880), 5 C. P. D. 331; *Blackburn Bldg. Soc. v. Cunliffe, Brooks* (1882), 22 Ch. D. 64, r.; *Re Guardian Permanent Benefit Bldg. Soc.* (1882), 23 Ch. D. 444, n.; *Murray v. Scott, Agnew v. Murray, Brimelow v. Murray* (1884), 9 App. Cas. 519; *Neath Bldg. Soc. v. Luce* (1889), 43 Ch. D. 158; *Amalgamated Soc. of Ry. Servants v. Osborne*, [1910] A. C. 87; *Sinclair v. Brougham*, [1914]

26. Of amendment—Rule previously disallowed.]—The certifying barrister struck out a rule of a building society, but the directors notwithstanding printed & acted upon it. Some

d. Who subject to rules—Borrowers.]—Borrowers from building societies incorporated under C. S. U. C. c. 53, though not members of the society or signing the rules, are made subject to all rules in force at the time

of becoming borrowers.—*GREEN v. HAMILTON PROVIDENT LOAN CO.* (1881), 31 C. P. 574.—**CAN.**

e. S. P. WESTERN CANADA LOAN & SAVINGS SOCIETY v. HODGES (1875), 22 Gr. 566.—**CAN.**

PART III. SECT. 2.

1. Depositary of rules.]—The Registrar is the proper depositary of the rules.—*STAMERS v. PRESTON* (1859), 9 I. C. L. R. 351.—**IR.**

years afterwards, the rule was amended & the barrister certified the amendment:—*Held*: the effect of his certificate was to make valid the whole rule as amended.—*Re* GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY (1882), 23 Ch. D. 440; 52 L. J. Ch. 857; 48 L. T. 134; 32 W. R. 73, C. A.; *varied* S. C. *sub nom.* MURRAY v. SCOTT, AGNEW v. MURRAY, BRIMELOW v. MURRAY (1884), 9 App. Cas. 519, H. L.

Annotations:—*Mentd.* Brooks v. Blackburn Benefit Bldg. Soc. (1884), 9 App. Cas. 857; Small v. Smith (1884), 10 App. Cas. 119; Blackburn & District Benefit Bldg. Soc. v. Cunliffe, Brooks (1885), 29 Ch. D. 902; *Re* Middlesbrough, Redcar, Saltburn-by-the-Sea & Cleveland District Permanent Benefit Bldg. Soc. (1885), 53 L. T. 203; *Re* Mutual Aid Permanent Benefit Bldg. Soc. (1885), 30 Ch. D. 434; Sheffield & South Yorkshire Permanent Bldg. Soc. v. Aizlewood (1889), 44 Ch. D. 412; *Re* West London & General Permanent Benefit Bldg. Soc., [1894] 2 Ch. 352; Amalgamated Soc. of Ry. Servants v. Osborne, [1910] A. C. 87; Sinclair v. Brougham, [1914] A. C. 398.

27. ——— **Rule ultra vires.**—CULLERNE v. LONDON & SUBURBAN GENERAL PERMANENT BUILDING SOCIETY, No. 24, *ante*.

28. **Effect of rules—Binding upon members inter se—Rights of strangers not affected.**—The rules of a benefit building society duly certified & allowed under the Friendly Societies Act, 1829 (c. 56), are only binding upon members of the society *inter se*, & do not affect the rights of third persons, who are not members, but stand in the position of strangers to the society (BRAMWELL, B.).—BOTTOMLEY v. FISHER (1862), 1 H. & C. 211; 31 L. J. Ex. 417; 6 L. T. 688; 27 J. P. 23; 8 Jur. N. S. 895; 10 W. R. 669; 158 E. R. 862.

Annotation:—*Mentd.* Dutton v. Marsh (1871), L. R. 6 Q. B. 361.

29. ——— **Contract between society & members.**—The rules of a building society constitute a contract between the society & its members, by which the liability of all classes of members is regulated.—*Re* WEST RIDING OF YORKSHIRE PERMANENT BENEFIT BUILDING SOCIETY, *Ex p.* PULMAN, *Ex p.* CHARNOCK, *Ex p.* JOHNSON & GREENWOOD (1890), 45 Ch. D. 463; 59 L. J. Ch. 823; 63 L. T. 483; 39 W. R. 74.

30. **Alteration of rules—Liabilities of advanced members increased—Covenant to pay according to “rules for time being.”—Alteration subject to rules of law & equity.**—A permanent benefit building society, comprising unadvanced or investing members, & advanced or borrowing members, lent to the advanced members at a premium the sums to which their shares would amount when fully paid up, taking from each of them a mtge. of freehold, copyhold, or leasehold property, to secure the sums advanced & the premiums, with interest thereon respectively. By his mtge. deed each advanced member covenanted to pay to the society, at the times & in manner prescribed by its rules “for the time being,” the sums payable periodically, by way of subscription or otherwise, in respect of his shares until (1st) the shares with interest on the amount thereof in advance should be realised, & until (2nd) the premium & interest thereon should be paid, & that in the meantime, except when varied by those presents, all the rules “for the time being” of the society should in respect of the said shares be observed by the member. The proviso for redemption took effect in each case “if the said shares & premium & interest thereon respectively should be duly realised & paid according to the covenant.” S.

in 1866, obtained, for a premium of £130 10s., an advance of £600, in twenty-four shares of the society of £25 each, & executed a mtge. in this form. The society afterwards, in 1873, passed new rules, one of which provided that advanced members should, before redeeming their securities, pay an additional sum as a contribution towards certain losses sustained by the society, and another of which (Rule I) provided that, so far as the rules of law & equity would permit, the rules then passed should apply to all the members as well present as future, & to all its transactions as well past as future:—*Held*: (1) S. & the other members who were advanced before the passing of the new rules were notwithstanding the reference in their covenants to the “rules for the time being,” entitled to redeem their securities on payment only of those sums which they were liable to pay according to the rules in existence at the date of their respective contracts; (2) Rule I excluded from the operation of the new rules those members whose contracts would be substantially varied by them.—*Re* NORWICH & NORFOLK PROVIDENT PERMANENT BENEFIT BUILDING SOCIETY, SMITH’S CASE (1875), 1 Ch. D. 481; 45 L. J. Ch. 143; 24 W. R. 103.

Annotations:—*Consd.* Wilson v. Miles Platting Bldg. Soc. (1887), 22 Q. B. D. 381, n.; Smith v. Galloway, [1898] 1 Q. B. 71. *Reid.* Rosenberg v. Northumberland Permanent Bldg. Soc. (1889), 5 T. L. R. 265; Durham & Northumberland Working Men’s Permanent Bldg. Soc. v. Davidson (1892), 61 L. J. Q. B. 473.

31. ——— **No covenant to pay according to “rules for time being.”**—An advanced member of a building society executed a mtge. to the society, with a proviso for redemption on payment of “the several sums, whether consisting of monthly subscriptions, fines, interest, or other payments which, under the constitution of the said society & the rules & regulations thereof,” ought to be paid in respect of his shares, & a covenant for payment to the same effect. At the time of the mtge. the rules of the society did not provide for any contribution by advanced members to losses of the society, but subsequently thereto the rules were duly altered by empowering the directors to make a levy on members of a contribution to losses; & under the rules so altered a levy was made. The mtgor. claimed to be entitled to redeem without paying any part of such levy:—*Held*: although the mtge. did not refer to the rules “for the time being,” the mtgor., by virtue of his contract, which was one of mtge. & membership combined, was bound by the altered rules, & was therefore not entitled to redeem except upon payment of his proportion of the levy.—BRADBURY v. WILD, [1893] 1 Ch. 377; 62 L. J. Ch. 503; 68 L. T. 50; 57 J. P. 68; 41 W. R. 361; 3 R. 195.

Annotations:—*Mentd.* Barnard v. Tomson, [1894] 1 Ch. 374; Kemp v. Wright, [1894] 2 Ch. 462.

Rights of redemption generally, *see* Part VII., Sect. 4, *post*.

32. **Evidence of rules—Examined copy of transcript—Copy of all rules must be examined with transcript.**—To give evidence of the transcript of the rules of a benefit society enrolled at the office of the clerk of the peace by proof of an examined copy of it, the witness who examined the copy with the transcript must prove that he examined the copy of all the rules with the transcript.—R. v. BOYNES (1843), 1 Car. & Kir. 65.

Part IV.—Officers.

SECT. 1.—INCORPORATED SOCIETIES.

SUB-SECT. 1.—IN GENERAL.

See 1874 Act, ss. 16 (6) (12), 21, 23, 24, 31; 1894 Act, ss. 18, 21, 23.

33. Appointment of officers—Corrupt agreement to pay in consideration of being appointed—Consideration illegal.]—Pltf. had for some years been engaged in promoting building societies of a particular type on a basis or plan he had settled, & on which he claimed a sort of "royalty." On the foundation of each society he took agreements from persons desiring to be appointed officers of the societies as surveyors or otherwise by which they undertook on his obtaining them such offices to pay him a sum of money. By the agreement the payment was stated to be a portion of pltf.'s "royalty" to assist in paying the loss of his time while establishing the society, use of his copyright rules, & his risk in providing all the necessary books, printing, & papers for the proper working of the society under his guidance until the first appropriation is made & for other services, & was expressed to be in consideration of the party being appointed to a specified office in the society. It was also provided that rules of the society should be the basis of the contract. By the rules the officers of the society were to be appointed by the promoters, of whom pltf. was one:—*Held*: the agreement was corrupt & fraudulent.—*STARR v. WALL* (1889), 6 T. L. R. 108, D. C.

34. When solicitor treated as "officer"—Receiving fixed salary—Acting as financial manager.]—W., a solr., was appointed & acted as sole solr. to the L. Society, which was incorporated under 1874 Act, at an annual salary out of which he was to provide offices, clerks, etc., & undertook to pay over to the society all fees & costs paid to him by clients of the society. An order was subsequently made for the compulsory winding-up of the society, & pursuant to the rules under Cos. (Winding-up) Act, 1890 (c. 63), application was made by the official receiver to bring to the notice of the court certain acts of misfeasance committed by W., & for an order that he should contribute to the assets of the society sums received by him as officer thereof:—*Held*: although *prima facie* a solr. is not any more an officer of a society than is a banker, yet inasmuch as W. had agreed to do all the work that the society had for him to do in consideration of a fixed salary, & to forego as far as the members of the society were concerned all the ordinary rules with regard to payment, & as he had acted practically as the society's financial manager, he was an officer of the society within sect. 10 of that Act, & as such his estate was liable to contribute to the assets of the society all sums that he had received as an officer of the society.—*Re LIBERATOR PERMANENT BENEFIT BUILDING SOCIETY* (1894), 71 L. T. 406; 10 T. L. R. 537; 2 Mans. 100; 15 R. 149, D. C.

PART IV. SECT. 1, SUB-SECT. 1.

g. Appointment of officers—Necessity of corporate seal.]—A resolution was passed by defts., that pltf. be engaged for the society's office as clerk:—*Held*: having regard to the statutes incorporating defts., & the character of pltf.'s employment, the contract should have been under defts.' corporate seal.—*HUGHES v. CANADA PERMANENT BUILDING & SAVINGS SOCIETY* (1876), 39 U. C. R. 221.—CAN.

PART IV. SECT. 1, SUB-SECT. 2.

h. Liability for illegal ballot for loan—Conducting lottery.]—By the rules of a society registered under 1886 Act the right to loans was to be allotted for by the members, & on the application of a member, winning a right to a loan, who was unable to dispose of the same on satisfactory terms, such right was to be purchased by the society for a specific sum in cash. A ballot was held under the rules & a managing director was con-

Annotations:—*Reid. Re London & General Bank*, [1895] 2 Ch. 166; *Re Western Counties Steam Bakeries & Milling Co.*, [1897] 1 Ch. 617; *Re Carpenter & Bristol Corp.*, [1907] 2 K. B. 617; *Re Harper's Ticket Issuing & Recording Machine* (1912), 29 T. L. R. 63.

35. Liability for misappropriation—Agreement by society to stifle a prosecution—Promissory notes given in pursuance of agreement—No right of recovery.]—The secretary of a building society, who had made default in accounting for money paid to him & was threatened by the society with a prosecution for embezzlement, applied for assistance to pltf.s., who were his relatives, & they gave a written undertaking to the society to make good the greater part of the debt due from the secretary, the expressed consideration being the forbearance of the society to sue the secretary for the amount for which pltf.s. made themselves responsible, & in pursuance of that undertaking they gave two promissory notes & some title deeds as collateral security to the society. Pltf.s. in giving the undertaking were actuated by the desire to prevent the prosecution, & that was known to the directors of the society; but no promise was made that there should be no prosecution. The society brought an action on the promissory notes in the Q. B. Div., & pltf.s. brought an action in the Ch. Div. to set aside the promissory notes & the collateral securities on the ground that they were made for an illegal consideration. The Q. B. action was transferred to the Ch. Div. & the two actions tried together:—*Held*: (1) it was an implied term of the agreement that there should be no prosecution, & the agreement was therefore founded on an illegal consideration, & void; (2) the society could not recover on the promissory notes nor enforce the securities.—*JONES v. MERIONETHSHIRE PERMANENT BENEFIT BUILDING SOCIETY*, [1892] 1 Ch. 173; 61 L. J. Ch. 138; 65 L. T. 685; 40 W. R. 273; 8 T. L. R. 133; 36 Sol. Jo. 108; 17 Cox, C. C. 389, C. A.

Annotation:—*Reid. McClatchie v. Haslam* (1891), 65 L. T.

SUB-SECT. 2.—DIRECTORS & TRUSTEES.

See 1874 Act, ss. 24, 25, 26, 29, 42, 43; 1894 Act, ss. 13 (3), 15 (2), 18.

36. Liability—For unauthorised acts—Guarantee of prior mortgage debt to prevent sale at loss—Transaction not authorised by rules.]—A building society advanced in 1876 to A, a member, £1,000. A. disposed in security an *ex facie* absolute disposition of certain subjects, which were already burdened by a prior mtge. In 1879 A.'s estates were sequestrated, and the directors of the society, in order to prevent a sale of the subjects at an alleged loss, granted B. a bond of corroboration guaranteeing the payment of his prior mtge. In 1882 an order for the voluntary winding-up of the society was made, & the liquidators instituted this

victed of unlawfully conducting a lottery contrary to Suppression of Gambling Act, 1895:—*Held*: rightly convicted.—*O'SULLIVAN v. COLLIS* (1913), 15 C. L. R. 692.—AUS.

k. Appointment of trustee—On death or retirement—Rules.]—A building society, in the exercise of its statutory powers provided by its rules that, on the death or retirement of a trustee, a new trustee should be elected in his place in a manner contrary to the statute, & that the appointment should

action concluding for reduction of the bond of corroboration granted to B. as being *ultra vires* of the directors & in violation of the rules & constitution of the society:—*Held*: the bond was *ultra vires*, being a transaction not authorised by the rules, & not incidental to the conduct of the society's business.—*SMALL v. SMITH* (1884), 10 App. Cas. 119, H. L.

Annotations:—*Consd.* Sheffield & South Yorkshire Permanent Bldg. Soc. v. Aizlewood (1889), 44 Ch. D. 412. *Reid.* Portsea Island Bldg. Soc. v. Barclay, [1894] 3 Ch. 86; Cyclists' Touring Club v. Hopkinson, [1910] 1 Ch. 179.

37. — Whether subject to the same liabilities as trustees.—Directors of a building society are not in the same position or subject to the same liabilities as trustees.—*SHEFFIELD & SOUTH YORKSHIRE PERMANENT BUILDING SOCIETY v. AIZLEWOOD* (1889), 44 Ch. D. 412; 59 L. J. Ch. 34; 62 L. T. 678; 6 T. L. R. 25.

Annotations:—*Mentd.* Want v. Campain (1893), 9 T. L. R. 254; *Re* Brazilian Rubber Plantations & Estates, [1911] 1 Ch. 425.

38. — For acts of co-directors—Ultra vires advances to member on security of shares—In pursuance of resolution passed by all directors.—The directors of a building society passed a resolution authorising advances to members on the security of their shares. Pltf., who was a director, concurred in this resolution. An advance was accordingly made to a member on the security of his shares, and the society thereby incurred a loss. Pltf. was no party to making this advance. In an action by pltf. to recover from the society deposits made by him, defts. counter-claimed in respect of the loss which they had incurred, on the ground that the advance was *ultra vires*, and was attributable to the illegal resolution which authorised such advances:—*Held*: pltf. was not liable, for the cause of the loss was the wrongful act of the directors who made the advance, who were not the servants or agents of pltf., & for whose acts the pltf. was not liable.—*CULLERNE v. LONDON & SUBURBAN GENERAL PERMANENT BUILDING SOCIETY* (1890), 25 Q. B. D. 485; 59 L. J. Q. B. 525; 63 L. T. 511; 55 J. P. 148; 39 W. R. 88; 6 T. L. R. 449, C. A.

Annotations:—*Reid.* London Trust Co. v. Mackenzie (1893), 62 L. J. Ch. 870; Lucas v. Fitzgerald (1903), 20 T. L. R. 16; Young v. Naval, Military & Civil Service Co-op. Soc. of South Africa, [1905] 1 K. B. 687. *Mentd.* *Re* Sharpe, *Re* Bennett, Masonic & General Life Assoc. v. Sharpe, [1892] 1 Ch. 154; Peel v. L. & N. W. Ry., [1907] 1 Ch. 5.

39. — To refund to society—Bonus received

be duly certified & forwarded to the proper officer. One of the trustees having retired a new trustee was elected in his place in the manner prescribed by the rules, but without the statutory formalities:—*Held*: the appointment was valid, & as the rules did not require that the appointment should be certified by any particular person, it was sufficient that its authenticity was guaranteed by the signatures of the board which elected the trustee & of the secretary of the society & the appointment forwarded to the registrar, in accordance with the rules.—*HEYDON v. LILLIS* (1907), 4 C. L. R. 1223.—*AUS.*

1. Vesting of property in trustee—Resignation & appointment of new trustee—Vesting of property without assignment.—A statute provided that on the removal of a trustee, the property should vest in the succeeding trustee for the same estate & interest without any conveyance or assignment:—*Held*: the word "removal" was not restricted to compulsory removal, & on acceptance of the resignation of a trustee by the board & the due appointment of a new trustee, the society's property vested in him without any

conveyance or assignment by the retiring trustee.—*HEYDON v. LILLIS* (1907), 4 C. L. R. 1223.—*AUS.*

PART IV. SECT. 1, SUB-SECT. 3.

m. Authority to sell mortgaged land by auction—Unauthorised withdrawal from sale by secretary.—Where the committee of a building society authorised its secretary to place lands mortgaged to it in the hands of an auctioneer for sale:—*Held*: the secretary had no authority to withdraw the land from the sale without a resolution of the committee to that effect.—*ROSS v. VICTORIAN PERMANENT PROPERTY INVESTMENT BUILDING SOCIETY* (1882), 8 V. L. R. 254.—*AUS.*

n. Receipt of money—Misappropriation—Liability of society.—Deft. borrowed money from pltf. society, the loan being secured by mtge. By an agreement between deft. & pltf.'s secretary it was arranged that the latter should collect the rents of the mortgaged property for deft. & apply the same in payment of the principal & interest of the borrowed money. The rents were duly collected but the secretary embezzled them, & pltf.

from borrower.]—A building society claimed from the directors & the exors. of deceased directors four sums of £105, £1,000, £500, and £250, received by them from D. on the occasions of four large advances made to him by the society, & divided between the directors. The transactions had been profitable to the society:—*Held*: on the evidence, the sums had been paid by the borrower as a bonus to the directors & could not be retained by them. The directors & the exors. of deceased directors were jointly & severally liable to the society for the sums so received & for the costs of the action.—*MUNICIPAL PERMANENT INVESTMENT BUILDING SOCIETY v. RICHARDS*, [1889] W. N. 103.

For loss on advances.—*See* Part VII., *post*.

For ultra vires borrowing.—*See* Part VIII., Sect. 2, sub-sect. 2, *post*.

SUB-SECT. 3.—THE SECRETARY.

See 1874 Act, ss. 17, 18, 20, 26, 40, 42; 1877 s. 2.

40. Petition in bankruptcy—Signed by secretary duly authorised—Affidavit of authority unnecessary.—A bkpcy. petition by a building society against a debtor was signed by the society's secretary, who was duly authorised in that behalf:—*Held*: the petition did not require to be supported by an affidavit of the secretary stating that he was such secretary & that he was authorised to present the petition.—*Re TOVEY* (1910), 26 T. L. R. 456.

SECT. 2.—UNINCORPORATED SOCIETIES.

SUB-SECT. 1.—IN GENERAL.

See Friendly Societies Act, 1829 (c. 56), ss. 8–12, 14, 22, 24, 33; 1836 Act, s. 5.

41. Power to deposit mortgages held by society—With bankers as security for loan.—The officers of a building society have no power to deposit the mtges. held by it as security for a loan from its bankers.—*MOYE v. SPARROW* (1870), 22 L. T. 154; 18 W. R. 400; *subsequent proceedings*, 22 L. T. 370.

Annotations:—*Reid.* Portsea Island Bldg. Soc. v. Barclay, [1894] 3 Ch. 86. *Mentd.* *Re* Victoria Permanent Benefit

society never received them. In an action brought to recover the amount of arrears due on the loan:—*Held*: the receipt of the moneys by its secretary was to be held as receipt by the society, & deft. was entitled to set off the amounts so received by the secretary against his indebtedness of principal & interest in respect of the loan.—*SOUTH MELBOURNE PERMANENT BUILDING & INVESTMENT SOCIETY & DEPOSIT INSTITUTE v. FIELD* (1893), 19 V. L. R. 213.—*AUS.*

o. Duty to account—Effect of failure—Appeal.—A building society petitioned the sheriff court alleging that their secretary had been dismissed from office; that he had refused to comply with a demand to give in an account of his intrusions with the funds of the society, & to pay over all money & to deliver all books & other property belonging to them, & praying for a decree ordaining him so to do. The sheriff having allowed a proof of their averments, defender appealed to the Ct. of Session:—*Held*: the case was not appealable.—*FIRST EDINBURGH & LEITH 415TH STARR BOWKETT BUILDING SOCIETY v. MUNRO* (1883), 11 R. (Ct. of Sess.) 5.—*SCOT.*

Sect. 2.—Unincorporated societies: Sub-sects. 1, 3.

Bldg. Investment & Freehold Land Soc., *Hill's Case*, *Jones' Case* (1870), L. R. 9 Eq. 605; *Re Durham County Permanent Investment Land & Bldg. Soc.*, *Davis' Case*, *Wilson's Case* (1871), L. R. 12 Eq. 516.

42. Liability on promissory note—Signed by officers for value received by society—Personal liability of signatories.]—A promissory note was made in the following form: "M. Building Society. Two months after demand in writing we promise to pay to P. one hundred pounds with interest, etc., for value received. H. & T., trustees; F., secretary"—*Held*: the parties who signed the note were personally liable upon it, & the right of the holder to sue them was not affected by 1836 Act, & 1829 Act.—*PRICE v. TAYLOR* (1860), 5 H. & N. 540; 29 L. J. Ex. 331; 2 L. T. 221; 24 J. P. 470; 6 Jur. N. S. 402; 8 W. R. 419; 157 E. R. 1294.

Annotations:—*Folld. Bottomley v. Fisher* (1862), 1 H. & C. 211; *Allan v. Miller* (1870), 22 L. T. 825. *Refd.* *Courtauld v. Saunders* (1867), 16 L. T. 562; *Dutton v. Marsh* (1871), 24 L. T. 470.

43. ———.]—A promissory note was made in the following form: "M. Building Society. One month after demand we jointly & severally promise to pay B. the sum of £120, with interest, etc., for value received. (Signed) H. & S., trustees; F., secretary"—*Held*: deft., F., was personally liable on this note; the addition of the word "secretary" to his signature did not cut down or exclude his liability, his signature being placed where a party usually signs such a document, & from its position showing nothing like a counter-signature as "secretary" merely.—*BOTTOMLEY v. FISHER* (1862), 1 H. & C. 211; 31 L. J. Ex. 417; 6 L. T. 688; 27 J. P. 23; 8 Jur. N. S. 895; 10 W. R. 669; 158 E. R. 862.

Annotation:—*Refd.* *Dutton v. Marsh* (1871), L. R. 6 Q. B.

44. ———.]—A promissory note in the form, "On demand we promise to pay A. £200, value received for the S. Building Society, & interest thereon at 5 per cent. *per annum* payable half yearly," was signed by defts., "M., G., N., trustees; N., secretary"—*Held*: defts. were personally liable on the note.—*ALLAN v. MILLER* (1870), 22 L. T. 825.

Annotation:—*Consd.* *Jones v. Jackson* (1870), 22 L. T. 828.

45. ———.]—Where pltf. lent £50 to a building society, for which she received a joint & several promissory note signed by the trustees of the society:—*Held*: the trustees were liable on the promissory note.—*HEATH v. KIDSGROVE PERMANENT BUILDING SOCIETY* (1887), 82 L. T. Jo. 449.

46. Right to remuneration—Rules authorising payment out of funds—Liability of directors.]—Pltf. was the surveyor of a building society, the object of which was to advance money to its members to enable them to buy or build houses, but not itself to buy or build. By one of the rules of the society, the surveyor was to look only to the funds of the society for his compensation. By resolutions at general meetings, at which deft., as one of the directors, was present, pltf. was directed to prepare plans, etc., for houses which the society was building, the compensation being a percentage upon the outlay. The society became insolvent, & pltf. sued deft., as one of the directors, for this percentage:—*Held*: pltf. was bound by the rules of the society to seek his compensation from the funds of the society solely.—*ALEXANDER v. WORMAN* (1860), 6 H. & N. 100; 30 L. J. Ex. 198; 3 L. T. 477; 25 J. P. 312; 158 E. R. 42.

47. Right to pension—Voluntary allowance made before winding up—Employment in ultra

vires business.]—A building society, in addition to the usual business of a building society, carried on banking & other businesses. All these businesses were housed in one building & were managed by the same board of directors & were served by the same staff. The society was ordered to be wound up in 1911, & the banking business was held to be *ultra vires* the society. In 1903, A., a correspondence clerk of the society, retired at the request of the board & was promised a pension; & in 1906, B., a clerk in the banking business, retired at the request of the board & was promised a pension. Both pensions were duly paid until the winding-up order, & A. & B. claimed to prove in the winding up for the capital value of their respective pensions:—*Held*: (1) A.'s pension was merely a voluntary allowance not founded on any contract, & his claim failed; (2) B., apart from any question of contract, being employed in the banking business which was *ultra vires*, could not prove against the assets of the society.—*Re BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY*, [1913] 1 Ch. 400; 82 L. J. Ch. 232; 108 L. T. 211; 29 T. L. R. 256; 20 Mans. 159.

SUB-SECT. 2.—THE TRUSTEES AND THE TREASURER.

See Friendly Societies Act, 1829 (c. 56), ss. 13-16, 18, 21.

48. Vesting of property in trustee—Mortgagor-trustee executing mortgage to remaining trustees—Resignation & appointment of new trustee—Vesting of interest of original mortgagees without assignment.]—A member of a building society, being one of three trustees of the society, on giving a mtge. to the society to secure the payments to become due upon his shares, executed the mtge. to the other two trustees, one of whom subsequently resigned, and a successor was appointed:—*Semble*: the interest of the original mtgces. vested, without assignment, in the remaining trustee & the successor, exclusively of the mtgor., by virtue of Friendly Societies Act, 1829 (c. 56), s. 21, incorporated in 1836 Act.—*WALKER v. GILES* (1848), 6 C. B. 662; 18 L. J. C. P. 323; 13 L. T. O. S. 209; 13 Jur. 588; 136 E. R. 1407.

Annotations:—*Mentd.* *Barnard v. Pilsworth* (1849), 6 C. B. 698, n.; *Doc d. Dirle v. Davies* (1851), 7 Exch. 89; *Pinhorn v. Souster* (1852), 8 Exch. 138; *Pinhorn v. Souster* (1853), 8 Exch. 763; *Brown v. Metropolitan Counties, etc., Soc.* (1859), 1 E. & E. 832; *Turner v. Barnes* (1862), 2 B. & S. 435; *Thorn v. Croft* (1866), L. R. 3 Eq. 193; *Re Royal Liver Friendly Soc.* (1870), L. R. 5 Exch. 78; *Re Potter, Ex p. Parke* (1874), *De Colyars County Court Cases*, 235; *Re Betts, Ex p. Harrison* (1881), 18 Ch. D. 127.

49. ———.]—Action as "trustees for the time being"—Rule requiring assignment to succeeding trustees—No assignment made to succeeding trustees.]—A rule of a building society required that a trustee who was removed should assign securities to the succeeding trustee:—*Held*: a declaration in covenant on a mtge. deed stating that pltf. were trustees for the time being & sued as such, according to the form of the statute, was good on general demurrer, although it appeared by plea that no assignment of the security had been made to them.—*MORRISON v. GLOVER* (1849), 4 Exch. 430; 19 L. J. Ex. 20; 14 L. T. O. S. 204; 14 J. P. 84; 154 E. R. 1281.

Annotations:—*Mentd.* *Doc d. Morrison v. Glover* (1850), 15 Q. B. 103; *Hankin v. Bennett* (1852), 21 L. J. Ex. 326; *Reeves v. White* (1852), 17 Q. B. 995; *Fleming v. Self* (1854), Kay, 518; *R. v. Trafford* (1854), 1 Jur. N. S. 252; *Prentice v. London* (1875), L. R. 10 C. P. 679; *Huckle v. Wilson* (1877), 26 W. R. 98; *Mulkern v. Lord* (1879), 4 App. Cas. 182; *Hack v. London Provident*

Bldg. Soc. (1883), 23 Ch. D. 103; Municipal Permanent Investment Bldg. Soc. v. Kent (1884), 53 L. J. Q. B. 290; Western Suburban & Notting Hill Permanent Benefit Bldg. Soc. v. Martin (1886), 17 Q. B. D. 66; Municipal Permanent Investment Bldg. Soc. v. Richards (1888), 39 Ch. D. 372; Palliser v. Dale (1897), 66 L. J. Q. B. 236; Winter v. Wilkinson, [1915] 1 Ch. 317.

50. — Transfer of property by person appointed by court—Service of petition on recusant trustee.]—If a petition is presented under Friendly Societies Act, 1829, or under Transfer of Trust Estates Act, 1830 (c. 60), to have a person appointed to convey property in the place of a recusant trustee, the latter ought not to be served with the petition, & if he is served, he will be entitled to his costs.—*Re THIRD BURNTREE BUILDING SOCIETY, Ex p. ARMSTRONG* (1848), 16 Sim. 296; 12 L. T. O. S. 3; 12 Jur. 595; 60 E. R. 888.

Annotation:—Reid. Re Knox's Trusts, [1895] 1 Ch. 538.

51. Vesting of property in treasurer or trustees.]—A building society may lend to one of its own members on mtge., & the security will, under Friendly Societies Act, 1829 (c. 56), s. 21, vest in the treasurer or trustees for the time being.—*MORRISON v. GLOVER* (1849), 4 Exch. 430; 19 L. J. Ex. 20; 14 L. T. O. S. 204; 14 J. P. 84; 154 E. R. 1281.

Annotations:—Mentd. Doe d. Morrison v. Glover (1850), 15 Q. B. 103; *Hankin v. Bennett* (1852), 21 L. J. Ex. 326; *Reeves v. White* (1852), 17 Q. B. 995; *Fleming v. Self* (1854), Kay, 518; *R. v. Trafford* (1854), 1 Jur. N. S. 252; *Prentice v. London* (1875), L. R. 10 C. P. 679; *Huckle v. Wilson* (1877), 26 W. R. 98; *Mulkern v. Lord* (1879), 4 App. Cas. 182; *Hack v. London Provident Bldg. Soc.* (1883), 23 Ch. D. 103; *Municipal Permanent Investment Bldg. Soc. v. Kent* (1884), 9 App. Cas. 260; *Western Suburban & Notting Hill Permanent Benefit Bldg. Soc. v. Martin* (1886), 17 Q. B. D. 66; *Municipal Permanent Investment Bldg. Soc. v. Richards* (1888), 39 Ch. D. 372; *Palliser v. Dale* (1897), 66 L. J. Q. B. 236; *Winter v. Wilkinson*, [1915] 1 Ch. 317.

52. Liability of trustee—Acting ministerially—Breach of trust by directors.]—A building society was established & the rules certified under 1836 Act; the directors subsequently changed the name & sought to convert it into a freehold land society. They made no alteration in the rules, but they applied the funds of the society towards the payment of the purchase-money of a piece of land they contracted to purchase.—*Held*: the trustees were not responsible for the funds as they only acted ministerially when they signed the cheques for payment; they should, however, be refused the costs of the suit.—*GRIMES v. HARRISON* (1859), 26 Beav. 435; 28 L. J. Ch. 823; 33 L. T. O. S. 115; 23 J. P. 421; 5 Jur. N. S. 528; 53 E. R. 966; *subsequent proceedings*, 27 Beav. 198.

Annotations:—Reid. Hughes v. Layton (1864), 33 L. J. M. C. 89. *Mentd. Re Kent Benefit Bldg. Soc.* (1861), 1 Drew. & Sim. 417; *R. v. D'Eyncourt* (1864), 9 L. T. 712; *Laing v. Reed* (1869), 39 L. J. Ch. 3, n.; *Thompson v. Planet Benefit Bldg. Soc.* (1873), L. R. 15 Eq. 333; *Murray v. Scott*, *Agnew v. Murray*, *Brimelow v. Murray* (1884), 9 App. Cas. 519.

— For mortgage debt—Land bought & mortgaged by directors ultra vires.]—*See* No. 58, *post*.

— On promissory notes.]—*See* Sub-sect. 1, *ante*.

53. Liability of treasurer—Moneys held as "bailee"—Robbery by violence.]—Declaration against the sureties of the treasurer of a building society, conditioned that he should duly & faithfully discharge the duties of his office, & duly

account to the trustees for money, goods, & chattels which he should receive on account of the trustees, alleged that he, as such treasurer, received £170, the monies of the society, & that according to the rules of the society he ought to have paid over the same monies to the bankers of the society, to the credit of pl'tfs., within, etc. Breach. Plea, that after he had received the monies, & before the time when he ought to have paid the same to the bankers, he without any default on his part, was robbed by violence of the whole of the said monies, by the same being feloniously & violently stolen from his person, & thereby he was unavoidably, & without any act or default of his, prevented from paying the said monies to the bankers of the society:—*Held*: the treasurer of a benefit building society was a bailee of the monies which he received on account of the society, & did not by 1836 Act, s. 4, & Friendly Societies Act, s. 20, become debtor to the society, & therefore he was discharged by the robbery; & consequently the plea was an answer to the action.—*WALKER v. BRITISH GUARANTEE ASSOCN.* (1852), 18 Q. B. 277; 21 L. J. Q. B. 257; 19 L. T. O. S. 87; 16 J. P. 582; 16 Jur. 885; 118 E. R. 104.

54. — To account—Bankers acting as treasurers—Inspection & approval of pass-book.]—Though bankers are also treasurers of a building society, an account will not be decreed against them, if their pass-book has been inspected & approved in the usual manner as between banker & customer.—*MOYE v. SPARROW* (1870), 22 L. T. 154; 18 W. R. 400; *subsequent proceedings*, 22 L. T. 370.

Annotations:—Mentd. Re Victoria Permanent Benefit Bldg. Investment & Freehold Land Soc., Hill's Case, Jones' Case (1870), L. R. 9 Eq. 605; *Re Durham County Permanent Investment, Land & Bldg. Soc., Davis' Case, Wilson's Case* (1871), L. R. 12 Eq. 516; *Portsea Island Bldg. Soc. v. Barclay*, [1894] 3 Ch. 86.

55. Bankruptcy of treasurer—Priority of society over other creditors.]—A benefit building society is not entitled on the bkpcy. of its treasurer, to priority over other creditors.—*Re BARRELL, Ex p. BAILEY* (1854), 5 De G. M. & G. 380; 23 L. J. Bcy. 36; 18 Jur. 988; 2 W. R. 401; 18 J. P. 327; 43 E. R. 917, L. JJ.

Annotations:—Consd. Re Williams, Jones v. Williams (1887), 36 Ch. D. 573. *Reid. John O'Gaunt Lodge of Oddfellows v. Bell* (1883), Deprose & Gammon, 67.

See, also, No. 63, *post*.

SUB-SECT. 3.—DIRECTORS AND MANAGERS.

56. Exercise of powers—Whether invalidated by failure to observe formalities.]—A rule of an unincorporated building society declared that the minutes of the managers entered in the minute book, & signed by the managers concurring therein, should be sufficient authority for the execution of any of the powers referred to:—*Held*: the omission of the managers to sign in conformity with this rule did not invalidate their execution of the powers entrusted to them.—*PRIESTLEY v. HOPWOOD* (1864), 4 New Rep. 239; 10 L. T. 646; 28 J. P. 628; 12 W. R. 1031.

57. Power to convey good title—Purchase of land from building society.]—Purchasers of land from a building society must not delude themselves

PART IV. SECT. 2, SUB-SECT. 3.

57 i. Power to convey in fee—Purchase of land from society.]—A mtgo. was made to the president & treasurer of a building society, their successors

& assigns, in trust for the society. The society having subsequently exercised the power of sale, the then president & treasurer, successors of the original mtgees., conveyed to the purchaser by a deed under a seal not the society's:—

Held: the officers for the time being had the power to convey in fee & that the power was duly exercised by them.—*Re INGLEHART & GAGNIER* (1881) 29 Gr. 418.—*CAN.*

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with the idea that the directors & the trustees of the society can convey a good & valid title; they are bound to call for the title-deeds, as in the event of their taking a defective title they must bear all the consequential risks.

A building society purchased a piece of freehold land, & the vendors upon payment of one-fourth of the purchase-money conveyed the land to the trustees of the society in fee, & signed a receipt for the whole of the purchase-money. The directors of the society & the trustees at the same time signed an agreement to pay the remaining purchase-money by instalments, & declared that in the meantime the deed should remain in the hands of the vendors, & that in default of payment they would execute a legal mtge. to secure the unpaid purchase-money. Default was made, & an action was brought to recover the purchase-money, & on a claim filed, a decree was made to carry the agreement into effect. The society, immediately on the execution of the conveyance by the vendors, sold the land in lots to divers persons, who, without looking into the title, paid their purchase-money & took a conveyance in fee from the trustees. The society omitted to pay the instalments of the purchase-money, & a bill was filed by the original vendors against the whole of the allottees & sub-purchasers of the land:—*Held*: they were bound to pay the purchase-money & redeem the mtge., or otherwise the whole of the estate must be sold; but if any party redeemed the land, the others must contribute towards the money paid for redemption, or otherwise the land of the party omitting to pay his contribution must be sold to discharge what was due in respect of his allotment.—*PETO v. HAMMOND* (1861), 30 Beav. 495; 31 L. J. Ch. 354; 8 Jur. N. S. 550; 54 E. R. 981.

Annotations:—*Reid*. Morland v. Cook (1868), L. R. 6 Eq. 252; *Oliver v. Hinton*, [1899] 2 Ch. 264.

58. Power to bind members—Acts ultra vires of directors—Trustees acquiescing—Whether other members bound.]—A society was formed, certified, & inrolled as a benefit building society; its rules did not indicate an intention that it should act as a benefit freehold land society. The directors bought land & mortgaged it to secure money borrowed for the purchase, & certain members, acting as trustees, covenanted to pay the mtge. debt, & under that covenant they had to pay the money. It did not appear that every member acquiesced in or was even cognisant of the transaction:—*Held*: the act of the directors & trustees was *ultra vires*, & the trustees could not compel contribution among the shareholders to recoup their loss.—*Re KENT BENEFIT BUILDING SOCIETY* (1861), 1 Drew. & Sm. 417; 30 L. J. Ch. 785; 4 L. T. 610; 25 J. P. 805; 7 Jur. N. S. 1045; 9 W. R. 686; 62 E. R. 439.

59. Liability for funds misappropriated—Whether action lies by person paying—For money had & received.]—Pltf. purchased the interest of a member of a building society in certain premises mortgaged to the society, & thereafter paid certain subscriptions or instalments in respect thereof to deft., the manager, who misapplied the money. By the rules the manager, in conjunction only with the treasurer & one of the trustees, was justified in receiving subscriptions:—*Held*: an action for money had & received would not lie to recover back the subscriptions so paid, as the money was received by the manager for the society & not for pltf., & even if it would lie, the member & not

pltf. should have sued.—*HAVERSON v. COLE* (1857), 6 W. R. 17.

60. Liability for funds misapplied—Investment in breach of trust.]—The directors of a benefit building society, duly enrolled under 1836 Act, attempted to convert it into a freehold land society, & for that purpose changed the title into "freehold land society" but made no alteration in the rules. They afterwards entered into an agreement to purchase a piece of land, for the purpose of dividing it among the members, & paid a portion of the purchase-money out of the funds of the society. One of the rules of the society authorised the directors to invest surplus monies in the purchase of land:—*Held*: the purchase was unauthorised by the rules of the society, & the directors should be ordered to refund the monies which they had so misapplied.—*GRIMES v. HARRISON* (1859), 26 Beav. 435; 28 L. J. Ch. 823; 33 L. T. O. S. 115; 23 J. P. 421, 5 Jur. N. S. 528; 53 E. R. 966; *subsequent proceedings*, 27 Beav. 198.

Annotations:—*Consd.* *Re Kent Benefit Bldg. Soc.* (1861), 1 Drew. & Sm. 417. *Reid*. *Laing v. Reed* (1869), 39 L. J. Ch. 3, n.; *Thompson v. Planet Benefit Bldg. Soc.* (1873), L. R. 15 Eq. 333. *Mentd.* *Hughes v. Layton* (1864), 33 L. J. M. C. 89; *Murray v. Scott*, *Agnew v. Murray*, *Brimelow v. Murray* (1884), 9 App. Cas. 519.

See, also, No. 236, *post*.

Liability for ultra vires borrowing.]—*See Part VIII., post*.

61. Action for account—By whom brought.]—A benefit building society, among its rules, had one that any member giving notice might withdraw his share, & have the money paid by him returned. Certain members, who had given such notice, filed a bill, on behalf of themselves & all other members not being defts., against the directors, praying for an account of the dealings of the society, that all losses occasioned by the fraud & mismanagement of the directors might be made good by them, & for payment of the debts & liabilities of the society. Some of the members had not given notice of withdrawal; but the bill did not state that their names were unknown to the pltfs.:—*Held*: on a demurrer for want of equity & for want of parties, the bill was defective for want of parties, for neither pltfs. nor defts., they all being directors, represented the non-withdrawing members.—*HARMER v. GOODING* (1849), 3 De G. & Sm. 407; 13 L. T. O. S. 134; 13 Jur. 400; 64 E. R. 537.

SUB-SECT. 4.—THE SECRETARY.

62. Power to bind society—By giving orders for work.]—If the secretary of a friendly building society formed under 1836 Act, gives orders for work & the work is actually done, the trustees of the society are bound to pay for it, if there be evidence to satisfy the jury that the secretary was the general agent of the directors, even though the work was not ordered at a board meeting.—*ALLARD v. BOURNE* (1863), 15 C. B. N. S. 468; 3 New Rep. 42; 143 E. R. 868.

63. Liability to make good deficiency—Misappropriation of moneys of society—Priority over other creditors.]—The secretary of a benefit building society established & certified under 1836 Act, the rules of which provided that the secretary's accounts should be regularly presented & audited, misappropriated the moneys of the society that came into his hands, & died leaving his estate insolvent:—*Held*: under Friendly Societies Act, 1834 (c. 40), s. 12, the society was entitled to be paid out of the estate the amount

of the defalcations in priority to other creditors, & the want of due diligence on the part of the society in examining the accounts was no bar to the claim.—*MOORS v. MARRIOTT* (1878), 7 Ch. D. 543; 47 L. J. Ch. 331; 42 J. P. 452; 26 W. R. 626.

Annotations:—*Reid. Re Welch, Ex p. Star Soc. of Oddfellows*, 1 Mans. 62; *Re Eilbeck, Ex p. Good Intent Lodge*, 987 of the Grand United Order of Odd Fellows, 1 K. B. 136.

See, also, No. 55, ante.

64. — Misappropriation by private clerk of secretary—Clerk authorised by secretary to receive moneys.—The secretary of a benefit building society employed H. as his private clerk to transact the business of the society. H. was not an officer of the society. The directors had drawn cheques from time to time, which were handed over to H. by the direction & with the knowledge of the secretary, for the purpose of being paid by him to the withdrawing members,

but instead of being so applied, they were misappropriated by H.:—*Held*: the secretary was liable to make good the moneys so misappropriated.—*Re MUTUAL AID PERMANENT BENEFIT BUILDING SOCIETY, Ex p. JAMES* (1883), 49 L. T. 530; 48 J. P. 54.

Liability on promissory notes.—See Nos. 42 et seq., ante.

65. Embezzlement by—Description in indictment—“Servant of trustees.”—The secretary of a benefit building society embezzled moneys received by him which had been borrowed by the trustees for the purposes of the society in their individual capacity, there being no rule of the society under which the money was so borrowed:—*Held*: in an indictment for embezzlement, the secretary was properly described as the servant of W. & others, W. being one of the trustees & a member of the society.—*R. v. REDFORD* (1869), 21 L. T. 508; 34 J. P. 117; 11 Cox, C. C. 367, C. C. R.

Part V.—Members.

SECT. 1.—MEMBERSHIP.

See Friendly Societies Act, 1829 (c. 56), ss. 26, 32; Friendly Societies Act, 1834 (c. 40), s. 8; 1836 Act, s. 1; 1874 Act, s. 38.

66. Who may be members—Joint stock company—Unincorporated society.—A joint stock co. cannot hold shares in a benefit building society established under 1836 Act.—*DOBINSON v. HAWKS* (1848), 16 Sim. 407; 12 L. T. O. S. 238; 12 Jur. 1037; 60 E. R. 931.

67. — Incorporated society.—A limited co. became a borrowing member of a benefit building society, borrowed £2,000 & entered into the usual building society mtge. for repayment of principal with fines & premiums. This advance was secured by a bond of indemnity. The mtge. was not paid & the co. was ordered to be wound up. The building society carried in a claim in the winding up, when it was objected on behalf of the liquidator that the mtge. was *ultra vires*. In an action brought on the bond which raised the question whether an incorporated co. could become a member of a building society:—*Held*: though under 1836 Act, which was passed for the benefit of industrious individuals, a co. could not be a member, the policy of the 1874 Act was different, & a limited co. could become a member of a building society just as much as it could become a member of any other corp.—*BRISTOL & CLIFTON PERMANENT BENEFIT BUILDING SOCIETY v. HARBOUR* (1886), 81 L. T. Jo. 171.

Executor.—An exor. is not entitled, on behalf of the estate, to take shares in a building society, or to make the estate liable for him as a shareholder therein.—*THORNE v. THORNE*, [1893] 3 Ch. 196; 63 L. J. Ch. 38; 69 L. T. 378; 42 W. R. 282; 8 R. 282.

69. — Infant—Incorporated society.—An infant may be a member of a building society registered under 1874 Act.—*NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY v. THURSTAN*, [1903] A. C. 6; 72 L. J. Ch. 134; 87 L. T. 529; 67 J. P. 129; 51 W. R. 273; 19 T. L. R. 54, H. L.; *affg.* S. C. *sub nom.* *THURSTAN v. NOTTINGHAM*

PERMANENT BENEFIT BUILDING SOCIETY, [1902] 1 Ch. 1, C. A.

See, also, Nos. 74, 108, post.

What members may sign instrument of dissolution.—See Part XIII., Sect. 1, sub-sect. 1, post.

70. Test of membership—Unincorporated society—Admission of members recorded in books.—A joint-stock brewery co., being in want of a loan of money, effected the following arrangement with a benefit building society: They, by a common deed of mtge., mtged. their real estates to the trustees of the society, to secure a sum of £7,500, & interest at 5 per cent. *per annum*. They agreed to take fifty shares in the society of £120 each, & gave sixty bills of exchange for £75 ls. each, payable at intervals of one month, in respect of the monthly subscriptions, premiums, & interest upon the fifty shares; they also gave a bond for £15,000 as an additional security for the £7,500. This sum of £7,500 was made up of an alleged loan to the brewery co. of £6,000 & £1,500 as the agreed premium of £30 each upon fifty shares. Upon a bill by the brewery co. against the trustees of the society, alleging that by means of the payment by pltf. of a large number of the sixty bills of exchange & by other payments, the sum actually advanced by the building society to them was nearly, if not entirely, paid off, & praying to be let in to redeem the mtge. upon payment of what should be found due from them upon taking the accounts in the ordinary manner as between mtgor. & mtgee., & for the delivery up of the bond & the remaining bills of exchange:—*Held*: in the absence of the books of the society, which are the primary evidence of the due admission of members, according to the rules of the society, pltf. were not to be considered members of the society.—*DOBINSON v. HAWKS* (1848), 16 Sim. 407; 12 L. T. O. S. 238; 12 Jur. 1037; 60 E. R. 931.

71. Cessation of membership—Withdrawal of shares.—Members of a building society incorporated under the 1874 Act, who had investing shares payable by monthly subscriptions, & upon

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p. Who is a member—Shareholder who has received amount of his shares.

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HODGINS v. ONTARIO LOAN & DEBENTURE CO. (1882), 7 A. R. 202.—CAN.

71 i. Cessation of membership—For-

feiture of shares.—The rules of a building society provided that when the fines due by a member amounted to the sum standing at his credit, the amount

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which no advance had been made, gave due notice of withdrawal & received the estimated amount of their shares under the rules of the society before the shares were fully paid up or matured. The society was, within a year afterwards, wound up in the county court, under the winding-up clauses of Companies Acts, & the judge, on the application of creditors, made an order declaring that holders of such shares not matured at the commencement of the winding up were, notwithstanding withdrawal, liable to contribute to the assets of the society:—*Held*: the order was wrong, for, on withdrawal of their shares, the holders ceased to be members of the society.—*Re SHEFFIELD & SOUTH YORKSHIRE PERMANENT BUILDING SOCIETY* (1889), 22 Q. B. D. 470; 58 L. J. Q. B. 265; 60 L. T. 186; 53 J. P. 375; 5 T. L. R. 192, D. C.

Annotation:—*Expld.* *Sibun v. Pearce* (1890), 44 Ch. D. 354.

72. ——— Unlimited company.—The memorandum & articles of association of a co. incorporated under Companies Acts with unlimited liability, in effect provided that, in respect of shares taken by persons for the purpose of enabling them to become borrowers from the co., the holders should be enabled to withdraw from the membership on paying off the loan, & all sums then due on the shares. On an application by the liquidator to have members so withdrawing declared liable for calls on the shares they had so held:—*Held*: there was nothing in Companies Acts to prevent an unlimited co. from validly providing by its memorandum & articles of association for a return of capital to the members of the co., or for the withdrawal of members from the co.—*Re BOROUGH COMMERCIAL & BUILDING SOCIETY*, [1893] 2 Ch. 242; 62 L. J. Ch. 456; 69 L. T. 96; 41 W. R. 313; 9 T. L. R. 282; 37 Sol. Jo. 269; 3 R. 339.

See, further, Part VI., Sect. 3, *post*; COMPANIES.

73. Liability of member—Contract—To build houses.—Where it was proved that A. had contributed to the funds of a building society, & had been present at a meeting of the society, &

party to a resolution that certain houses should be built:—*Held*: this made him liable to an action for work done in building those houses, without proof that he had an actual interest in them, or in the land on which they were built.—*BRAITHWAITE v. SKOFFIELD* (1829), 9 B. & C. 401; 7 L. J. O. S. K. B. 274; 109 E. R. 149.

Annotation:—*Refd.* *Alexander v. Worman* (1860), 30 L. J. Ex. 198.

74. Liability of infant member—Purchase of land from society during infancy—Ratification after coming of age.—In May, 1882, an infant purchased a plot of freehold land from the trustees of a building society of which he was a member and a committee-man. In July of that year he came of full age. For four and a half years he paid monthly instalments of the purchase money, and acted as a committee-man:—*Held*: he had ratified the contract, and was liable under its provisions.—*WHITTINGHAM v. MURDY* (1889), 60 L. T. 956.

See, also, No. 69, *ante*, No. 108, *post*.

Rights & liabilities of members — On winding up.—*See* Part XIII., *post*.

SECT. 2.—MEETINGS.

See Friendly Societies Act, 1829 (c. 56), s. 10; 1836 Act, s. 1; 1874 Act, s. 16 (1).

75. Conduct of suits by or against society—Provision for approval of “special meeting”—Approval at “special general meeting.”—One of the certified rules of an unincorporated society provided that no action should be brought or defended until the approbation of the majority of members present at “a special meeting” of the society should be obtained:—*Held*: it was no objection that the approbation of the majority was obtained at a “special general meeting.”—*CUTBILL v. KINGDOM* (1847), 1 Exch. 494; 17 L. J. Ex. 177; 10 L. T. O. S. 114; 154 E. R. 210.

Annotations:—*Mentd.* *Morrison v. Glover* (1849), 4 Exch. 430; *Ex p. Payne* (1849), 18 L. J. Q. B. 197; *Burbidge v. Cotton* (1851), 5 De G. & Sm. 17; *Fleming v. Self* (1854), 3 De G. M. & G. 997; *R. v. Trafford* (1854), 4 E. & B. 122; *Farmer v. Smith* (1859), 4 H. & N. 196; *Grimes v. Harrison* (1859), 26 Beav. 435; *Wright v. Deley* (1866), 4 H. & C. 209; *Mulkern v. Lord* (1879), 4 App. Cas. 182.

Part VI.—Shares.

SECT. 1.—IN GENERAL.

See Friendly Societies Act, 1829 (c. 56), s. 3; 1836 Act, s. 1; 1874 Act, ss. 13, 16 (2) (4), 39; 1894 Act, s. 1 (b) (c) (d).

76. Restrictions on value of shares to be held by one member—Unincorporated societies.—*Semble*: under 1836 Act the Legislature intended that no one member should acquire a larger interest than £150 in respect of his share or shares in such society.—*CUTBILL v. KINGDOM* (1847), 1 Exch. 494; 17 L. J. Ex. 177; 10 L. T. O. S. 114; 154 E. R. 210.

Annotations:—*Mentd.* *Morrison v. Glover* (1849), 4 Exch. 430; *Ex p. Payne* (1849), 18 L. J. Q. B. 197; *Burbidge v.*

thereof should be forfeited to the society, & that the member should thereafter cease to have an interest in the society; the rule required notice to be sent to a member six months in arrears. B., a member whose contributions had been exceeded by fines had received no notice as to arrears:—*Held*: B. had ceased to be a member.—*IRVINE & FULLARTON PROPERTY IN-*

VESTMENT & BUILDING SOCIETY v. CUTHBERTSON (1905), 8 F. (Ct. of Sess.) 1.—SCOT.

q. Necessity of signing rules.—A rule that all persons upon becoming members of the society should sign the rules, is directory only—the signing of the rules not being a condition precedent to membership.—*Re ST.*

Cotton (1851), 5 De G. & Sm. 17; *Fleming v. Self* (1854), 3 De G. M. & G. 997; *R. v. Trafford* (1854), 4 E. & B. 122; *Farmer v. Smith* (1859), 4 H. & N. 196; *Grimes v. Harrison* (1859), 26 Beav. 435; *Wright v. Deley* (1866), 4 H. & C. 209; *Mulkern v. Lord* (1879), 4 App. Cas. 182.

77. ———.—A member of a building society may hold one or more shares exceeding £150 in value.—*MORRISON v. GLOVER* (1849), 4 Exch. 430; 19 L. J. Ex. 20; 14 L. T. O. S. 204; 14 J. P. 84; 154 E. R. 1281.

Annotations:—*Mentd.* *Doe d. Morrison v. Glover* (1850), 15 Q. B. 103; *Hankin v. Bennett* (1852), 21 L. J. Ex. 326; *Reeves v. White* (1852), 17 Q. B. 995; *Fleming v. Self* (1854), Kay, 518; *R. v. Trafford* (1854), 1 Jur. N. S. 252; *Prentice v. London* (1875), L. R. 10 C. P. 679; *Huckle v. Wilson* (1877), 26 W. R. 98; *Mulkern v. Lord* (1879), 4 App. Cas. 182; *Hack v. London Provident Bldg. Soc.*

JOHN BUILDING SOCIETY (1889), 28 N. B. R. 597.—CAN.

PART VI. SECT. 1.

r. Joint holders.—Two or more persons may hold shares in a building society jointly.—*GILBERT v. NEW-CASTLE PERMANENT INVESTMENT & BUILDING SOCIETY* (1896), 17 N. S. W. Eq. 72.—AUS.

(1883), 23 Ch. D. 103; *Municipal Permanent Investment Bldg. Soc. v. Kent* (1884), 9 App. Cas. 260; *Western Suburban & Notting Hill Permanent Benefit Bldg. Soc. v. Martin* (1886), 17 Q. B. D. 66; *Municipal Permanent Investment Bldg. Soc. v. Richards* (1888), 39 Ch. D. 372; *Palliser v. Dale* (1897), 66 L. J. Q. B. 236; *Winter v. Wilkinson*, [1915] 1 Ch. 317.

78. Nature of shares—Whether within Charitable Uses Act, 1736 (c. 3).—Shares in a co. of which the object was to purchase land and build upon or otherwise improve it and sell or let it, and shares in a benefit building society:—*Held*: not within Charitable Uses Act, 1736.

The real question in such cases is, whether the share is such that it might result to the owner as land, or whether nothing can come to him but in shape of money.—*ENTWISTLE v. DAVIS* (1867), L. R. 4 Eq. 272; 36 L. J. Ch. 825; 31 J. P. 708.

Annotations:—*Consd.* *Re Hollon, Forbes v. Hardcastle* (1893), 68 L. T. 160. *Reid.* *Re Dawson, Pattison v. Bathurst*, [1915] 1 Ch. 626.

79. — Whether included in bequest of “moneys.”—A testator by his will bequeathed “all the moneys both in the house and out of it.” He was possessed of some shares in a building society:—*Held*: they did not pass by the bequest.—*COLLINS v. COLLINS* (1871), L. R. 12 Eq. 455; 40 L. J. Ch. 541; 24 L. T. 780; 19 W. R. 971.

Whether proper subject of donatio mortis causa.—Certificates of investment shares in a building society, which shares might at any time be withdrawn are not the proper subject of a *donatio mortis causa*.—*Re WESTON, BARTHOLOMEW v. MENZIES*, [1902] 1 Ch. 680; 71 L. J. Ch. 343; 86 L. T. 551; 50 W. R. 294; 18 T. L. R. 326; 46 Sol. Jo. 281.

Annotation:—*Mentd.* *Re Andrews, Andrews v. Andrews*, [1902] 2 Ch. 394.

81. Title to shares—Payment by society to registered owner—Without notice of trust.—In 1876 A., as agent for his wife, purchased three shares in a building society, and without the knowledge or consent of the wife he had them registered in his own name. All subscriptions in respect of the shares were paid out of the wife’s separate estate, and she kept the share certificates, and as between herself and her husband she was entitled to the shares. By the rules of the society it was provided that shareholders should receive a certificate for every share, which must be produced on the transfer or withdrawal thereof for the purpose of having a memorandum indorsed thereon; and also that no transfer of the scrip should pass the interest of the shareholder therein named until the same should have been registered in the books of the society. In 1883, A. without the knowledge or consent of his wife withdrew the shares and obtained payment for them. When he presented himself for payment the secretary asked

for the certificates, but A. represented that they were in the possession of his brother, who was also a shareholder of the society, and would be produced on the following day, and the secretary thereupon paid him the money. Upon an action by the wife to have herself registered as the owner of the shares:—*Held*: payment had been made to the person legally entitled without notice of the wife’s claim, and the action must be dismissed.—*NOLLOTH v. SIMPLIFIED PERMANENT BENEFIT BUILDING SOCIETY* (1885), 53 L. T. 859; 34 W. R. 73; 2 T. L. R. 97.

SECT. 2.—TRANSFER.

Right of transferee to be registered as owner—Sale & transfer after winding-up order.—*See* No. 308, *post*.

SECT. 3.—WITHDRAWAL.

See 1836 Act, s. 1; 1874 Act, s. 16 (4); 1894 Act, s. 1 (b) (c).

82. Right of withdrawal—Subject to available balance in hand—Payment in rotation.—The rules of a building society provided, in the case of depositors who had given the prescribed notice to withdraw, that “if the available balance in hand shall be at any time insufficient to pay all the depositors wishing to withdraw, they shall be paid in rotation, according to the priority of their notices.” A depositor gave notice of withdrawal, and his deposit not being repaid he brought an action to recover it:—*Held*: the fact that the available balance was insufficient to pay the depositors who had given prior notice to withdraw was an answer to the action.—*BRETT v. MONARCH INVESTMENT BUILDING SOCIETY*, [1894] 1 Q. B. 367; 63 L. J. Q. B. 237; 70 L. T. 146; 58 J. P. 367; 42 W. R. 209; 10 T. L. R. 187; 38 Sol. Jo. 183; 9 R. 141, C. A.

83. — Alteration of rules relating to.—*AULD v. GLASGOW WORKING MEN’S BUILDING SOCIETY*, No. 13, *ante*.

— *Effect of.*—*See* Nos. 22, 23, *ante*.

84. — Loss of—Stoppage of business.—The question whether an investing member of a building society may withdraw so as to obtain priority over other members does not depend on the answer to be given to the question whether the society was solvent or insolvent when his notice matured, or on the answer to be given to the question whether the members or officers of the society then knew that the society was insolvent. The line is to be drawn at the time when there is a stoppage of the society’s business, or a recognition,

PART VI. SECT. 3.

a. Rights of withdrawal—Application of rules.—Rules giving the right to members to withdraw or discontinue apply only where the society is actually a going concern.—*Re CO-OPERATIVE STARR-BOWKETT & CO. BUILDING SOCIETY* (1896), 22 V. L. R. 47.—*AUS.*

t. — Subject to deduction—Payment in rotation.—A shareholder of a building society incorporated under 1874 Act, the members of which were entitled under the rules to withdraw on giving certain notice thereof, & to be paid out according to the priority of their notices, sent in a notice of withdrawal. Before he had been paid out, the society resolved that a certain proportion per £1 be deducted from all shareholders accounts & placed to a suspense account; this resolution was intimated to him. He was subsequently paid out subject to this deduction & he

granted a receipt for the sum paid him as “placed to the debit of my share account.” After the society was in funds to pay him out in full he claimed the balance:—*Held*: the shareholder was entitled to the balance.—*GLASGOW WORKING MEN’S PROVIDENT INVESTMENT BUILDING SOCIETY v. GALBRAITH* (1884), 21 Sc. L. R. 782.—*SCOT.*

a. — In respect of prior to withdrawal.—The rules of a building society provided:—“Any member holding unadvanced shares shall be entitled to withdraw from the society on application to the directors in writing, & shall be entitled to receive the amount standing at his credit in the books of the society in respect of his shares as at the immediately preceding annual balance, together with the amount of subscriptions paid by him thereafter”:—*Held*: under this rule a member withdrawing was liable to a deduction of 40 per cent. on the

value of his shares in respect of losses incurred by the Society, as appearing from the last balance-sheet, although that balance-sheet was approved after the date of his withdrawal.—*SCOTTISH PROPERTY INVESTMENT CO. BUILDING SOCIETY v. STEWART* (1885), 12 R. (Ct. of Sess.) 925; 22 Sc. L. R. 619.—*SCOT.*

c. — Non-timeous withdrawal of shares.—A rule provided that members on whose shares no advances had been made might “on one month’s notice in writing to the manager withdraw his or her subscriptions paid thereon,” with interest at a certain rate, “& the same shall be paid as soon after the expiry of the month’s notice as the funds will permit”:—*Held*: members who only gave notice of withdrawal within one month of the date of the winding-up could not benefit by the rule.—*NORTH BRITISH BUILDING SOCIETY v. M’LELLAN* (1887), 14 R. (Ct. of Sess.) 827.—*SCOT.*

Sect. 3.—Withdrawal. Sect. 4: Sub-sect. 1.]

by those who are entitled to form a judgment, that the business must be stopped.—*Re AMBITION INVESTMENT BUILDING SOCIETY*, [1896] 1 Ch. 89; 65 L. J. Ch. 113; 73 L. T. 508; 44 W. R. 141; 2 Mans. 607.

Annotation:—**Mentd.** *Sixth West Kent Mutual Bldg. Soc. v. Hills*, [1899] 2 Ch. 60.

85. Waiver of notice of withdrawal—Acceptance of loan subsequent to notice—Loan ultra vires.—A member who had given notice of withdrawal and subsequently accepted an advance from the society, which was admittedly *ultra vires*, on the security of his fully paid shares, was held to have waived his notice of withdrawal, and not to be entitled to set off the amount due from him in respect of the advance against such fully paid shares.—*Re COUNTIES CONSERVATIVE PERMANENT BENEFIT BUILDING SOCIETY*, *DAVIS v. NORTON*, [1900] 2 Ch. 819; 69 L. J. Ch. 798; 49 W. R. 71; 44 Sol. Jo. 699.

86. Interest on shares withdrawn—Whether shareholder entitled to—Interest not determined by committee according to rules—Maturity of notices before knowledge of insolvency.—Shareholders whose notices of withdrawal had matured before the societies were known to be insolvent, but who had not received the sums due to them, were not, in the absence of a determination by the committee under the rule of the amount due to them in respect of interest, entitled to be allowed in the winding up interest on those sums till payment.—*Re SUNDERLAND 36TH UNIVERSAL BUILDING SOCIETY* (1890), 24 Q. B. D. 394; 59 L. J. Q. B. 217; 62 L. T. 293; 38 W. R. 509; 6 T. L. R. 199; *sub nom.* *KING v. RAWLINGS*, 54 J. P. 613, D. C.

Annotations:—**Follid.** *Sixth West Kent Mutual Bldg. Soc. v. Shove* (1895), [1899] 2 Ch. 64, n. **Mentd.** *Barnard v. Tomson*, [1894] 1 Ch. 374; *Re Ambition Investment Bldg. Soc.*, [1896] 1 Ch. 89; *Sixth West Kent Mutual Bldg. Soc. v. Hills*, [1899] 2 Ch. 60; *Re Gwawr-y-Gwelthyr Industrial & Provident Soc.*, *Dovey v. Morgan*, [1901] 2 K. B. 477.

87. Time for payment—Power of arbitrator to fix.—The rules of a benefit building society authorised the directors to invest the funds on mtges. for ten years at any rate of interest, or in building on or improving land mortgaged to them, & authorised members to withdraw their shares upon giving a certain notice, & provided that such members should not be liable to any future fines, but should be entitled to receive the net amount of their subscriptions paid with interest, & also a share of profits. No time was specified in making such payments, & the directors had power to pay such claims in the order in which they arose. The amount payable to a withdrawing member having been referred to arbitration:—**Held**: it was competent to the arbitrator to consider when, consistently with the due prosecution of the other objects of the society, such payment should be made, & to fix a time for such payment accordingly.—*ARMITAGE v. WALKER* (1855), 2 K. & J. 211; 26 L. T. O. S. 182; 20 J. P. 53; 2 Jur. N. S. 13; 69 E. R. 756.

Annotations:—**Mentd.** *Callaghan v. Dolwin* (1860), L. R. 4 C. P. 288; *Walker v. General Mutual Bldg. Soc.* (1887), 36 Ch. D. 777; *Davies v. Second Chatham Permanent Benefit Bldg. Soc.*, *Mackenzie v. Everton & West Derby Permanent Benefit Bldg. Soc.* (1889), 61 L. T. 680.

88. — Period of payment—Between date of

d. Notice of withdrawal — Conditional cancellation.—Unadvanced members who had given notice of withdrawal were invited by circulars sent out by the society to cancel their notices. The circulars did not expressly mention a condition that cancellations would not be used unless

shareholders, representing at least nine-tenths of the amount under notice of withdrawal cancelled their notices, & the form of cancellation sent along with the circular was absolute in its terms. Nine-tenths did not cancel their notices of withdrawal:—**Held**: cancellation was con-

ditional upon nine-tenths of the members who had given notice of withdrawal cancelling their notices.—*SCOTTISH PROPERTY INVESTMENT CO. BUILDING SOCIETY v. STEWART* (1885), 12 R. (Ct. of Sess.) 925; 22 So. L. R. 619.—**SCOT.**

last dividend and notice of withdrawal—At rate in deposit.—Pltf. was a member and shareholder of deft. building society, &, in Mar. 1887, was the holder of £250 paid-up investment shares. On Mar. 2 he gave notice of withdrawal of £125 part thereof, at a month's date, and that sum was duly paid to him. On July 15, the directors apportioned to the paid-up investment shares then on the register an *interim* dividend at the rate of 5 per cent. *per annum*, for the half-year ending June 30; but they refused to pay any interest or dividend to the pltf. on the £125 withdrawn. Thereupon pltf. claimed 15s. as interest on that sum from Jan. 1, the date of the last dividend, to Mar. 2, the date of notice of withdrawal, at the rate allowed on deposits namely 4 per cent. pursuant to rules 19 & 21 of the society. The directors had passed the following resolutions, on Nov. 5, 1886, that "subject to the rules the interest allowed on moneys withdrawn do not for the present exceed 2½ per cent. *per annum*"; and on Feb. 18, 1887, that "No interest be allowed upon *interim* withdrawals until further consideration." Pltf. had no notice of these resolutions. By rule 9 of the society, paid-up shares might be withdrawn or repaid upon the terms set forth in rule 21. Rule 19 provided that interest should be allowed on investment shares at such rates as the board should from time to time fix, & rule 21 that any member might withdraw the subscriptions in respect of investment shares, subject to the conditions specified below, after one month's notice in writing. . . . A member withdrawing a portion only of the amount at the credit of his share account, should not be paid interest thereon at a rate exceeding that for the time being allowed on deposits. Interest on all shares should cease at the date of notice of withdrawal. For debts. it was contended that, as there was no contract to pay interest, the only interest pltf. was entitled to was the interest fixed by the board, & here the board had fixed no interest, and that the resolution of Feb. 18 was fatal to pltf.'s claim:—**Held**: pltf. was entitled to interest on the £125 withdrawn from the date of the last dividend up to the date of notice of withdrawal, and such interest ought to be at the rate allowed on deposits, namely 4 per cent.—*PERRATT v. LONDON SCOTTISH PERMANENT BENEFIT BUILDING SOCIETY* (1888), 59 L. T. 31, D. C.

89. Shares fully paid up—Priority according to dates of notices.—The rules of a building society provided that any member desirous of withdrawing should, by giving a month's notice in writing, be entitled to receive back his subscription money in the manner therein mentioned; that members withdrawing, whose shares were fully paid up, should be entitled to 5 per cent. interest from the time such shares were so paid up, or from the time the previous dividend was paid; and that if more than one member should give notice to withdraw they should be paid in rotation according to the priority of their notices. The society was ordered to be wound up under the Companies Acts, and at the date of the winding up the shareholders consisted of three classes, viz.: (1) members who gave early notices of withdrawal of their shares, and who claimed to be paid out of the assets in priority to those who gave later notices;

(2) members who gave later notices, and who claimed that all the withdrawing members should be paid *pari passu*; and (3) members who gave no notices. On the question whether the members who gave notice of withdrawal before the winding up commenced, were entitled to have interest added to their respective claims from the date of the winding up to the respective dates of payment of their claims:—*Held*: such of the members whose shares were fully paid up at the dates of their respective notices were entitled to be paid interest on the amounts due to them, from the times when such shares were fully paid up, or from the times of the payment of the last dividend, until the times of the payment of the amounts due to them, the members who gave notice of withdrawal prior to the commencement of the winding up being paid in priority to other members, according to the respective dates of their notices.—*Re MIDDLESBROUGH, REDCAR, SALTBURN-BY-THE-SEA & CLEVELAND DISTRICT PERMANENT BENEFIT BUILDING SOCIETY (No. 2) (1885)*, 53 L. T. 203.

Annotation:—*Refd.* *Re Reliance Permanent Benefit Bldg. Soc. (1892)*, 61 L. J. Ch. 453.

90. — Right to compound interest—On giving prescribed notice of withdrawal.—By the rules of a benefit building society it was provided that shareholders might withdraw on giving one month's notice of their intention so to do, and should be entitled to receive back the subscriptions paid, with interest thereon at the rate of 5 per cent. *per annum*:—*Held*: under a winding-up order of the society those shareholders who had duly given notice of withdrawal were entitled to compound interest on their subscriptions.—*Re DONCASTER PERMANENT BENEFIT BUILDING & INVESTMENT SOCIETY (1866)*, 14 L. T. 13.

Rights & liabilities of members on dissolution.—*See Part XIII., post.*

SECT. 4.—FINES AND FORFEITURES.

SUB-SECT. 1.—FINES.

See 1836 Act, s. 1; 1874 Act, s. 16 (13).

91. Nature of fines—Not subject of equitable relief.—The rules of a benefit building society empowered the society to advance to its members the amount of their shares, repayable by monthly contributions covering principal and interest & imposed fines for non-payment of the contributions at the rate of 1s. per pound per month:—*Held*: the fines were not within the doctrine of equitable relief against penalties.—*PARKER v. BUTCHER (1867)*, L. R. 3 Eq. 762; 36 L. J. Ch. 552.

Annotations:—*Refd.* *Pilkington v. Baker*, [1877] W. N. 210. *Mentd.* *Matterson v. Elderfield (1869)*, 20 L. T. 503; *Clarkson v. Henderson (1880)*, 14 Ch. D. 348.

92. — Reserved in mortgage to unincorporated society—Transaction not made usurious.—The fines reserved in a mtge. to a building society for non-payment of the contributions do not make

the transaction usurious.—*CARR v. JOHNSON (1848)*, 11 L. T. O. S. 356.

93. — Taken as part of "principal" in foreclosure suit.—“Fines” imposed by, and payable under, the rules of a benefit building society, & covenanted to be paid in a mortgage deed by a member of the society, form part of the principal money secured by the mtge., & when an account is decreed are included under the term “principal, interest & costs.”—*PROVIDENT PERMANENT BUILDING SOCIETY v. GREENHILL (1878)*, 9 Ch. D. 122; 38 L. T. 140; 42 J. P. 775; 27 W. R. 110.

Annotations:—*Mentd.* *Clarkson v. Henderson (1880)*, 14 Ch. D. 348; *Re Middlesbrough Bldg. Soc. (1884)*, 54 L. J. Ch. 592.

94. Against whom enforceable—Purchaser of forfeited shares—Fines for non-payment of instalments of purchase-money.—The mortgaged property of an advanced member of a building society became saleable in consequence of his default. The property was sold by the society to pltf., who took the forfeited shares, part of the purchase-money being payable by £20 instalments:—*Held*: he was liable, under the rules, to fines for non-payment of the instalments of the purchase-money.—*HANDLEY v. FARMER (1861)*, 29 Beav. 362; 51 E. R. 667.

Annotations:—*Mentd.* *Re Doncaster Permanent Bldg. & Investment Soc. (1866)*, 15 W. R. 102; *Re Doncaster Permanent Bldg. Soc. (1867)*, L. R. 4 Eq. 579.

95. What fines are reasonable.—The rules of a benefit building society empowered the society to advance to its members the amount of their shares, repayable by monthly contributions covering principal & interest, and imposed fines for non-payment of the contributions at the rate of 1s. per pound per month:—*Held*: the fines were reasonable within 1836 Act, s. 1.—*PARKER v. BUTCHER (1867)*, L. R. 3 Eq. 762; 36 L. J. Ch. 552.

Annotations:—*Refd.* *Pilkington v. Baker*, [1877] W. N. 210. *Mentd.* *Matterson v. Elderfield (1869)*, 20 L. T. 503; *Clarkson v. Henderson (1880)*, 14 Ch. D. 348.

96. ——One of the rules of a building society provided that the fines incurred by all then present or future mtgors., by neglecting to make their monthly payments of principal, interest, fines, & other payments, should be at the rate of 5 per cent. per month on the total amount in arrear:—*Held*: the amount of the fine was not unreasonable.—*Re MIDDLESBROUGH BUILDING SOCIETY (1884)*, 54 L. J. Ch. 592; 51 L. T. 743; 49 J. P. 278; 1 T. L. R. 46.

97. On what amount chargeable—Unpaid fines.—One of the rules of a building society provided that the fines incurred by all then present or future mtgors., by neglecting to make their monthly payments of principal, interest, fines, and other payments, should be at the rate of 5 per cent. per month on the total amount in arrear:—*Held*: the monthly fine was to be calculated at the rate of 5 per cent. per month on the amount of the previous fines and other payments as well as of the principal and interest in arrear.—*Re MIDDLESBROUGH BUILDING SOCIETY (1884)*, 54 L. J. Ch. 592; 51 L. T. 743; 49 J. P. 278; 1 T. L. R. 46.

PART VI. SECT. 4, SUB-SECT. 1.

91 i. Nature of fines—Whether penalty.—The bye-law of a building society provided that a member neglecting to pay his monthly dues, should be fined a specified sum per share each month, “until the end of one year, when the share or shares in default shall be declared forfeited to the society.” It then directed that a month before the expiration of such year, the secretary should send a notice to the defaulter, calling his attention to the bye-law; & provided

that in case of the defaulter being a borrower these fines should be trebled; & that at the end of six months’ default the mtge. should be liable to foreclosure, & to be declared forfeited:—*Held*: the bye-law, being penal in its character, should be construed strictly.—*OTTAWA UNION BUILDING SOCIETY v. SCOTT (1865)*, 24 U. C. R. 341.—*CAN.*

95 i. What fines are reasonable—Cumulative in arithmetical progression.—The trustees of a benefit building society were, under one of its rules,

empowered to charge borrowing members, as a penalty in case of repayments being in arrear, “fines at the rate of 3d. per share for the first month, & for each & every succeeding month 3d. per share additional on such repayments.” The trustees having charged a borrowing member fines computed as cumulative in arithmetical progression:—*Held*: on such computation the fines would not be “reasonable” within 6 & 7 Wm. 4, c. 32, s. 1.—*Re TIERNEY’S ESTATE (1874)*, 9 L. R. Eq. 1.—*IR.*

Sect. 4.—Fines and forfeitures: Sub-sects. 1 & 2.

98. For what period chargeable—Rules containing scale for first six months only—Fine limited to six months.]—The rules of a benefit building society, duly certified by the Registrar of Friendly Societies, provided that every mtge. should contain full powers of sale and covenants in accordance with the rules as a security for any money advanced, and that in case the mtgor. should neglect or refuse to observe and perform the covenants for payment of advance instalments, as well as any fines inflicted for neglect of payment as provided for in a table to the rules, then after certain steps taken the board of directors should be at liberty to sell the mortgaged property, and if any member should be desirous of redeeming, he should be allowed to do so on payment of all advance repayments, and any fines due in respect thereof up to the time of redemption, and the present value of the future repayments. The table referred to purported to show the fines to which borrowing members were liable for default of payment of their monthly subscriptions and interest on their shares from one to ten, according to an increasing scale, for a period of from one to six months, but made no provision beyond six months. The pltf. borrowed £1,400 from the society, and took twenty-eight £50 shares, and his mtge. was expressed to be for securing the repayment of £1,400, with interest at 7½ per cent., by monthly instalments of £31 10s. for five years. The payments having fallen into arrear, and the society having taken possession, pltf. brought an action for redemption, and the society claimed to be entitled to fines for each unpaid instalment increasing month by month in the same proportion as for the first six months:—*Held*: upon the reasonable construction of the rules, the rights of the society were restricted to a six months' fine in respect of each unpaid instalment of each share.—*LOVEJOY v. MULKERN* (1877), 46 L. J. Ch. 630; 37 L. T. 77, C. A.

99. Interest on fines—Whether chargeable—Fines for non-payment of contributions.]—The rules of a benefit building society empowered, the society to advance to its members the amount of their shares, repayable by monthly contributions covering principal & interest, & imposed fines for non-payment of the contributions at the rate of 1s. per pound per month:—*Held*: the fines did

99 i. For what period chargeable—Rules containing scale for six months only—Fines limited to six months.]—A rule declared, that, in case of default in monthly subscriptions, the defaulter should pay a fine of 3d. per share for the first month, 6d. for the second month, & 1s. for the third month, doubling the fine for each succeeding month, till the expiration of the first six months:—*Held*: no fine was chargeable after the first six months.—*WILSON v. UPPER CANADA BUILDING SOCIETY* (1866), 12 Gr. 206.—*CAN.*

e. — Borrowers — Non-borrowers.]—A bye-law provided that any member neglecting to pay his monthly dues should be fined a specified sum per share each month "until the end of the year"; that in case of the defaulter being a borrower, these fines should be trebled; & that at the end of six months' default the mtge. should be liable to foreclosure, & to be declared forfeited:—*Held*: the fines could be imposed on borrowers only for twelve, & on non-borrowers for six, months, the right to forfeit or to foreclosure being then substituted.—*OTTAWA UNION BUILDING SOCIETY v. SCOTT* (1865), 24 U. C. R. 341.—*CAN.*

f. Where society supposed to

have terminated.]—Where the members ceased paying their monthly subscriptions in ten years after the establishment of the society, under the supposition, on the part of all, that the society should then terminate, & did not resume paying, but it was subsequently found that, from mismanagement & losses, further payments were necessary:—*Held*: the rule as to fines was not to be enforced as regarded monthly subscriptions falling due after all had ceased to pay.—*WILSON v. UPPER CANADA BUILDING SOCIETY* (1866), 12 Gr. 206.—*CAN.*

PART VI. SECT. 4, SUB-SECT. 2.

101 i. When forfeiture takes place—Neglect to pay subscriptions or instalment of advance in accordance with rules—Automatic forfeiture.]—A rule of a Bowkett building society provided that if any member should make default in payment of his subscription or of an instalment of an advance, whether by way of appropriation or loan, & continued in default for sixteen weeks, he should cease to be a member, & should forfeit his shares & all rights & claims of, in, & to the society." A member of the society, failed to pay his

not carry interest.—*PARKER v. BUTCHER* (1867), L. R. 3 Eq. 762; 36 L. J. Ch. 552.

Annotations:—*Mentd.* *Matterson v. Elderfield* (1869), 20 L. T. 503; *Pilkington v. Baker*, [1877] W. N. 210; *Clarkson v. Henderson* (1880), 14 Ch. D. 348.

100. ——— Or contravention of rules.]—No interest is chargeable upon fines imposed upon the mtgor. for default, or for acting in contravention of the rules of the society.—*INGOLDBY v. RILEY* (1873), 28 L. T. 55.

SUB-SECT. 2.—FORFEITURES.

101. When forfeiture takes place—Neglect to pay subscriptions in accordance with rules—Option of directors.]—A clause in the deed of settlement establishing a benefit building society provided that if any member should from any cause whatever permit any monthly subscription on any share or shares held by him to be in arrear for six months such share, or shares, and all moneys paid in respect thereof, should, at the expiration of the six months, become absolutely forfeitable to the co:—*Held*: the neglect of a member to pay his subscriptions & fines for six months, operated as a forfeiture of his share or shares at the option of the directors.—*MOORE v. RAWLINS* (1859), 6 C. B. N. S. 289; 28 L. J. C. P. 247; 33 L. T. O. S. 205; 141 E. R. 467.

Annotations:—*Consd.* *Re East Kongsberg Co., Bigg's Case* (1865), L. R. 1 Eq. 309. *Reid.* *Re Asiatic Banking Corp., Ex p. Collum* (1869), 39 L. J. Ch. 59. *Mentd.* *Crowther v. Thorley* (1883), 48 L. T. 644; *Re Jones, Clegg v. Ellison*, [1898] 2 Ch. 83; *Re Russell Institution, Figgins v. Baghino*, [1898] 2 Ch. 72.

102. Declaration of forfeiture by society.]—A society was registered under 1836 Act as a benefit building society, but was converted into and called a freehold land society, and a plot of land bought and allotted among its members. The land was paid for partly by members' subscriptions and partly by borrowed money, for which the society was liable. The society did not appear to have been conducted at any time in the usual way benefit building societies are:—*Held*: the shares of a member did not become forfeited on his merely ceasing to pay his subscriptions, etc., until so declared by the society in pursuance of the rules.—*R. v. D'EYNCOURT* (1864), 4 B. & S. 820; 9 L. T. 712; 28 J. P. 116; 122 E. R. 667;

subscription &, some considerable time after the expiration of sixteen weeks, the board of directors actually passed a resolution forfeiting the shares, & the society claimed subscriptions up to the time of the resolution:—*Held*: the shares were automatically forfeited on default for sixteen weeks.—*No. 7 BOWKETT BENEFIT BUILDING SOCIETY, QUEENSLAND v. WARREN*, [1914] S. R. Q. 125.—*AUS.*

101 ii. ———.]—The rules of a building society provided, that every member failing to pay his monthly instalments shall be fined 1d. per share for every month such instalments were in arrears, & such fines might be liquidated from the first money paid in by the defaulter, or deducted from the amount already paid in by him, &, so soon as the fines should amount to the sum at his credit, the amount thereof should then be forfeited to the society, & be carried to the contingent fund, & the member should thereafter cease to have an interest in the society:—*Held*: the rule automatically operated a forfeiture of shares.—*IRVINE & FULLARTON PROPERTY INVESTMENT & BUILDING SOCIETY v. CUTHBERTSON* (1905), 43 Sc. L. R. 17.—*SCOT.*

sub nom. HUGHES v. D'EYNCOURT, 3 New Rep. 420; 12 W. R. 408; *sub nom.* HUGHES v. LAYTON, 33 L. J. M. C. 89; 10 Jur. N. S. 513.

103. Effect of forfeiture—Liability to contribute not discharged.]—A shareholder of a benefit building society, who has forfeited his shares by non-payment of fines, etc., although he is neither a director nor member of executive committee, is liable to be put on the list of contributories, on the winding-up of the society.—*Re* ST. GEORGE'S BENEFIT BUILDING SOCIETY, *Ex p.* FOOTE, JENNINGS & DEARSLEY (1858), 32 L. T. O. S. 69; 6 W. R. 766.

See, further, Part XIII., Sect. 2, post.

104. Waiver of forfeiture—Acceptance of arrears after forfeiture under rules—Not amounting to waiver.]—A rule of a building society provided that each member should pay 10s. per share subscription at every monthly meeting, & any member not having executed a mtge. to the society, continuing to neglect payment of his monthly subscriptions for six consecutive monthly nights, should thereupon cease to be a member of the

society, and forfeit all his interest therein. By other rules, the entire management was vested in twelve directors, five to be a quorum. Pltf., a member, not having executed a mtge., for seven successive months made default in payment of his monthly subscriptions, but on a subsequent monthly meeting night paid them to two of the directors, who attended for the purpose of receiving subscriptions, and they accepted the arrears, in ignorance of the stringency of the rule, & gave receipts for them. At the first monthly meeting after that the directors resolved that pltf. had, on the sixth default, ceased to be a member of the society, and had forfeited all his interest therein; & they erased his name from the list of members, & returned him the arrears paid by him to the two directors:—*Held*: pltf. had forfeited his interest in the society; the acceptance of the arrears by the two directors did not waive the forfeiture; and the rule was not unreasonable.—*CARD v. CARR* (1856), 1 C. B. N. S. 197; 26 L. J. C. P. 113; 28 L. T. O. S. 124; 140 E. R. 83.

Part VII.—Advances.

SECT. 1.—IN GENERAL.

See 1894 Act, s. 12.

105. Application of general law of mortgage.]—Pltfs., trustees of a building society, were first mtgees. of house property for a sum of money which was an advance out of their funds to E., one of their subscribers, & defts., the bank, were second mtgees. of E. The first mtge. was in the usual form of a building society's mtges. The bank, with the consent of pltfs., had sold part of the property in order to reduce the balance of E.'s account; & in order to complete the redemption it was arranged, at the request of the bank, that upon payment of the balance of the amount estimated to be due to pltfs. upon their securities, instead of the usual statutory receipt on the indenture, pltfs. should execute a surrender & release of the property. This was done, but the bank not being prepared to pay certain costs, charges, & expenses, the surrender remained in the hands of one of pltfs., & the suit became necessary. E., in 1866, became bkpt., the other deft., S., was his creditors' assignee:—*Held*: there was no difference between the rights of a building society who were mtgees. & an ordinary mtgee., & the ct. had power to direct a sale instead of a foreclosure, but only upon terms.—*BELL v. LONDON & SOUTH WESTERN BANK*, [1874] W. N. 10.

106. Who may execute mortgage to society—Executor—For purposes of executorship.]—An exor. in order to raise money for the purposes of the exorship. may mortgage to a benefit building society.—*CRUIKSHANK v. DUFFIN* (1872), L. R. 13 Eq. 555; 41 L. J. Ch. 317; 26 L. T. 121; 36 J. P. 708; 20 W. R. 354.

Annotation:—*Re* *Thorne v. Thorne*, [1893] 3 Ch. 196.

107. ——— Mortgage to secure advance to estate & liability as shareholder—Good to extent of advance.]—A mtge. by an exor. to a building

society, though made to secure, not only money advanced & interest thereon, but all moneys due from him as a shareholder, is not wholly void as against the beneficiaries, but is good to the extent of the money advanced & reasonable interest thereon, provided the advance was made in good faith to the exor. in that capacity.—*THORNE v. THORNE*, [1893] 3 Ch. 196; 63 L. J. Ch. 38; 69 L. T. 378; 42 W. R. 282; 8 R. 282.

108. ——— Infant—Mortgage void against infant.]—Although an infant may be a member of a building society registered under 1874 Act, & may by s. 38 give all necessary acquittances, he cannot execute a valid mtge. to secure advances made to him by the society. Such a mtge. is by Infants Relief Act, 1874 (c. 62), s. 1, absolutely void as against the infant.—*NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY v. THURSTAN*, [1903] A. C. 6; 72 L. J. Ch. 134; 87 L. T. 529; 67 J. P. 129; 51 W. R. 273; 19 T. L. R. 54, H. L.; *affg.* S. C. *sub nom.* *THURSTAN v. NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY*, [1902] 1 Ch. 1, C. A.

See, also, Nos. 69, 74, ante.

109. Transfer of mortgage by society—Assignment to third person.]—*Qu.*: whether a building society has the ordinary right of a mtgee. to transfer his security, by way of assignment, to any third person.—*Re RUMNEY & SMITH*, [1897] 2 Ch. 351; 66 L. J. Ch. 641; 76 L. T. 800; 45 W. R. 678; 13 T. L. R. 479; 41 Sol. Jo. 607, C. A. *Annotations*:—*Re* *Sun Bldg. Soc. v. Western Suburban & Harrow Road Bldg. Soc.*, [1920] 2 Ch. 144. *Mentd. Re Crunden & Meux's Contract*, [1909] 1 Ch. 690.

110. S. P. SUN BUILDING SOCIETY v. WESTERN SUBURBAN & HARROW ROAD BUILDING SOCIETY, [1920] 2 Ch. 144; 89 L. J. Ch. 492; 123 L. T. 423; 36 T. L. R. 536; 64 Sol. Jo. 549.

111. Power to redeem first mortgage—& enter

g. ——— Death of member—No personal representative—Declaration of forfeiture by society.]—In 1864, a non-borrowing member died intestate. No one administered until 1869. In that interval his shares ran into arrear, & the society in 1865, declared them forfeited:—*Held*: the forfeiture of the shares in the absence of a personal

representative was illegal.—*GLASS v. HOPE* (1869), 16 Gr. 420.—*CAN.*

PART VII. SECT. 1.

109 i. Transfer of mortgage by society—Assignment to third person.]—A building society is not precluded by Building Societies Act, 1874, from

exercising the ordinary right of a mtgee. to transfer his mtge., by way of assignment, to a third person.—*ULSTER BUILDING SOCIETY v. GLENTON* (1888), 21 L. R. Ir. 124.—*IR.*

h. Interest in advance.]—A rule provided that "any member who has been granted an advance shall, from the

Sect. 1.—In general. Sects. 2 & 3.]

into possession of mortgaged property—Power to spend money on protection of security.]—In 1878, the directors of a building society in exercise of their powers under the rules, advanced £25,000 to J. upon the security of, *inter alia*, a second mtge. of a leasehold colliery. In 1881 the first mtgees. of the leasehold colliery comprised in the society's security threatened to foreclose, & the directors made a further advance to J. of £41,000, £40,000 of which they borrowed for the purpose under their borrowing powers; & they subsequently entered into possession of the colliery, & paid an arrear of wages then due to the colliers, & they further expended considerable sums in payment of rents & royalties, & in working & maintaining the colliery until the society went into liquidation:—*Held*: (1) as the first advance was within their powers, the directors had power by implication to do those things which might result from the working out of the relation subsisting between first & second mtgees., & accordingly had power to redeem the first mtgee., & to exercise their borrowing powers for the purpose of paying him off; (2) they also had power to enter into possession of the mortgaged property, & to pay out of the assets of the society the rents reserved by the lease, & the proper expenses of maintaining & working the colliery without rendering themselves liable to such expenditure; but (3) an inquiry must be directed as to the sum paid by the directors for arrears of wages when they took possession, as such payment was not one for which there was a potential necessity. —**SHEFFIELD & SOUTH YORKSHIRE PERMANENT BUILDING SOCIETY v. AIZLEWOOD** (1889), 44 Ch. D. 412; 59 L. J. Ch. 34; 62 L. T. 678; 6 T. L. R. 25.

Annotations:—**Reid**. *Want v. Campaign* (1893), 9 T. L. R. 254. **Mentd.** *Re Brazilian Rubber Plantations & Estates*, [1911] 1 Ch. 425.

SECT. 2.—SECURITY ON WHICH ADVANCES MAY BE MADE.

See 1874 Act, ss. 13, 28; 1894 Act, s. 13.

112. Leasehold estate—Advances upon security of leasehold colliery—Inclusion of interests in personal estate as collateral security.]—The directors of a benefit building society, having a large discretion vested in them as confidential agents, may properly make advances on classes of securities forbidden to ordinary trustees, & are not precluded from making advances on securities of a speculative nature. By the rules of a building society constituted under 1874 Act, with the object of raising by the subscriptions of the members a fund for making advances to members on mtge. (*inter alia*) of leasehold estate, it was provided amongst other things that none of the directors should be answerable for any act or

default of any other of them or for the insufficiency or deficiency in title of any security taken for the repayment of any advances, unless the loss should happen through their own neglect or default; & that the funds of the society should be applied at the discretion of the board in making advances to members in respect of the shares held by them on (*inter alia*) legal or equitable mtge. of leasehold property. In 1878 the directors advanced £25,000 to J. upon two securities, the principal of which was a second mtge. of a leasehold colliery, taking at the same time as collateral security a charge upon certain beneficial interests under a trust of personal estate. During the transactions which resulted in the advance, the chairman of the board was in direct communication with the borrower, & took an active part in inquiring into the nature & value of the security, while the other directors simply exercised in good faith their judgment on the materials submitted to them; the advance was made upon a valuation & report by a competent surveyor selected by the chairman from five surveyors whose names were submitted by the borrower:—*Held*: (1) an advance upon the security of a leasehold colliery was not *ultra vires* the society; (2) the inclusion of the interests in personal estate as collateral security did not *ex necessitate* vitiate the whole loan, though the propriety of the transaction must be tested as if no such ingredient entered into it; (3) it was within the powers of the directors to accept a leasehold colliery as security for an advance; (4) as the rules of the society did not limit the directors to securities under which a legal estate would be vested in them, & the risk of foreclosure by the first mtgee. was one which a man of business & ordinary prudence might be willing to incur, the directors were not guilty of negligence in acting on the report of the surveyor, & taking a second mtge. as their principal security; & (5) the chairman, against whom the action came on in default of pleading to allegations that the advance was made upon improper security, was, but that the other directors were not, liable to make good to the society the loss of the sum advanced.—**SHEFFIELD & SOUTH YORKSHIRE PERMANENT BUILDING SOCIETY v. AIZLEWOOD** (1889), 44 Ch. D. 412; 59 L. J. Ch. 34; 62 L. T. 678; 6 T. L. R. 25.

Annotations:—**Mentd.** *Want v. Campaign* (1893), 9 T. L. R. 254; *Re Brazilian Rubber Plantations & Estates*, [1911] 1 Ch. 425.

113. First mortgage—Postponed to subsequent loan—Transaction ultra vires.]—A building society was prohibited by its rules from lending on property subject to any previous mtge., but had power to release any portion of a mortgaged estate if satisfied that the remainder would be a sufficient security. The society had lent H. £17,000 upon first mtge., & having exhausted its borrowing powers & being in want of cash, it entered into an arrangement under which H.

date of granting same, become liable for such a rate of interest as along with the interest allowed by the bank will amount to 5 per cent. until such member has received said advance, when he shall pay to the society interest thereon at the rate of 5 per cent. on the full amount of said advance; & all interest shall be payable at the terms of *Martinmas & Whitsunday*; & members failing to pay the same within fourteen days thereafter shall be charged interest thereon at 5 per cent. from the term of payment:—*Held*: the rule ceased to be operative when the society ceased to be a going concern.—**NORTH BRITISH**

BUILDING SOCIETY v. M'LELLAN (1887), 14 R. (Ct. of Sess.) 827.—**SCOT.**

k. Bank interest.]—A rule provided that any member holding a share, in respect of which no advance had been made, & which, by the subscriptions paid & the profits thereon, should have accumulated to £25 (the amount of said share), should be entitled to receive the amount thereof, with bank interest from the date of completion, & his connection with the society in respect of same should cease:—*Held*: there being no stipulation to the contrary, & as the funds of the society were operated on from day to

day, interest was due at bank current account rates.—**NORTH BRITISH BUILDING SOCIETY v. M'LELLAN** (1887), 14 R. (Ct. of Sess.) 827.—**SCOT.**

PART VII. SECT. 2.

1. Real estate—Advance on mortgage—Collateral security.]—The rules of a society restricted the directors to the advancing of money upon mtge. of real property:—*Held*: there was nothing to prevent them from taking the mtgor.'s bond in addition, even if they could not take the bond of a stranger.—**ALMON v. BUSCH**, R. E. D. 362.—**CAN.**

borrowed £6,000 from an insurance co. upon the security of the property he had mortgaged to the society, & the society joined in the security & released the property so as to give the co. a first charge for £6,000. The £6,000 was paid to H. & handed over by him to the society, who credited him with the amount in part discharge of the £17,000:—*Held*: (1) the transaction was *ultra vires* the society, & its directors had no power to give the co. any charge in priority to that of the society; (2) the co. had no equity to claim equality for their mtge. with that of the society; & (3) the case was not one in which the ct. ought to impose any terms upon the society.—*PORTSEA ISLAND BUILDING SOCIETY v. BARCLAY*, [1895] 2 Ch. 298; 64 L. J. Ch. 579; 72 L. T. 744; 11 T. L. R. 424; 39 Sol. Jo. 502; 12 R. 324, C. A.

114. Second mortgage—Of leasehold colliery.]—*SHEFFIELD & SOUTH YORKSHIRE PERMANENT BUILDING SOCIETY v. AIZLEWOOD*, No. 112, *ante*.

115. — Power to redeem first mortgage.]—*SHEFFIELD & SOUTH YORKSHIRE PERMANENT BUILDING SOCIETY v. AIZLEWOOD*, No. 111, *ante*.

116. Shares of member — Without other security.]—Building societies, under 1874 Act, have no power to advance the funds of the societies upon any other securities than those specified in ss. 13 & 25 of that Act, nor had building societies under 1836 Act power to advance the funds of the societies upon any other securities than those specified in that & the incorporated Acts; & such societies have no power to make advances to their members upon the security of their shares only.—*CULLERNE v. LONDON & SUBURBAN GENERAL PERMANENT BUILDING SOCIETY* (1890), 25 Q. B. D. 485; 59 L. J. Q. B. 525; 63 L. T. 511; 55 J. P. 148; 39 W. R. 88; 6 T. L. R. 449, C. A.

Annotations:—Mentd. Re Sharpe, Re Bennett, Masonic & General Life Assco. v. Sharpe, [1892] 1 Ch. 154; *London Trust Co. v. Mackenzie* (1893), 62 L. J. Ch. 870; *Lucas v. Fitzgerald* (1903), 20 T. L. R. 16; *Young v. Naval, Military & Civil Service Co-op. Soc. of South Africa*, [1905] 1 K. B. 687; *Peel v. L. & N. W. Ry.*, [1907] 1 Ch. 5.

SECT. 3.—CONSTRUCTION AND EFFECT OF MORTGAGES.

117. Implied covenant to pay — Payment of advance in instalments—Whole amount payable on default of three instalments.]—Pltfs., trustees of a building society, advanced to deft. £4,000, to be repaid by monthly instalments, & deft. by deed, for securing such payments & the observance of the rules of the society, demised certain leasehold premises to pltfs. It was agreed that upon non-payment of three successive instalments, or non-observance of the rules, pltfs. might sell the premises, & upon any sale the whole amount thereinbefore stipulated to be paid by instalments as aforesaid, & remaining unpaid, should be held immediately payable, & be retainable accordingly from the proceeds of sale, subject to such discount as the directors of the society for the time being might think proper to allow. Deft. also covenanted to pay the instalments. Upon non-payment by deft., pltfs. exercised their power of sale, & brought an action upon the deed to recover the whole of the difference between the proceeds of sale & the amount of unpaid instalments. Another

deed for acquiring a further sum on the same terms incorporated all powers & authorities given by the first deed for recovery of the money thereby made payable:—*Held*: (1) the terms of the first deed implied a covenant to pay the whole amount upon non-payment of three instalments; (2) the terms of the second deed implied the same covenant.—*SHERIFF v. GLENTON* (1873), 28 L. T. 65; 37 J. P. 517.

118. Covenant to observe rules — Rules authorising society to consolidate mortgages—Binding on second mortgagee with notice.]—A mortgaged two leasehold plots of land, & the houses in course of erection thereon, to a building society to secure £500. On the same day he executed a second mtge. of the same property to B. Subsequently A. mortgaged three other plots of land & houses to the society to secure £600. B. had a charge on that property. The first mtge. contained a covenant by A. to observe all the rules of the society, one of which provided that if the society held more than one mtge. from any member, such member should not have power to redeem one property alone without the consent of the board. B. acted as A.'s solr. in the matter of the first mtge., & was the witness to his execution of it. A. became bkpt., & the society having taken possession of all the houses, B. brought a redemption action. The society claimed to consolidate their mtges. as against him:—*Held*: the covenant to observe the rules amounted to an express covenant that the society should have power to consolidate, & B. having notice of that covenant had expressly taken his mtge. subject to the risk of consolidation, & the society had a right to consolidate.—*ANDREWS v. CITY PERMANENT BENEFIT BUILDING SOCIETY* (1881), 44 L. T. 641.

119. Right of liquidators to transfer mortgages—Without concurrence of mortgagors—Mortgages “to society” —“Society” including “successors & assigns.”]—In the winding up of a society the liquidators agreed to sell & transfer the mtge. securities held by the society, & the question arose whether the concurrence of the various mtgors. was necessary:—*Held*: this must be determined by the language of the mtge. securities themselves, & as the expression “the society” was defined in the society's mtges. as including its “successors & assigns,” where the context should so admit or require, the mtges. were transferable.—*SUN BUILDING SOCIETY v. WESTERN SUBURBAN & HARROW ROAD BUILDING SOCIETY*, [1920] 2 Ch. 144; 89 L. J. Ch. 492; 123 L. T. 423; 36 T. L. R. 536; 64 Sol. Jo. 549.

See, also, No. 109, *ante*.

120. Set-off of subscriptions paid — Right of society to—Against repayments due under mortgage.]—A member of a building society obtained an appropriation of £500 in respect of certain shares, repayment of which was secured by mtge. to the society. He also continued his subscriptions after his appropriation. Afterwards he made default in his repayments under the mtge., & also discontinued his subscriptions. By the rules of the society he was then entitled to have his subscriptions placed to his credit in respect of his repayments under the mtge., but he made no request to that effect, & it was not done, but the society entered on the mortgaged estate, & sold

m. — — — — —.]—A building society may take a bond as additional security for money overdue on mtge. of real estate.—*HOPE v. GLASS* (1863), 23 U. C. R. 86.—CAN.

n. — — — — —.]—Building societies can take only real property

security, & cannot take collateral security for loans on real property.—*CANADA PERMANENT BUILDING & SAVINGS SOCIETY v. LEWIS* (1859), 8 C. P. 352.—CAN.

PART VII. SECT. 3.

119 i. *Right of liquidator to transfer*

— — — — —.]—A liquidator on calling up loans made by the society, has power by virtue of his appointment to assign & reconvey securities.—*SCOTTISH PROPERTY INVESTMENT CO. BUILDING SOCIETY & LIQUIDATORS v. MACLAREN* (1882), 19 Sc. L. R. 891.—SCOT.

Sect. 3.—Construction and effect of mortgages.
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it for a sum which, after repaying all money due to the society, left a surplus for the member. The member had mortgaged the equity of redemption in the mortgaged estate to A., & his other property, including the subscriptions, had been assigned to B.:—*Held*: as between A. & B. the doctrine of marshalling applied, & the repayments to the society must be apportioned ratably between the mortgaged estate & the subscriptions.—*MOXON v. BERKELEY MUTUAL BENEFIT BUILDING SOCIETY* (1890), 59 L. J. Ch. 524; 62 L. T. 250.

Annotation:—*Refd.* *Baglioni v. Cavalli* (1900), 49 W. R. 236.

121. ——— Repayments not premature.]—Deft. society was registered under Building Societies Acts, & existed for the purpose of making advances to its members out of a fund, raised by means of the subscriptions of the members, upon the security of freehold, leasehold, or copyhold estates. Pltf. purchased four shares in deft. society, £25 being the full amount to be paid up by fortnightly subscriptions on each share. Under r. 32 of the rules any member having obtained an advance might elect to discontinue his subscriptions on his shares upon notice, & the amount of subscriptions already paid on such shares should be placed to his credit in his repayment account in respect of advances. By r. 27, if any member, having obtained an advance by sale, was desirous of terminating his engagements with the society, the amount of any of his subscriptions might be placed to the credit of his repayment account, subject to a deduction from same of 1 per cent. *per annum* upon the amount advanced, in addition to the amount of premium paid, for such time as he might use the advance, & if the amount paid for subscriptions should not be sufficient to pay the deduction, the difference should be paid by the member before the property was redeemed. Pltf. became entitled under the rules as a member to bid for an advance of £400, & bid £554 for an advance of £400, the repayment of the £554 to be by quarterly instalments in twelve & a half years. At the same time he discontinued his subscriptions on his shares, having paid £31 19s. 10d. upon them. Pltf., as security for the advance, mortgaged his house to defts. & handed them the title deeds. The instalments due upon the advance were regularly paid up to Oct., 1895, when pltf. gave defts. notice of his desire to repay the balance of his account. In Dec., 1895, he sent defts. a cheque for £10 13s. 10d., which made his repayments £554, after taking into account the £31 19s. 10d. paid upon his shares for which he was to be given credit. At that time there were still three instalments due, but pltf. claimed to set off against those future instalments the £31 19s. 10d., & then nothing remained due in respect of the advance. Defts. contended that under r. 27 pltf. must first be debited with a sum of 1 per cent. *per annum* upon the amount advanced, amounting to £47:—*Held*: r. 27 applied only to repayment of advances which took place prior to the period when such advances would fall to be paid off, & not to cases where the repayment was not premature.—*WEEKES v. SOUTH LONDON EQUITABLE BUILDING SOCIETY* (1897), 13 T. L. R. 291, C. A.

122. ——— Right of advanced member to—Against earliest instalments of advance payable—Weekly payments made before mortgage executed.]—Pltf., a member of a benefit building society represented by defts., applied for a loan of £250.

Notice having been given by the society that the money would be ready at the end of three months from the notice, pltf., in accordance with the rules, paid 12s. per week until a satisfactory security should be provided, & the weekly payments amounted to £16 4s. when the mtge. was eventually executed for £220. The rules further provided that a sum amounting to 10 per cent. upon the money advanced should be paid quarterly from the date of the mtge., but pltf. refused to pay the three first quarterly instalments, on the ground that they must be considered as satisfied by the previous weekly payments:—*Held*: the society were not justified in demanding the instalments without first setting off the £16 4s. paid previously.—*INGLIS v. CAVE*, [1869] W. N. 131.

Annotation:—*Mentd.* *Laing v. Reed* (1869), 21 L. T. 83.

123. Death of advanced member—Satisfaction of repayments due without recourse to subscriptions paid—Subscriptions payable to legal personal representative.]—A member of a building society obtained an advance on the security of certain property, which he subsequently conveyed to trustees. The member's shares in the society were not transferred to the trustees. The member made payments in part discharge of the mtge., but at his death there was a balance owing to the society. After his death the trustees sold the mortgaged property, & paid into ct. a sum sufficient to satisfy the balance of the mtge. debt, & they then claimed to have the amount standing to the credit of the deceased member's subscription account paid to them to recoup them the sum paid into ct.:—*Held*: the subscription money ought to be paid to the legal personal representative of the mtgor.—*Re BURTON, SCOTT v. HACKNEY 172ND STARR BOWKETT BUILDING SOCIETY* (1897), 13 T. L. R. 275.

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See 1894 Act, s. 1 (c).

124. Determination of amount payable—Mortgage to terminating society—Payment of dues to end of estimated probable duration—Future payments treated as if due immediately.]—Pltf. became a member of & purchased twelve & a half shares in a building society, constituted under 1836 Act, & the society advanced £750 in respect of such shares, upon a conveyance of certain property to the trustees of the society by way of mtge. According to the rules of the society, 10s. per month subscription, & 4s. per month redemption money, were payable on each share until £120 per share should be realised for the non-purchasing members. On a bill against the trustees for redemption:—*Held*: upon the terms of the mtge. deed & the rules of the society, pltf. was entitled to redeem only upon payment of all the future subscriptions on his shares until the dissolution of the society, the probable duration of the society to be ascertained by calculation, & the future payments to be treated as if immediately due.—*MOSLEY v. BAKER* (1848), 6 Hare, 87; 17 L. J. Ch. 257; 12 Jur. 551; 67 E. R. 1093; *sub nom.* *MOSELEY v. BAKER*, 10 L. T. O. S. 461; *affd.* (1849), 3 De G. M. & G. 1032, L. C.

Annotations:—*Consd.* *Seagrave v. Pope* (1852), 1 De G. M. & G. 783. *Distd.* *Fleming v. Self* (1854), 3 De G. M. & G. 997; *Priestley v. Hopwood* (1864), 4 New Rep. 239. *Refd.* *Matterson v. Elderfield* (1869), 20 L. T. 503; *Harvey v. Municipal Permanent Investment Bldg. Soc.* (1884), 26 Ch. D. 273. *Mentd.* *Copland v. Bartlett* (1848), 6 C. B. 18; *Ingoldby v. Riley* (1873), 28 L. T. 55.

125. ——— Sums due or thereafter to become due.]—The owner of shares in a benefit

building society gave a mtge. security on leaseholds for sums advanced to him by the society in respect of his shares. He subsequently claimed to be entitled to redeem the premises so mortgaged, upon the terms of repaying the amounts advanced to him by the society, less the amount of subscriptions which he had paid & the proportion of profits in the society to which he was entitled, & he instituted a suit for redemption:—*Held*: he was not entitled to redeem, except upon the terms of paying all sums which, according to the rules of the society were then due, or might, thereafter, become due during the probable duration of the society.—*SEAGRAVE v. POPE* (1852), 1 De G. M. & G. 783; 22 L. J. Ch. 258; 20 L. T. O. S. 158; 16 Jur. 1099; 42 E. R. 756, L. C.

Annotation:—*Mentd.* Fleming v. Self (1854), 3 De G. M. & G. 997.

126. ——— Liability for further subscriptions.]—The estimated probable duration of a benefit building society was thirteen years. On the rules & terms of the mtge. deed:—*Held*: an advanced member was entitled to redeem on payment of his subscriptions to the end of the thirteen years, although he was still liable, under the rules, to continue to pay subscriptions until £120 a share had been realised for every member.—*SPARROW v. FARMER* (1859), 26 Beav. 511; 28 L. J. Ch. 537; 33 L. T. O. S. 216; 23 J. P. 500; 5 Jur. N. S. 530; 53 E. R. 995.

Annotations:—*Distd.* Harvey v. Municipal Permanent Investment Bldg. Soc. (1884), 26 Ch. D. 273. *Refd.* Priestley v. Hopwood (1864), 4 New Rep. 239; *Re* Doncaster Permanent Benefit Bldg. Soc., *Ex p.* Hopper (1867), 36 L. J. Ch. 871.

127. ———.]—An advanced member of a building society:—*Held*: entitled to redeem his mtge. on payment merely of his fines & the subscriptions to the end of the thirteenth year, the estimated duration of the society, though he still remained liable for the subsequent subscriptions.

In a suit for redemption, by an advanced member of a building society, a sum was found due from him to the society beyond that secured by the mtge.:—*Held*: an order on pltf. to pay it should be made in the redemption suit.—*HANDLEY v. FARMER* (1861), 29 Beav. 362; 54 E. R. 667.

Annotations:—*Refd.* *Re* Doncaster Permanent Bldg. & Investment Soc. (1866), 15 W. R. 102; *Re* Doncaster Permanent Bldg. Soc. (1867), L. R. 4 Eq. 579.

128. ——— Payment of dues to end of longest possible duration.]—In a suit by a borrowing member of a benefit building society against the trustees of the society to redeem his mtge.:—*Held*: in taking the accounts of the monthly payments, etc., which would have to be paid by pltf. as the price of redemption, the possible & not the probable duration of the society must be considered.—*FLEMING v. SELF* (1854), 3 De G. M. & G. 997; 3 Eq. Rep. 14; 24 L. J. Ch. 29; 24 L. T. O. S. 101; 18 J. P. 772; 1 Jur. N. S. 25; 3 W. R. 89; 43 E. R. 390, L. C.

Annotations:—*Consd.* Smith v. Pilkington (1859), 1 De G. F. & J. 120. *Refd.* Farmer v. Smith (1859), 4

H. & N. 196. *Mentd.* R. v. Trafford (1854), 4 E. & B. 122; Armitage v. Walker (1855), 2 Jur. N. S. 13; Archer v. Harrison (1857), 7 De G. M. & G. 404; Mulkern v. Lord (1879), 4 App. Cas. 182; Hack v. London Provident Bldg. Soc. (1883), 23 Ch. D. 103; Municipal Bldg. Soc. v. Kent (1884), 9 App. Cas. 260; Buckle v. Lordonny (1887), 56 L. J. Ch. 437; Sheffield & South Yorkshire Permanent Bldg. Soc. v. Aizlewood (1889), 44 Ch. D. 412.

129. Terms of redemption—Right of redeeming member to be credited with bonus.]—In a suit by a borrowing member of a benefit building society against the trustees of the society to redeem his mtge.:—*Held*: in taking the accounts pltf. was entitled to be given credit for the same proportion of profits (bonus) to which, at the date of his notice to redeem, a withdrawing but unadvanced member would have been entitled.—*FLEMING v. SELF* (1854), 3 De G. M. & G. 997; 3 Eq. Rep. 14; 24 L. J. Ch. 29; 24 L. T. O. S. 101; 18 J. P. 772; 1 Jur. N. S. 25; 3 W. R. 89; 43 E. R. 390, L. C.

Annotations:—*Folld.* Archer v. Harrison (1857), 7 De G. M. & G. 404. *Consd.* Smith v. Pilkington (1859), 1 De G. F. & J. 120. *Mentd.* R. v. Trafford (1854), 4 E. & B. 122; Armitage v. Walker (1855), 2 Jur. N. S. 13; Farmer v. Smith (1859), 4 H. & N. 196; Mulkern v. Lord (1879), 4 App. Cas. 182; Hack v. London Provident Bldg. Soc. (1883), 23 Ch. D. 103; Municipal Bldg. Soc. v. Kent (1884), 9 App. Cas. 260; Buckle v. Lordonny (1887), 56 L. J. Ch. 437; Sheffield & South Yorkshire Permanent Bldg. Soc. v. Aizlewood (1889), 44 Ch. D. 412.

130. ——— Erroneous calculation by trustees.]—The calculation of a bonus in a benefit building society was made upon the assumption that the borrowing members were not to participate in the bonus, & the bonus declared was much larger than it ought to have been:—*Held*: a borrowing member redeeming was entitled to the bonus actually declared prior to his notice to redeem, but he was to be debited with all extra monthly charges & payments for the utmost possible prolongation of the society.—*ARCHER v. HARRISON* (1857), 7 De G. M. & G. 404; 29 L. T. O. S. 71; 21 J. P. 515; 3 Jur. N. S. 194; 44 E. R. 158, L. C.

Annotations:—*Mentd.* Smith v. Pilkington (1859), 30 L. T. O. S. 196; Betteley v. Stainsby (1862), 9 Jur. N. S. 440.

131. ——— Deduction of redemption money paid in.]—Upon redemption by a borrowing member of a building society:—*Held*: he was entitled to a bonus declared by the society, & also to credit, in taking the accounts, for the redemption or interest money paid by him to the society.—*SMITH v. PILKINGTON* (1859), 1 De G. F. & J. 120; 29 L. J. Ch. 227; 24 J. P. 227; 45 E. R. 304, L. C. & L. JJ.

Annotations:—*Mentd.* Matterson v. Elderfield (1869), 20 L. T. 503; Kley v. Read (1897), 76 L. T. 39.

132. ——— Premiums added to sum advanced—Interest charged on combined amount—Rebate for premiums contracted to be paid.]—Under the rules of a building society which required that loans upon a mtge. should be repaid by annual instalments & premiums spread over a certain number of years:—*Held*: the society was justified in adding the whole of the annual premiums to

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o. Terms of redemption—Right of redeeming member governed by circular reciting rules.]—A circular was issued, with the knowledge of the directors of a building society, which set out that "loans can be paid at any time & a discharge of the mtge. will be given, the rule of the society being, when this privilege is taken advantage of, to charge three months' additional interest at the same rate at which the loan was made." A. was thereby induced to mtge. his land for twenty years, the loan to be repayable on the instalment plan:—*Held*: he could

insist on redeeming his mtge. according to the terms set forth in the circular.—*HODGINS v. ONTARIO LOAN & DEBENTURE CO.* (1882), 7 A. R. 202.—*CAN.*

p. ——— Discrepancy between rules & tables annexed.]—Where there is a discrepancy between the rules & the tables annexed thereto, & referred to in them, the tables will govern, & a mtgor. will be allowed to redeem on payment of the sum indicated by the tables.—*SLAYTER v. JOHNSTON* (1864), 1 Old. 502.—*CAN.*

q. ——— Mortgage of two properties.]—A mtgor., by two distinct transactions, mortgaged two proper-

ties, one of which on sale under foreclosure did not realise the sum for which it was mortgaged:—*Held*: the mtgor. might redeem the other property without payment of the balance due on the first mtge.—*SLAYTER v. JOHNSTON* (1864), 1 Old. 502.—*CAN.*

r. ——— Prior to time limited—Account.]—By a mtge. made with a building society to secure £700, it was provided that the principal & interest should be paid off by monthly instalments. The mtgee. was given power of entry & sale, etc., in the event of default in the payment of two months' instalments being made. The

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the capital, & charging interest upon the combined amount, & upon the borrower redeeming before the end of the period, he was not entitled to a rebate in respect of the premiums contracted to be paid.—**HARVEY v. MUNICIPAL PERMANENT INVESTMENT BUILDING SOCIETY** (1884), 26 Ch. D. 273; 53 L. J. Ch. 1126; 51 L. T. 408; 32 W. R. 557, C. A.

Annotation:—Mentd. London & County United Bldg. Soc. v. Angell (1896), 65 L. J. Q. B. 194.

133. — Mortgage to secure subscriptions & "other moneys"—Embezzlement by mortgagor in capacity of secretary.]—H., a member of debt. society, mortgaged property to the society to secure principal money by certain instalments, with interest & subscriptions, & "other moneys becoming due from the mtgor. to debt. society." H. was also secretary of the society, & in that capacity had received & misapplied money belonging to the society. He had conveyed the equity of redemption in the mortgaged property to pltf., who claimed to redeem on payment of the mtge. debt, with interest, subscriptions, fines, & other payments due from H. as member. The society claimed in addition to that the amount which H. had embezzled, contending that it came within the words "other moneys":—**Held**: the words applied to debts *ejusdem generis* with what had been mentioned before, & the sums which H. had embezzled were not *ejusdem generis* with the mtge. debt, interest, & subscriptions, but were due from H. on a totally different contract, & the society could not insist upon pltf. paying such sums before redeeming the property.—**BAILES v. SUNDERLAND EQUITABLE INDUSTRIAL SOCIETY, LTD.** (1886), 55 L. T. 808; 51 J. P. 310; 3 T. L. R. 97.

—**After alteration of rules.]—See Nos. 19 et seq., 30, 31, ante.**

134. Effect of winding-up on right to redeem—Incorporated society—Redemption on payment of difference between advance & repayments with interest.]—A building society, registered under 1874 Act, had for its objects: (1) to form a good investment for investors; (2) to advance to shareholders money for building & other purposes, to a not greater extent than the amount of their shares, on their granting a bond for same over heritable security. The rules provided that the shares were to be limited to £25, that a shareholder who had not received an advance was to pay up his shares by monthly instalments, & when such instalments with profits amounted to £25 per share he was to be paid out. As to a member who had received an advance, it was provided that he should pay up his advance by monthly instalments on his shares with interest at the rate of 5 per cent. on the loan. It was also provided that members could withdraw on giving a month's notice. On withdrawal by an unadvanced member, he was to receive the whole instalments paid on his shares with interest. On withdrawal by a borrowing member, he was to pay up the whole of his debt, interest, & penalties, after deducting the amount of the monthly instalments paid upon his shares with interest calculated thereon. A. took shares for the sole purpose of obtaining an advance. He executed a bond in common form as security, & the society granted him a back-letter, to the effect that they agreed not to enforce

the bond so long as the regular payments of the instalments, interest, & other sums due upon his shares were paid. A. regularly paid his instalments with interest charged on the whole sum lent. Losses having been incurred, the society was in Feb., 1880, ordered to be wound up voluntarily. There were no outside creditors. In July, 1880, A. gave notice, under the rules, of withdrawal to the liquidators, & claimed a discharge of his bond on his paying to them the difference between his loan & the amount *in cumulo* of the instalments paid by him, with interest added. The liquidators denied his right to withdraw after liquidation, unless he paid up the whole loan & left the instalments to be refunded according to the result of the liquidation:—**Held**: (1) the advance had *pro tanto* been extinguished by the total amount of the instalments paid by A.; (2) from & after the date of the winding-up order A. had a right to redeem his security by paying to the liquidators the difference between his advance & his instalments with interest added thereon as against excess of interest which he had been charged, & on payment of such difference, with interest thereon, he was entitled to be relieved of all further liability as a contributory or otherwise.—**BROWNIE v. RUSSELL** (1883), 8 App. Cas. 235; 48 L. T. 881; 47 J. P. 757, H. L.

Annotations:—Folld. Tosh v. North British Bldg. Soc. (1886), 11 App. Cas. 489. **Consd.** Re Middlesborough, Redcar, & Saltburn, etc., Bldg. Soc. (1889), 58 L. J. Ch. 771; London Provident Bldg. Soc. v. Morgan, [1893] 2 Q. B. 266; Kemp v. Wright, [1895] 1 Ch. 121. **Distd.** Re Counties Conservative Permanent Benefit Bldg. Soc., Davis v. Norton, [1900] 2 Ch. 819. **Refd.** Buckle v. Lordonny (1887), 56 L. J. Ch. 437; Re Sunderland 36th Universal Bldg. Soc. (1890), 24 Q. B. D. 394; Durham & Northumberland Working Men's Permanent Bldg. Soc. v. Davidson (1892), 61 L. J. Q. B. 473; Barnard v. Tomson, [1894] 1 Ch. 374. **Mentd.** Cunliffe, Brooks v. Blackburn & District Benefit Bldg. Soc. (1884), 54 L. J. Ch. 376; Re Britannia Permanent Benefit Bldg. Soc. (1891), 65 L. T. 196; Re West London & General Permanent Benefit Bldg. Soc., [1894] 2 Ch. 352; Re Ambition Investment Bldg. Soc. (1895), 73 L. T. 508; Sixth West Kent Mutual Bldg. Soc. v. Hills, [1899] 2 Ch. 60.

135. — Unincorporated society—Right to redeem in accordance with rules.]—It was provided by the rules of a building society that any member who had given any property in security to the society might, on giving three months' notice, redeem same by renouncing the shares & paying the balance of the advance, & that, thereupon, his interest in the society should cease, or that when the subscriptions of any advanced member were equal to the amount of the advance, his payments on the shares & his connection with the society should cease. Losses having been incurred, the society, in May, 1882, ceased to carry on business, & in July, 1884, a winding-up order was made. One advanced member completed his repayments in June, 1883, & two others gave notice of withdrawal in April & May, 1882. There were no outside creditors:—**Held**: (1) the above members were entitled to redeem their securities in accordance with the rules, & to cease to be members of the society; (2) although the members were entitled to share profits, they were not bound to bear a share of the losses.—**TOSH v. NORTH BRITISH BUILDING SOCIETY** (1886), 11 App. Cas. 489; 35 W. R. 413, H. L.

Annotations:—Consd. Buckle v. Lordonny (1887), 56 L. J. Ch. 437; Re Middlesborough, Redcar, & Saltburn, etc., Bldg. Soc. (1889), 58 L. J. Ch. 771. **Refd.** Durham &

rules provided that if a mtgor. wished to redeem before the time limited for the purpose, the board might allow him so to do upon such terms as they might think reasonable. Default having been made, the society entered

into possession of the mortgaged premises:—**Held**: the mtgor. was not entitled to redeem before the due date of the mtge. without the board's permission; but that an account would be ordered of what was then due

between mtgor. & mtgee., & on payment of the amount found due the mtgor. would be entitled to recover possession of the premises.—**O'REILLY v. HEYDON** (1893), 14 N. S. W. Eq. 283.—**AUS.**

Northumberland Working Men's Permanent Bldg. Soc. v. Davidson (1892), 61 L. J. Q. B. 473; London Provident Bldg. Soc. v. Morgan, [1893] 2 Q. B. 266; Kemp v. Wright, [1894] 2 Ch. 462.

136. — — — — —.]—A building society not registered under 1874 Act was ordered to be wound up:—*Held*: the advanced members were not liable to be put upon the list of contributories, but were entitled to redeem upon the terms expressed in the rules, as if no winding-up order had been made.—*Re MIDDLESBOROUGH, REDCAR, & SALT BURN, ETC., BUILDING SOCIETY* (1889), 58 L. J. Ch. 771; 5 T. L. R. 516.

Annotations:—*Consd.* *Re Britannia Permanent Benefit Bldg. Soc.* (1891), 65 L. T. 196. *Distd.* *London Provident Bldg. Soc. v. Morgan*, [1893] 2 Q. B. 266. *Refd.* *Kemp v. Wright*, [1894] 2 Ch. 462.

See, also, Part XIII., Sect. 1, sub-sect. 2; Sect. 2, sub-sect. 2, *post*.

137. Liability of redeeming member to contribute for losses—Rules apportioning losses between members generally—Redemption on payment of all additional charges.—The rules of an unincorporated building society, which was being wound up by the ct. provided that losses should be apportioned amongst the members generally, that any member who had made the full payment or repayment on his shares should remain in the society until he had made all additional payments or repayments allotted to him, & if he had mortgaged any property to the society for an advance on his shares such property should not be redeemable until all such additional charges had been paid:—*Held*: the proportion of the deficiency falling to each member who sought to redeem a mtge. must be paid by him before he could be allowed to do so.—*Re ALBION MUTUAL PERMANENT BENEFIT BUILDING SOCIETY* (1888), 43 Ch. D. 410, n.

Annotation:—*Refd.* *Re West Riding Permanent Benefit Bldg. Soc.* (1890), 43 Ch. D. 407.

138. Liability to contribute to losses of investing members.—A rule of a building society provided that, in the event of there being a deficiency of income by which the society might be prevented from meeting its anticipated expenditure & liabilities, the amount should be apportioned between the investing & borrowing members. Another rule provided that property mortgaged to the society to secure advanced shares should be so secured until the amount of such shares should be repaid to the society, with all fines & other payments incurred in respect thereof. Losses having occurred:—*Held*: (1) under the first rule "liabilities" included the sums due to the investing members in respect of their shares, & the borrowing members were liable to contribute ratably to any losses thereon incurred by the investing members; (2) under the second rule a borrowing member was not entitled to redeem his mtge., except on payment of what might be due from him in respect of his above-mentioned liability.—*Re WEST RIDING OF YORKSHIRE PERMANENT BENEFIT BUILDING SOCIETY* (1890), 43 Ch. D. 407; 59 L. J. Ch. 197; 62 L. T. 486; 38 W. R. 376; 6 T. L. R. 160.

Annotation:—*Refd.* *Re West London & General Permanent Benefit Bldg. Soc.*, [1894] 2 Ch. 352.

139. Rules authorising deduction from sums standing to credit of members—Liability of advanced members to be debited with losses.—By r. 12 of a building society, the directors were empowered to deduct annually from the amount standing to the credit of any member such sum as might be necessary to meet the current expenses & contingencies of the society, in the event of the yearly profits being insufficient to meet such expenses & contingencies. Deft. became a mem-

ber of the society in May, 1888. For some time prior to that date the secretary of the society had been misappropriating the money of the society, but his defalcations were not discovered until the following August. The current year of the society ended in October. Deft., on the discovery of such defalcations, sought to redeem a mtge. which he had received from the society. The society refused, & called upon him to make good his proportion of the loss resulting from the defalcations. Deft. then ceased to continue the payment of his subscriptions. In an action by the society for subscriptions & consequent fines, & deft.'s alleged proportion of the loss from such defalcations:—*Held*: deft. was liable to pay the subscriptions & fines, but was not liable to pay a proportionate loss from such defalcations.—*DURHAM & NORTHUMBERLAND WORKING MEN'S PERMANENT BUILDING SOCIETY v. DAVIDSON* (1892), 61 L. J. Q. B. 473; 67 L. T. 269; 56 J. P. 660; 8 T. L. R. 428, C. A.

140. — No special provision in rules.—*TOSH v. NORTH BRITISH BUILDING SOCIETY*, No. 135, *ante*.

141. Losses incurred after advance—Retention of mortgage as security.—In 1867, pltf., an advanced member of a building society, gave a mtge. to defts., the trustees of the society, to secure all such principal or interest money & other payments as he ought to pay according to the rules. Pltf. made all the required payments, the term of which expired in 1884. The rules of the society provided that when any advanced member had made all his payments during the term, they were to cease & the trustees were to return his title deeds & indorse a receipt, & on completion of his term the member was entitled to share in surplus profits. The rules were silent as to losses. After the advance to pltf. the society suffered losses, & defts. claimed to retain the mtge. as a security for the share of those losses, to which they contended pltf. was liable to contribute. The society was not incorporated under 1874 Act. There were no outside creditors, & the society was solvent. In an action by pltf. for (*inter alia*) a discharge of his mtge. & delivery up of his title deeds:—*Held*: pltf. could not be called on to contribute to losses, & was entitled to the relief claimed.—*BUCKLE v. LORDONNY* (1887), 56 L. J. Ch. 437; 56 L. T. 273; 35 W. R. 360; 3 T. L. R. 369.

142. — Advanced member of unincorporated society—Liability to contribute for ordinary debts—No further liability unless stipulated by rules.—Building societies are not governed by the doctrine of partnership, but by the doctrine of principal & agent, all the members being principals & the directors their agents. All members of a society not registered under 1874 Act are liable to contribute toward the payment of the ordinary creditors of the society, & there is no difference in this respect between advanced & unadvanced members. Unless the rules or the terms of their mtges. expressly exonerate them from liability, advanced members cannot redeem without contributing to ordinary debts. In the absence of any contract by the rules or otherwise to that effect, advanced members are not liable to make any further contribution to the losses of the unadvanced.—*Re WEST LONDON & GENERAL PERMANENT BENEFIT BUILDING SOCIETY*, [1894] 2 Ch. 352; 63 L. J. Ch. 506; 70 L. T. 796; 42 W. R. 535; 10 T. L. R. 280; 38 Sol. Jo. 273; 8 R. 764; *subsequent proceedings* (1898), 78 L. T. 393, C. A.

See, further, Part XIII., *post*.

Sect. 4.—Redemption. Sect. 5: Sub-sect. 1.]

143. Costs of redemption action—Right of mortgagees to add costs of suit to security—Conduct not oppressive nor vexatious.]—The directors of a building society in answer to one of their members & mtgors. stated that £736 was due to the society on the mtge., the society having been for some years in possession. Soon afterwards the directors informed the mtgor. that they intended to sell the mortgaged property, they having power under the mtge. deed so to do. The mtgor. filed a bill to restrain the sale, & for redemption. The directors informed the mtgor. that they had no intention to press a sale. The mtgor. then proposed that a decree for the usual accounts should be taken, & a decree for an account was taken. The mtgor. carried in surcharges to the amount of £1,227 principally for fines & commission, which he claimed to have disallowed, but which were allowed to the mtgees., but the mtgees. were charged for certain occupation rents, & were disallowed charges for repairs, so that the amount due at the filing of the bill was found to be £517 instead of £736:—*Held*: there was nothing in the conduct of the mtgees. which would deprive them of the right to add their costs of the suit to their security.—*COTTERELL v. STRATTON* (1872), 8 Ch. App. 295; 42 L. J. Ch. 417; 28 L. T. 218; 37 J. P. 4; 21 W. R. 234, L. C. & L. JJ.

Annotations:—*Consd.* *Kinnaird v. Trollope* (1889), 42 Ch. D. 610; *Rourke v. Robinson*, [1911] 1 Ch. 480; *Graham v. Seal* (1918), 88 L. J. Ch. 31. *Refd.* *Cottrell v. Finney* (1874), 43 L. J. Ch. 562; *Credland v. Potter* (1874), 31 L. T. 522; *Turner v. Hancock* (1882), 20 Ch. D. 303; *Bank of New South Wales v. O'Connor* (1889), 14 App. Cas. 273; *Williams v. Jones* (1911), 55 Sol. Jo. 500. *Mentd.* *Re Hoskin's Trusts* (1877), 25 W. R. 779; *Re Jones, Christmas v. Jones*, [1897] 2 Ch. 190.

144. — Taxation on lower scale—Mortgage under £1,000.]—A mtgor. received an advance of £900 from a building society, & conveyed to the society property to secure payment by him of £900 & interest in one hundred & twenty instalments, amounting together to £1,275, & also of certain fines & charges in the event of his failing to pay the instalments. A decree for redemption having been made, the costs of the suit to be added to the security:—*Held*: as the sum originally advanced was less than £1,000, the costs must be taxed on the lower scale, & the fines & charges which might be incurred could not for such purpose be considered as added to the sum advanced.—*COTTERELL v. STRATTON* (1874), 9 Ch. App. 514; 43 L. J. Ch. 573; 30 L. T. 589; 22 W. R. 607, L. J.

SECT. 5.—ENFORCEMENT OF MORTGAGE.**SUB-SECT. 1.—SALE.**

145. Power of sale—Whether exercisable—Statutory power incorporated in mortgage—Sale on default of performance of any covenant.]—By a building society's mtge. it was provided that if default should be made in the performance of any of the covenants, then the total sum for which the mtge. should then be redeemable should be considered as actually due & payable, & the power of sale given to mtgees. by Conveyancing & Law of Property Act, 1881 (c. 41), should apply & be exercisable by the trustees of the society. The mtgor. neglected to pay one of the instalments, & the trustees contracted to sell the property:

143 i. Costs of redemption action.]—Where a mtgor. seeking to redeem land alleged to have been sold by the mtgee., proved that the alleged sale was, on technical points, invalid, but

his bill contained charges of fraud & collusion against the mtgee. & the purchasers which were not proved:—*Held*: though entitled to a redemption decree, he should pay the costs of both

—*Held*: the statutory power of sale, whether applicable to a building society mtge. or not, was incorporated in the mtge. by the act of the parties, & as the money had become due, the power was exercisable.

The contract for sale was dated within less than three months of default, & no notice of the proposed sale had been given to the mtgor. nor to a second mtgee. under the above Act, s. 20 (1). The purchaser ascertained the want of notice, & required the concurrence of the mtgor., which was agreed to, & the second mtgee. was ready to do the same. The conditions of sale stated that the property was being sold by mtgees. under a power of sale, & that the assignment was to be taken without the concurrence of other parties:—*Held*: (1) if the mtgor. & second mtgee. had not waived the notice, they had waived the right to object to the want of it; (2) want of notice did not prevent the vendors from exercising their power of sale; (3) the purchaser would get the title he had contracted to take; (4) the vendors must bear the costs occasioned by the concurrence of the mtgor. & second mtgee.—*Re THOMPSON & HOLT* (1890), 44 Ch. D. 492; 59 L. J. Ch. 651; 62 L. T. 651; 38 W. R. 524.

146. — By whom exercisable—Power limited to trustees of society—Transfer of mortgage without concurrence of mortgagor.]—A member of a building society mortgaged property to the trustees of the society to secure repayment by instalments of an advance, & the mtge. deed empowered the trustees or trustee for the time being of the society, in case of default, to sell the mortgaged property. The mtge. was afterwards, without the concurrence of the mtgor., transferred to R., who was not a member of the society, & he put up the property for sale purporting to act under the power:—*Held*: the power of sale could not be exercised by any person other than the trustees or trustee for the time being of the society, & the vendor could not make a good title to the property.—*Re RUMNEY & SMITH*, [1897] 2 Ch. 351; 66 L. J. Ch. 641; 76 L. T. 800; 45 W. R. 678; 13 T. L. R. 479; 41 Sol. Jo. 607, C. A.

Annotations:—*Refd.* *Re Crunden & Meux's Contract*, [1909] 1 Ch. 690. *Mentd.* *Sun Bldg. Soc. v. Western Suburban & Harrow Road Bldg. Soc.*, [1920] 2 Ch. 144.

147. — Improper exercise of—Sale disadvantageous to mortgagor—No proof of fraud or undervalue.]—If a mtgee. exercises his power of sale *bonâ fide* for the purpose of realising his debt & without collusion with the purchaser, the ct. will not interfere, even though the sale be very disadvantageous, unless the price is so low as in itself to be evidence of fraud.

A. mtged. his interest in an agreement for a building lease to a building society. In erecting the buildings under the agreement, A. encroached on the land of an adjoining owner, & his landlords refused to grant him the lease, & his payments to the building society fell into arrear. A. entered into negotiations to procure a conveyance of the ground encroached upon. Pending, & with notice of such negotiations, the building society sold under their power of sale. A. brought an action to set aside the sale, alleging that the society had taken advantage of the difficulties about the lease to sell in collusion with the purchaser at a gross undervalue:—*Held*: there was nothing improper in the circumstances of the sale, & no proof that

the mtgee. & the purchaser.—*ROSS v. VICTORIAN PERMANENT PROPERTY INVESTMENT BUILDING SOCIETY* (1882), 8 V. L. R. 254.—AUS.

it was at an undervalue.—**WARNER v. JACOB** (1882), 20 Ch. D. 220; 51 L. J. Ch. 642; 46 L. T. 656; 46 J. P. 436; 30 W. R. 731.

Annotations:—**Reid**. *Martinson v. Clowes* (1882), 21 Ch. D. 857; *Farrar v. Farrars* (1888), 40 Ch. D. 395; *Colson v. Williams* (1889), 58 L. J. Ch. 539; *Field v. Debenture Corp.* (1896), 12 T. L. R. 469; *Kennedy v. De Trafford*, [1896] 1 Ch. 762; *Haddington Island Quarry Co. v. Huson*, [1911] A. C. 722. **Mentd.** *Charles v. Jones* (1887), 35 Ch. D. 544; *Nutt v. Easton* (1899), 47 W. R. 430.

148. — Sale to officer of society at auction—Invalidity as against mortgagor.—A building society, selling as mtgees. under their power of sale, put up property for sale by public auction. The secretary to the society knew all the circumstances of the sale, & in conjunction with the society's solr., arranged with the auctioneer about the sale, & personally took to the auctioneer the directors' instructions for the sale, & told him what the reserved price was to be:—**Held**: (1) the secretary was in the same position as to the purchase of the property as the mtgees. themselves, or their solr. or agent acting for them in the sale, & was unable to bid for, or buy, any of the lots at such sale, though stating at the time that he was buying on his own account; (2) a sale made to such secretary at the auction must, in the event of the mtgor. redeeming, be set aside.—**MARTINSON v. CLOWES** (1882), 21 Ch. D. 857; 51 L. J. Ch. 594; 46 L. T. 882; 30 W. R. 795; *affd.* (1885), 52 L. T. 706, C. A.

Annotations:—**Appld.** *Hodson v. Deans*, [1903] 2 Ch. 647. **Reid**. *Farrar v. Farrars* (1888), 40 Ch. D. 395; *Bath v. Standard Land Co.*, [1911] 1 Ch. 618. **Mentd.** *Colson v. Williams* (1889), 58 L. J. Ch. 539; *Nutt v. Easton* (1899), 47 W. R. 430.

149. — Position of purchaser — Liability for — Fines for non-payment of instalments.—The mortgaged property of an advanced member of a building society became saleable in consequence of his default. The property was sold by the society to pltf., who took the forfeited shares, part of the purchase-money being payable by £20 instalments:—**Held**: he was liable, under the rules, to fines for non-payment of the instalments of the purchase-money.—**HANDLEY v. FARMER** (1861), 29 Beav. 362; 54 E. R. 667.

Annotations:—**Mentd.** *Re Doncaster Permanent Bldg. Investment Soc.* (1866), 15 W. R. 102; *Re Doncaster Permanent Bldg. Soc.* (1867), L. R. 4 Eq. 579.

150. — Prior sale subject to equitable mortgage.—A member of a building society, in consideration of a sum of money to be advanced to him by instalments, deposited the deeds of certain houses of which he was lessee with a memorandum in writing engaging "to execute a mtge. deed to the society when called on." He

afterwards executed a mtge. with power of sale. After the memorandum of agreement, but before the mtge., he sold the houses, "subject to the mtge." to A., who had notice of the agreement. The power of sale under the mtge. was subsequently exercised, & a question arose as to the title to the houses as between B., who purchased under the power, & A., who alleged that, at the time of his purchase, he had no notice that the mtge. would contain a power of sale:—**Held**: A. was bound by the terms of the mtge., & was trustee of the property for B.—**LEIGH v. LLOYD** (1865), 2 De G. J. & Sm. 330; 6 New Rep. 371; 34 L. J. Ch. 646; 12 L. T. 813; 13 W. R. 1054; 46 E. R. 403, L. C.

151. Application of proceeds of sale—Deduction of amounts due or becoming due—Rebate on account of future instalments.—A member of a benefit building society mortgaged property to the society. The mtge. deed provided, according to the rules, that the gross amount of principal & interest should be repaid by equal monthly instalments. The rules made a provision for a rebate, in the discretion of the directors, to a mtgor. making payments or redeeming in advance. Another rule provided that, upon three months' default in the monthly instalments, the society might sell the premises, & deduct from the proceeds all money due or to become due to them from the mtgor. That rule was silent as to any rebate. The mortgaged property having been sold by the society, upon the mtgor.'s default:—**Held**: the mtgor. could not claim any rebate in respect of the instalments which had not accrued due when the sale was made, & it was not in the nature of a penalty.—**MATTERSON v. ELDERFIELD** (1869), 4 Ch. App. 207; 20 L. T. 503; 33 J. P. 326; 17 W. R. 422, L. C.

Annotations:—**Reid**. *Neath Bldg. Soc. v. Luce* (1889), 43 Ch. D. 158. **Mentd.** *Ingoldby v. Riley* (1873), 28 L. T. 55.

152. — Retention of all subscriptions, fines & unpaid principal—Right to retain future interest.—A member of a permanent benefit building society obtained an advance in respect of his shares on his executing a mtge. in the form prescribed by the rules, by which he was to pay the principal & interest at 5 per cent. by monthly subscriptions extending over seven years. The deed contained a power of sale by the trustees of the society in case of default in payment of the subscriptions, & it was declared that the trustees should retain out of the purchase-money, after payment of expenses, all such subscriptions, fines, & other sums of money & payments which should be then due, or which

PART VII. SECT. 5, SUB-SECT. 1.

148 i. Power of sale—Improper exercise of—Sale to officer of society at auction—Invalidity as against mortgagor.—A building society advertised for sale the mortgaged property under their power. At the auction it was stated by the auctioneer that the price to be paid for the premises was to be over & above the amount of other mtge. debts against a portion of the same estate. One of the directors, who was also solr. to the society, bid off the property, though it afterwards appeared that he acted only as agent for a third party:—**Held**: the sale must be set aside & the mtgor. be allowed to redeem.—**MONTGOMERY v. FORD** (1855), 5 Gr. 210.—**CAN.**

1. — Different lands — Different mortgages—Sale in one lot.—Mtgees. having several powers of sale over different lands comprised in different mtges. are not authorised in selling all the lands in one lot; but such sale may be sanctioned where the mtgees.

clearly prove that a sale so made had been more advantageous to all parties concerned, than a sale in separate lots would have been.—**ROSS v. VICTORIAN PERMANENT PROPERTY INVESTMENT BUILDING SOCIETY** (1882), 8 V. L. R. 254.—**AUS.**

151 i. Application of proceeds of sale—Unpaid instalments—Deduction of amounts due or becoming due—Rebate on account of future instalments.—A member obtained from a building society as "advanced shares" a loan, repayable "by way of annuity" in thirteen years by monthly "subscriptions" or instalments of £30 each, together with certain fines in default of punctual payment. The loan was secured by a mtge. deed, whose terms were in accordance with those directed by a rule which stipulated that in case of the borrower being two months in arrear, the trustees might sell the mortgaged premises, & after paying all expenses, should "retain in trust for the society all repayments, fines, & other payments & sums then due to the

society in respect of the said shares, & the then present value of future repayments to be made in respect of the shares calculated to the end of the term for which the said shares have been advanced, & which future payments shall be discounted after the rate of 5 per cent. per annum interest on such repayments upon the principle of repayments made at the end of each year." The mortgaged premises were subsequently sold, & the society claimed twenty-three months' instalments, which were then in arrear & the fines upon them, "the present value of future payments at 6 per cent. discount, as per rule":—**Held**: the society was entitled, in addition to arrears & fines, to the value, at the date of payment, of the future repayments in respect of the mtge., calculated from such date to the end of the term for which the mtge. was originally taken, subject to a rebate or discount at the rate of 5 per cent. *per annum*.—**Re O'DONOHUE'S ESTATE** (1876), 10 L. R. Eq. 221.—**IR.**

**Sect. 5.—Enforcement of mortgage: Sub-sects. 1, 2
3. Sect. 6.]**

should afterwards become due, in respect of the shares during the remainder of the period of seven years, it being agreed that in case of any such sale, all the money which would at any time afterwards become due from the mtgor. in respect of the shares, according to the rules of the association, should be considered as then immediately due & payable, & should pay the residue of the purchase-money to the mtgor. The mtgor. paid a few of the subscriptions & then fell into arrear, & the mortgaged property was sold by the trustees:—*Held*: the trustees of the society were entitled to retain out of the proceeds of the sale all subscriptions & fines payable up to the time of the completion of the sale, & such further sum as represented the balance of the principal sum remaining at that time unpaid, but they were not entitled to any payment in respect of interest accruing after the principal had been all repaid.—*Re GOLDSMITH, Ex p. OSBORNE* (1874), 10 Ch. App. 41; 44 L. J. Bcy. 1; 31 L. T. 366; 39 J. P. 132; 23 W. R. 49, L. C. & L. JJ.

SUB-SECT. 2.—FORECLOSURE.

See 1874 Act, s. 13.

153. Right to foreclose—Mortgage in form of trust for sale.]—Property was conveyed by a member of a building society to the trustees, on trust for sale, to secure the money due to the society:—*Held*: the trustees were not entitled to a foreclosure, but to a decree for sale.—*SCWETZER v. MAYHEW* (1862), 31 Beav. 37; 54 E. R. 1051.

154. — Mortgage in respect of shares.]—A building society is entitled to foreclosure of mtges. to members made in respect of their shares, although the deeds & rules contain only powers of sale in case of default in payment of subscriptions.—*INGOLDBY v. RILEY* (1873), 28 L. T. 55.

155. — Consolidation of two mortgages—Default in respect of one.]—A building society had taken two mtges., dated respectively May 12, 1871, & Nov. 21, 1874, for distinct debts, which were to be repaid by monthly instalments extending over a period of twelve years. The mtgor. had become bkpt., & as to the 1874 mtge. default had been made. The 1871 mtge. had passed into the hands of a bank, which had paid all the monthly instalments already due, & had offered to compound the instalments still to fall due by an immediate payment. A declaration having been made that the building society was entitled to resist the redemption of the bank's mtge. alone, & had a right to consolidate & foreclose the two mtges.:—*Held*: the doctrine of consolidation could not be applied to a case where there had been no default with respect to one of two existing securities.—*CUMMINS v. FLETCHER* (1880), 14 Ch. D. 699; 49 L. J. Ch. 563; 42 L. T. 859; 28 W. R. 772, C. A. *Annotations*:—*Consd. Harris v. Tubb* (1889), 60 L. T. 699. *Reid. Harter v. Colman* (1882), 19 Ch. D. 630.

156. Form of foreclosure decree.]—The form of foreclosure decree in the case of a mtge. to a

building society does not differ from that in the case of an ordinary mtge.—*PROVIDENT PERMANENT BUILDING SOCIETY v. GREENHILL* (1878), 9 Ch. D. 122; 38 L. T. 140; 42 J. P. 775; 27 W. R. 110. *Annotations*:—*Mentd. Clarkson v. Henderson* (1880), 14 Ch. D. 348; *Re Middlesbrough Bldg. Soc.* (1884), 54 L. J. Ch. 592.

157. — Reference to rules of society.]—In a foreclosure action by a building society judgment was taken in the following form: "Account of what is due or payable to pltf. society under or by virtue of their security, regard being had to the redemption tables of the society, & for the costs of the action; in default of payment of the amount to be certified within six months from date of certificate to be due, foreclosure. Reference to chambers to appoint a receiver of the rents & of the leasehold premises."—*BONEY v. CHARTER*, [1887] W. N. 52.

158. — Inclusion of present & future subscriptions owing & payable—Account of mortgagor's share of profits of society.]—Where a building society is entitled to foreclosure of mtges. to members made in respect of their shares, although the deeds & rules contain only powers of sale in case of default in payment of subscriptions, etc., a decree for foreclosure in such a case properly includes an account of all subscriptions "due & owing & payable, & hereafter to become due & owing & payable," & an account of the mtgor.'s share of profits made by the society, if the rules provide for their distribution.—*INGOLDBY v. RILEY* (1873), 28 L. T. 55.

SUB-SECT. 3.—PROOF IN BANKRUPTCY.

159. Right to prove for premiums on advances—Insufficiency of mortgage—Principal, interest & premiums payable in instalments—Premium in nature of capital.]—A member of a building society borrowed from the society, on the security of a mtge., £1,200, for which he was to pay £144 premium & interest at 5 per cent. *per annum*. The principal, premium, & interest were made payable by the borrower to the society in a fixed number of monthly instalments, each of which consisted of principal, premium, & interest. The borrower having filed a liquidation petition, & the mtge. being insufficient:—*Held*: the premium was not in the nature of interest, & the society were entitled to prove for it in the liquidation.—*Re PHILLIPS, Ex p. BATH* (1884), 27 Ch. D. 509; 51 L. T. 520; 32 W. R. 808, C. A.

See, generally, BANKRUPTCY & INSOLVENCY, Vol. IV., pp. 243 et seq.

SECT. 6.—DISCHARGE OF MORTGAGE.

See 1836 Act, s. 5; 1874 Act, s. 42.

See, generally, MORTGAGE.

160. Reconveyance—Vesting of legal estate in person redeeming without notice—Priority over subsequent mortgagee.]—A piece of land was mortgaged to a friendly society, & by way of second

according to the rules.—*DOMINION BUILDING & LOAN ASSOCIATION v. GORDON* (1894), 26 N. S. R. 551.—*CAN.*

PART VII. SECT. 6.

a. Right to—On payment of repayments & other sums.]—A rule provided that a member desiring to have his property discharged from a mtge. to the society before the expiration of the full time for which it had been taken,

PART VII. SECT. 5, SUB-SECT. 2.

t. Right to foreclose—Amount recoverable.]—Deft. subscribed for shares of stock & obtained an advance on mtge. to be repaid in monthly instalments according to the rules. The instrument was to become void on performance by the mtgor. of his obligations by payment of subscriptions & other sums to be paid from time to time according to the rules.

The mtge. contained no provision by which the principal became due in any other way than by the monthly payments; but, by the rules, in the event of default of payment of interest, dues, etc., for a period of two months, the whole amount borrowed became at once due & payable without further notice:—*Held*: the amount for which pltf. could foreclose must be limited to the amount due for monthly payments to the time of sale; to be computed

mtge. to a banking company. A building society agreed to pay off the first mtge., & to make a further advance, having no notice of the second mtge., & by a deed indorsed on the first mtge. deed, the first mtgees. reconveyed to the mtgor., & by another deed he conveyed the land to the building society to secure repayment of the sum aid to the first mtgees., & the further advance :-

as the legal estate had passed by a reconveyance & not by a receipt under 1874 Act, s. 42, it was vested in the building society, & gave them priority over the second mtgees.—*CARLISLE BANKING CO. v. THOMPSON* (1884), 28 Ch. D. 398; 53 L. T. 115; 33 W. R. 119.

161. — Costs of—Allowance of.]—On an ordinary taxation the taxing master disallowed the costs of a deed of reconveyance from a benefit building society of property in a registered county, thinking that a receipt was sufficient under 1836 Act, s. 5:—*Held*: his decision was wrong.—*RE PAGE* (No. 2) (1863), 32 Beav. 485; 55 E. R. 190.

162. Statutory receipt—Vesting of legal estate in prior mortgagee.]—Property was mortgaged to a building society, & afterwards to A. The mtgor. borrowed money from B. to pay off the building society, which was done on Sept. 4, & a receipt was indorsed on the mtge. Fourteen days afterwards, the mtgor. executed a new mtge. to B.:—*Held*: the legal estate vested, under 1836 Act, in A., & not in B.—*PROSSER v. RICE* (1859), 28 Beav. 68; 54 E. R. 291.

Annotations:—*Consd.* *Pease v. Jackson* (1868), 3 Ch. App. 578, n.; *Sangster v. Cochrane* (1884), 28 Ch. D. 298.

163. — Vesting of legal estate in person best entitled—Right to tack further advances.]—A member of a building society having made a mtge. to the trustees of the society & a subsequent equitable charge in favour of plffs., requested defts. to pay off the first mtge. That was done, & the receipt of the trustees was indorsed upon the first mtge. & the title deeds handed over to defts., & the mtgor. at the same time executed a mtge. of the property to defts., who had no notice of plffs.' charge:—*Held*: (1) defts. had the better equity; (2) on the satisfaction of the first mtge. the legal estate in the property was vested, by virtue of 1836 Act, s. 5, either in the original mtgor. or in the parties who had the best right to call for it, in either of which cases it had passed to defts.

Defts. at the time of paying off the first mtge. made a further advance, which was included in the mtge. to them:—*Held*: they were not entitled to tack that.—*PEASE v. JACKSON* (1868), 3 Ch. App. 576; 37 L. J. Ch. 725; 32 J. P. 757; 17 W. R. 1, L. C.

Annotations:—*Folld.* *Lawrence v. Clements* (1874), 31 L. T. 670. *Consd.* *Fourth City Mutual Benefit Bldg. Soc. v. Williams, Marson v. Cox* (1879), 14 Ch. D. 140. *Folld.* *Robinson v. Trevor* (1883), 12 Q. B. D. 423. *Consd.* *Sangster v. Cochrane* (1884), 28 Ch. D. 298. *Folld.* *Mason v. Rhodes* (1885), 53 L. T. 322. *Consd.* *Hosking v. Smith* (1888), 13 App. Cas. 582; *Crosbie-Hill v. Sayer*, [1908] 1 Ch. 866. *Reid.* *Carlisle Banking Co. v. Thompson* (1884), 28 Ch. D. 398.

164. — — — — —.]—A. being possessed of houses held by two under-leases borrowed money from a building society, & in order to secure repayment demised the houses to the society by two

leases, each ten days short of the term out of which it was derived. A. afterwards obtained an assignment of the lease which had been granted to his own lessor, & then, concealing the mtge. of the under leases, mortgaged the houses to B. for a term one day short of the original lease. Subsequently, C. paid off the building society, & made a further advance to A. C. at the same time took from the building society a receipt in conformity with 1836 Act, & from A. by way of mtge. two leases similar to those which had been granted to the building society. B. on discovering C.'s mtge., commenced an action of ejectment against A. & C. for breaches of covenants contained in the leases to C.:—*Held*: the action must be restrained, C. being entitled to priority over B. in respect of the sum paid to the building society, though not in respect of the further advance.—*LAWRENCE v. CLEMENTS* (1874), 31 L. T. 670.

Annotation:—*Reid.* *Sangster v. Cochrane* (1884), 28 Ch. D. 298.

.., the lessee of a term, in Nov., 1865, mortgaged it to the trustees of a building society of which he was a member, to secure payment by him of all money which might become due from him pursuant to the rules of the society. In Sept., 1868, A. again mortgaged it to plff. to secure £70 then due from him to plff., & such further sums as should thereafter be advanced by plff. Notice of the mtge. to plff. was not given to the building society. Previously to June, 1875, A. applied to defts. to advance to him £150 on the security thereof. He informed them that the property was subject to the mtge. to the building society, but was not subject to any other incumbrance. In July, 1875, defts. paid to the trustees of the building society £57 18s. 11d., being the full amount due from A., & thereupon the trustees, under 1836 Act, s. 5, signed a receipt indorsed on the deed of mtge. to the society, acknowledging that all money intended to be secured by the mtge. to the building society, had been paid. In the same month defts. paid to A. £92 1s. 1d., being the balance of the £150 agreed to be advanced, & thereupon he executed a mtge. of the term to defts. to secure payment of the £150. A. afterwards became insolvent. An action for foreclosure having been brought in a county ct., the judge, by his decree, declared that the hereditaments were subject (1) to a charge of what might be due to defts. in respect of the £57 18s. 11d. paid by them to the building society, (2) to a charge of what might be due to plff. by virtue of the mtge. to him, (3) to a charge of what might be due to defts. on the security of their mtge., so far as same might not be included in the first charge:—*Held*: (1) (*BRETT, M.R., & BOWEN, L.J.*) the case fell within *Pease v. Jackson*, No. 163, *ante*; (2) *BAGGALLAY, L.J.* on the authority of *Pease v. Jackson*, No. 163, *ante*, defts. had the better equity, & the better right to call for the legal estate, & the legal estate in the property comprised in the mtge. to the building society had vested in defts. by virtue of the indorsed receipt, but the security acquired by defts. by reason of the legal estate becoming vested in them did not extend beyond the amount advanced by them to pay off the building society, &

should be allowed to do so on payment of all repayments, fines, or other sums due in respect thereof up to the time of redemption & of the present value of future repayments, calculated to the end of the term, & discounted at such rate of interest & on such terms as the directors might determine:—*Held*: the society had the right to say upon what terms future repayments should be computed, & could insist on repay-

ment of the whole amount of the mtge., which included the principal sum & interest for the whole period the mtge. had to run.—*WESTERN CANADA LOAN & SAVINGS SOCIETY v. HODGES* (1875), 22 Gr. 566.—*CAN.*

162 i. Statutory receipt—Vesting of legal estate in transferee of mortgage.]—S. leased lands to P. who mtged. the lands to a building society; subse-

quently P. purported to transfer to S. the mortgaged premises, in consideration of a loan, S. agreeing to accept the mtge. The trustees of the building society subsequently indorsed, upon the mtge. deed, a receipt for the money secured thereby:—*Held*: the receipt of the trustees so indorsed was effectual, under 1836 Act, s. 5, to pass the legal estate to S.—*STAMERS v. PRESTON* (1859), 9 I. C. L. R. 351.—*IR.*

Sect. 6.—Discharge of mortgage. Sect. 7.]

as regarded the further advance, they were incumbrancers puisne to pltf., & notwithstanding Land Transfer Act, 1875 (c. 87), s. 129, defts., owing to Vendor & Purchaser Act, 1874 (c. 78), were precluded from treating the property vested in them as security for the further sum advanced by them to A.; (3) the priorities were correctly ascertained, & the decree of the county ct. judge was right.—**ROBINSON v. TREVOR** (1883), 12 Q. B. D. 423; 53 L. J. Q. B. 85; 50 L. T. 190; 32 W. R. 374, C. A. *Annotations*:—**Consd.** Carlisle City & District Banking Co. v. Thompson (1884), 53 L. T. 115; Sangster v. Cochrane (1884), 28 Ch. D. 298. **Folld.** Mason v. Rhodes (1885), 53 L. T. 322. **Consd.** Hosking v. Smith (1888), 13 App. Cas. 582.

166. ———.]—H. mortgaged leaseholds to building societies established under 1836 Act, & executed a second mtge. to resps. H. afterwards borrowed a sum from applts., part of the loan being applied in paying off the building societies, & the balance being paid directly to H., who executed a mtge. to applts. to secure the loan. Upon being so paid off the building societies indorsed on their respective mtges. receipts to the mtgor. in accordance with s. 5, & delivered the indorsed deeds with the title deeds to applts. Neither the building societies nor applts. had any notice of resps.' mtge. Resps. having brought an action against applts. for foreclosure & sale:—**Held**: applts.' mtge. had priority over resps.' mtge., not only in respect of the money applied in paying off the building societies, but also in respect of the balance of the loan paid directly to H.—**HOSKING v. SMITH** (1888), 13 App. Cas. 582; 58 L. J. Ch. 367; 59 L. T. 565; 37 W. R. 257, H. L.

Annotation:—**Expld.** Crosbie-Hill v. Sayer, [1908] 1 Ch. 866.

167. ———.]—When the legal estate in land has been vested in a building society as mtgees. & the society on being paid off indorses a receipt on the mtge. deed as provided by 1874 Act, s. 42, the effect of the receipt is to vest the legal estate in the person who in equity is best entitled to call for it, & not necessarily in the person who actually paid off the society; & where there are successive equitable mtges. & the society is paid off by the mtgor., the effect of the statutory receipt is to vest the legal estate in the equitable mtgee. who is first in point of time, unless the society is paid off by an equitable mtgee. who had no notice of prior incumbrances, in which case the legal estate vests in that mtgee., notwithstanding that there are incumbrances prior to his in point of date.—**FOURTH CITY MUTUAL BENEFIT BUILDING SOCIETY v. WILLIAMS, MARSON v. COX** (1879), 14 Ch. D. 140; 49 L. J. Ch. 245; 42 L. T. 615; 28 W. R. 572.

Annotations:—**Consd.** Robinson v. Trevor (1883), 12 Q. B. D. 423; Sangster v. Cochrane (1884), 28 Ch. D. 298; Crosbie-Hill v. Sayer, [1908] 1 Ch. 866. **Refd.** Hosking v. Smith (1888), 13 App. Cas. 582.

168. ———.]—Land & four houses thereon were vested in a building society as mtgees., & on the society being paid off by pltf., by request of the mtgor., the mtge. deed, with a receipt indorsed in accordance with 1874 Act, s. 42, was with other title deeds handed to him, & the mtgor. shortly afterwards conveyed to him the property, on mtge. for a larger loan. The mtgor. had prior to the payment to the building society conveyed one house in fee to deft., who was ignorant of the

mtge. to the society, & he at once took possession of it, but pltf. knew nothing of the sale & purchase:—**Held**: in accordance with previous decisions, though not agreeing with them, the effect of the indorsed receipt was to vest the legal estate in pltf., & to give him, to the extent of the money paid to the society & the interest thereon, priority over deft.'s claim.—**SANGSTER v. COCHRANE** (1884), 28 Ch. D. 298; 54 L. J. Ch. 301; 51 L. T. 882; 49 J. P. 327; 33 W. R. 221; 1 T. L. R. 150.

Annotation:—**Apld.** Crosbie-Hill v. Sayer, [1908] 1 Ch. 866.

169. ———.]—The statutory receipt given by a building society under 1874 Act, s. 42, on payment off of a legal mtge. vests the legal estate in the person having the best right to call for a conveyance thereof. A third party who pays off a legal mtge. at the request of the mtgor. has *prima facie* a better right than the mtgor. to call for a conveyance, & becomes, in default of evidence of intention to the contrary, entitled in equity to stand in the shoes of the mtgee. The mere fact that as part of the same transaction the mtgor. executes in favour of the third party a memorandum of equitable charge containing an agreement to give a legal mtge. when called upon does not abrogate this *prima facie* right.

In 1902 D. mortgaged freeholds to a building society. In June, 1905, D.'s bankers, at his request, paid off the mtge. The building society delivered the title deeds other than the mtge. deed to the bank, & D. executed in favour of the bank a memorandum of equitable charge containing an agreement to execute a legal mtge. when called upon. Shortly afterwards the building society handed the mtge. deed to the bank, indorsed with the receipt authorised by s. 42. The receipt was dated the day of payment off, though in fact executed afterwards. In Nov., 1905, by means of forged title deeds, D. obtained an advance from defts.' predecessor in title, & executed what purported to be a legal mtge. of the property to him. In 1906 pltf. paid off the money owing to the bank. D. executed a mtge. of the property to them, & the bank handed them the title deeds, but did not convey the legal estate to them. Pltf. were in ignorance of the transaction with defts.' predecessor, & he was ignorant of the bank's claim when he advanced his money to D.:—**Held**: the statutory receipt operated to vest the legal estate in the bank, & the bank's mtge. was still alive for the purpose of giving pltf., as having the best right to call for the legal estate, priority over the incumbrance vested in defts.—**CROSBIE-HILL v. SAYER**, [1908] 1 Ch. 866; 77 L. J. Ch. 466; 99 L. T. 267; 24 T. L. R. 442.

Annotation:—**Apprvd.** Manks v. Whiteley, [1912] 1 Ch. 735.

170. ——— **Whether final discharge of mortgagor's liabilities.**—By the rules of a benefit building society a subscription of 10s. a share per month was payable from Sept., 1845, until the objects of the society were fully accomplished. One of those objects was the formation of a fund, from which money might be advanced to the shareholders to enable them to purchase freehold or leasehold property, & they were declared to be entitled to receive the sums mentioned in certain tables. One of the tables stated the amount which a shareholder was entitled to receive on each share for thirteen years, viz. £60 during the first year, £120 at the end of the thirteenth year,

b. Whether final discharge — Arrears of interest.—The granting by a member of a building society incorporated under 1874 Act, of a heritable bond in security of an advance to him by the society does not supersede the

rule of the society in regard to the advance, & that a discharge of the bond & of all interest thereon does not import a discharge of an obligation under the rules of the society to pay 10 per cent. upon arrears of interest

upon advances, such obligation not appearing *ex facie* of the bond.—**GALASHIELS PROVIDENT BUILDING SOCIETY v. NEWLANDS** (1893), 20 R. (Ct. of Sess.) 821; 30 Sc. L. R. 730.—**SCOT.**

& sums varying between them in the intermediate years. The rules also declared that the advance should be secured by a mtge., & that if any shareholder should be desirous of satisfying the security he should be at liberty to do so, "by paying the subscriptions that would have become due on the shares advanced, up to the end of the thirteenth year"; also, that when the £120 for each unadvanced share, with all the expenses & liabilities of the company, should be fully realised, the society should terminate. In June, 1851, deft., the owner of four shares, received an advance of £280, & executed a mtge. deed, in which he covenanted to pay the subscriptions & interest payable on his shares according to the rules of the society. The society sustained losses, & at the end of the thirteenth year there were not sufficient funds to pay the unadvanced shareholders £120 a share:—*Held*: (1) deft. was entitled to redeem his property in July, 1858, the thirteen years not terminating until the following Sept., but, notwithstanding such redemption, his liability to the payment of the monthly subscriptions continued so long as there was not realised £120 per share for the unadvanced shares; (2) the covenant in the mtge. deed extended to the payment of the subscriptions subsequent to the thirteen years, & might be sued upon, although the security was vacated.—*FARMER v. SMITH* (1859), 4 H. & N. 196; 28 L. J. Ex. 226; 32 L. T. O. S. 371; 23 J. P. 230; 5 Jur. N. S. 533, n.; 7 W. R. 362; 157 E. R. 812.

Annotations:—*Consd.* Sparrow v. Farmer (1859), 26 Beav. 511. *Apld.* Farmer v. Giles (1860), 5 H. & N. 753. *Distd.* Priestley v. Hopwood (1864), 4 New Rep. 239. *Consd.* London & County United Bldg. Soc. v. Angell (1896), 65 L. J. Q. B. 194. *Refd.* Re Doncaster Permanent Bldg. & Investment Soc. (1866), 15 W. R. 102.

171. ———.]—Pltf., a member of a benefit building society, received the amount of his shares in advance, & executed a mtge. to the society as a security therefor. He afterwards conveyed the property to deft., subject to the mtge., & deft. covenanted to pay all subscriptions & other payments to become due in respect of pltf.'s shares by the rules of the society. The shares were not assigned, but remained in the name of pltf. By one of the rules, the managers were to have power to determine the amount of money to be paid by any mtgor. in full for the claims of the society upon his property, on payment of which the shares in respect of which the security might be made should be wholly extinguished. The society having resolved that members might redeem their mtges. on payment of so much per share, deft. paid the amount, & the usual receipt was indorsed on the mtge. deed:—*Held*: pltf.'s shares were thereby extinguished, & pltf. released from any further liability to the society, & deft. could not be called on under the covenant to pay to pltf. money which he had paid to the society in respect of the shares subsequently, in consequence of the sum fixed by the managers for the payment in full not being found sufficient to meet the exigencies of the society.—*PRIESTLEY v. HOPWOOD* (1864), 4 New Rep. 239; 10 L. T. 646; 28 J. P. 628; 12 W. R. 1031.

172. ———.]—Where a borrowing member of a building society has mortgaged property to the society to secure advances & all payments due from him to the society, & the society on payment

c. Undated memorandum of settlement—Indorsement on mortgage—Presumption of satisfaction.]—Upon a sale of land the abstract of title set out a mtge. given to a building society by a mtgor. who was a shareholder by subscription. The proviso was for

repayment at times appointed in the co.'s rules, by monthly subscriptions to be continued until the objects of the society should be attained. The mtge. was produced & had indorsed upon it a memorandum, without date, purporting to be signed by the secretary-

off of the mtge. indorses a statutory receipt under 1874 Act, s. 42, such receipt precludes them from questioning the sufficiency of the payment, & from making any further claim against the mtgor. in respect of the debt.—*HARVEY v. MUNICIPAL PERMANENT INVESTMENT BUILDING SOCIETY* (1884), 26 Ch. D. 273; 53 L. J. Ch. 1126; 51 L. T. 408; 32 W. R. 557, C. A.

Annotation:—*Consd.* London & County United Bldg. Soc. v. Angell (1896), 65 L. J. Q. B. 194.

173. ——— *Receipt given by mistake.*]—By a mistake in their office, a building society informed a mtgor. desirous of redeeming his house property, that the total amount necessary to be paid to redeem was £839, instead of £1,216. The £839 was paid, & the society sealed a statutory receipt upon the deed of mtge.:—*Held*: in the absence of fraud the society could not recover the balance or re-open the account.—*LONDON & COUNTY UNITED BUILDING SOCIETY v. ANGELL* (1896), 65 L. J. Q. B. 194.

174. ——— *Delivery as escrow—Obtained through fraudulent misrepresentation—Rights of society.*]—In 1887 freeholds were mortgaged to a building society by H. to secure advances. In October, 1892, H. died, having devised the freeholds to N. upon trust for sale. In Dec., 1892, C., the solr. who acted for the society & also for H., & after H.'s death, for N., having fraudulently represented to the society that notice to pay off their mtge. had been given, procured the statutory receipt to be indorsed on the mtge., & obtained possession of the title deeds of the property. The money owing to the society was never paid off, N. at that time being unaware of the existence of the mtge. N. shortly afterwards agreed to sell the property to C., & by a deed of Dec. 29, 1892, which recited the trust for sale in H.'s will, N. in consideration of £700 paid to him by C. at or before the execution of the deed the receipt whereof N. thereby acknowledged, conveyed the property to C. in fee. The purchase-money was not in fact paid. The conveyance & the other title deeds, except the mtge. & the statutory receipt, were shortly afterwards deposited by C. with pltf. as security for an advance of £650. In 1893 C. was adjudicated bkpt., his frauds were discovered, & he was convicted & sentenced:—*Held*: (1) the society were entitled in the circumstances to show that they had never been paid off; (2) the statutory receipt & the mtge. were delivered only as an escrow, & the mtge. not having been paid off, & the legal estate being still in the society, they had priority over pltf.—*LLOYDS BANK, LTD. v. BULLOCK*, [1896] 2 Ch. 192; 65 L. J. Ch. 680; 74 L. T. 687; 44 W. R. 633; 12 T. L. R. 435; 40 Sol. Jo. 545.

Annotations:—*Consd.* Capell v. Winter, [1907] 2 Ch. 376. *Refd.* King v. Smith, [1900] 2 Ch. 425. *Mentd.* Hunt v. Luck (1900), 49 W. R. 155.

SECT. 7.—STAMP DUTIES AND INCOME TAX.

See Friendly Societies Act, 1829 (c. 56), s. 37; 1836 Act, s. 4; 1874 Act, s. 41.

175. *Stamp duties—What securities exempt—Mortgages & other securities given to unincorporated society.*]—Mtges. & other securities given to the trustees of building societies established

treasurer of the society, that it was paid & settled in full, but the signature was not proved:—*Held*: this mtge. should not, in favour of the vendor, be presumed to have been satisfied.—*MCINTOSH v. ROGERS* (1888), 12 P. R. 389.—*CAN.*

Sect. 7.—Stamp duties and income tax. Part VIII.
Sect. 1: Sub-sects. 1 & 2.]

under 1836 Act, are exempt from stamp duty.—**WALKER v. GILES** (1848), 6 C. B. 662; 18 L. J. C. P. 323; 13 L. T. O. S. 209; 13 Jur. 588; 136 E. R. 1407.

Annotations:—Consd. *Barnard v. Pilsworth* (1849), 6 C. B. 698, n.; *Thorn v. Croft* (1866), L. R. 3 Eq. 193; *Re Royal Liver Friendly Soc.* (1870), L. R. 5 Exch. 78. **Mentd.** *Doe d. Dixie v. Davies* (1851), 7 Exch. 89; *Pinhorn v. Souster* (1852), 8 Exch. 138; *Pinhorn v. Souster* (1853), 1 C. L. R. 99; *Brown v. Metropolitan Counties, etc., Soc.* (1859), 1 E. & E. 832; *Turner v. Barnes* (1862), 2 B. & S. 435; *Re Potter & Ferrigo, Ex p. Park* (1874), De Colvars County Court Cases 235; *Re Betts, Ex p. Harrison* (1881), 18 Ch. D. 127.

176. S. P. BARNARD v. PILSWORTH (1849), 6 C. B. 698, n.; 18 L. J. C. P. 330, n.; 14 L. T. O. S. 132; 136 E. R. 1422.

Annotation:—Refd. *Thorn v. Croft* (1866), L. R. 3 Eq. 193.

177. ——— Mortgage by person not member.]—Mtges. to benefit building societies, by persons who are not members, are exempted from stamp duty by 1836 Act.—**THORN v. CROFT** (1866), L. R. 3 Eq. 193; 36 L. J. Ch. 68; 15 L. T. 205; 31 J. P. 356; 15 W. R. 54.

178. ——— Mortgage before rules certified & deposited—Formalities complied with subsequently.]—A benefit building society took a mtge. from a member before its rules had been certified & deposited. Those formalities having afterwards been complied with:—**Held:** the deed was exempt from the stamp duty under 1836 Act, & Friendly Societies Act, 1829 (c. 56), ss. 7, 37.—**WILLIAMS v. HAYWARD** (1856), 22 Beav. 220; 25 L. J. Ch. 289; 26 L. T. O. S. 134; 19 J. P. 788; 1 Jur. N. S. 1128; 52 E. R. 1092.

179. ——— Draft to bearer drawn by member on society—For amount due on withdrawal.]—By the rules of a benefit building society, its members were holders either of completed shares of £30, or of uncompleted shares of £30, to be paid up by monthly instalments. A notice of twenty-eight days was to be given by any member wishing to withdraw his shares, who was, at the same time, to leave his pass-book at the office, & if at any time the money in hand was not sufficient to pay all the members wishing to withdraw, they were to be paid in rotation according to the priority of their notices. By the practice of the society, members holding completed shares were allowed to withdraw only whole shares, but members holding uncompleted shares were allowed to withdraw the whole or any part of the money standing to the account of the shares. Interest was paid half-yearly on completed shares, but not on uncompleted shares. The mode of withdrawing shares, whether completed or uncompleted, was by the member giving notice of withdrawal, upon which he was furnished with a form of request for a draft, on the receipt of which request, signed by him, a draft for the amount was forwarded to him, made payable to bearer. The drafts were usually paid within a week of the notice to withdraw. Drafts payable to bearer were forwarded half-yearly to the holders of completed shares, in respect of the interest due on the shares, without any previous request:—**Held:** such drafts were liable to stamp duty, not being within the protection of 1836 Act, s. 4, & Friendly Societies Act, 1829, s. 37.—**A.-G. v. GILPIN** (1871), L. R. 6 Exch. 193; 40 L. J. Ex. 134; 19 W. R. 1027.

180. ——— Receipt to tenant from un-

incorporated society as mortgagees—Mortgage in force at time of receipt.]—Deft. was the secretary of a benefit building society registered pursuant to 1836 Act. He received £12 from K., & gave an unstamped receipt for that amount. The above sum was paid for rent of a cottage & premises. K. had been the occupier of the cottage & premises as tenant to the owner thereof, who, being a member of the society, had mortgaged same to the trustees of the society as security for an advance made to him out of the funds of the society. At the time the receipt was given the mtge. was in force, & the member had made default in the payments by the deed covenanted to be made by him to the trustees, who had entered into the receipt of the rents, & K. had attorned tenant to the trustees:—**Held:** the receipt was liable to stamp duty, & was not exempt by reason of 1836 Act, s. 4, & Friendly Societies Act, 1829, s. 37.—**A.-G. v. PHILLIPS** (1871), 24 L. T. 832; 19 W. R. 1146.

181. ——— Reconveyance by incorporated society to mortgagor—Trustees for dissolution parties to reconveyance.]—A reconveyance by a building society incorporated under 1874 Act, to the mtgor. is exempt from stamp duty by virtue of s. 41 of that Act; nor is the right to exemption lost by reason of the trustees for the purpose of the dissolution of the society being joined as parties to the reconveyance.—**OLD BATTERSEA & DISTRICT BUILDING SOCIETY v. INLAND REVENUE COMRS.**, [1898] 2 Q. B. 294; 67 L. J. Q. B. 696; 78 L. T. 746, D. C.

182. ——— Extent of exemption—1836 Act—Friendly Societies Act, 1840 (c. 73), s. 1.]—Held: Friendly Societies Act, 1840, s. 1, did not affect the exemptions re-enacted as to building societies by 1836 Act.—**WALKER v. GILES** (1848), 6 C. B. 662; 18 L. J. C. P. 323; 13 L. T. O. S. 209; 13 Jur. 588; 136 E. R. 1407.

Annotations:—Consd. *Barnard v. Pilsworth* (1849), 6 C. B. 698, n.; *Thorn v. Croft* (1866), L. R. 3 Eq. 193; *Re Royal Liver Friendly Soc.* (1870), L. R. 5 Exch. 78. **Mentd.** *Doe d. Dixie v. Davies* (1851), 7 Exch. 89; *Pinhorn v. Souster* (1852), 8 Exch. 138; *Pinhorn v. Souster* (1853), 8 Exch. 763; *Brown v. Metropolitan Counties Life Assce. Soc.* (1859), 1 E. & E. 832; *Turner v. Barnes* (1862), 9 Jur. N. S. 199; *Re Potter & Ferrigo, Ex p. Park* (1874), De Colvars County Court Cases 235; *Re Betts, Ex p. Harrison* (1881), 18 Ch. D. 127.

183. Income tax—Right of advanced member to deduct—From present & future repayment—On sum representing interest.]—W. borrowed from a building society a sum of money on mtge. of certain property. The advance was repayable over a term of years by periodical instalments covering principal, interest, & charges for working expenses. W. regularly made the repayments in respect of his advance until his death, which occurred some time prior to 1881. In that year the executors of W. applied to the society for liberty to deduct income tax from such repayments. The directors of the society stated that they had nothing to do with the question of income tax as payable upon property upon which the society had made advances, & that the repayments must be paid in full in accordance with the society's rules. Shortly afterwards the society was ordered to be wound up. In 1885 the executors of W. applied to the official liquidators of the society to allow them to deduct income tax from the repayment falling due that month, not only in respect of that repayment, but also of all repayments

PART VII. SECT. 7.

183 i. Income Tax—Right of advanced member to deduct—On paying interest—Failure to claim deduction.]—

An advanced member, who fails to deduct income tax when paying interest on his advance, cannot claim the deduction from the society, when

subsequently settling with it.—**GALA-SHIELDS PROVIDENT BUILDING SOCIETY v. NEWLANDS** (1893), 30 So. L. R. 730; 20 Fl. (Cl. of Sess.) 821.—**SCOT.**

since 1877. That was refused, on the ground whatever might be the law on the subject of income tax, that part which represented income tax due prior to the winding-up of the society could not be deducted, as any claim in respect of it must be proved in the ordinary way as a claim in the winding-up. In the result, the executors, under protest by the liquidators, deducted income in respect of repayments made since 1877. No mention of income tax was contained in the society's rules, & the society, whilst a going concern, invariably refused to allow advanced shareholders to deduct anything from the repayments in respect of income tax. A summons having been taken out on behalf of the liquidators asking that the executors of W. might be ordered to pay the sum which they had deducted for income tax :—*Held* : the executors were entitled to deduct income tax in respect of the present repayment, & also from future repayments, but only upon so much thereof as represented interest, but they could not be allowed to deduct anything for income tax in respect of past repayments.—*Re MIDDLESBROUGH, REDCAR, SALTBURN-BY-THE-SEA, & CLEVELAND DISTRICT PERMANENT BENEFIT BUILDING SOCIETY, Ex p. WYTHES* (1885), 53 L. T. 492.

184. — Liability of society to pay—Interest

received from borrowing member by instalments—No deduction by borrower.]—A benefit building society lent money to borrowing members at a fixed rate of interest, & took from them a security on their property. The repayment of the loans was by weekly payments of a fixed sum in respect of principal & interest, the proportion of interest to principal in each payment decreasing as time went on, & the principal remaining due decreased. No deduction was allowed to be made by the borrower in respect of income tax. The society were assessed to income tax under Schedule D, on the interest they received as being interest of money within Income Tax Act, 1853 (c. 34), s. 2 :—*Held* : the expression "interest of money" in s. 2 was not restricted to annual interest, & the interest received by the society was not in respect of a loan on land but of a contract relating to interest of money lent, & was assessable in their hands to income tax.—*LEEDS PERMANENT BENEFIT BUILDING SOCIETY v. MALLANDAINE*, [1897] 2 Q. B. 402 ; 66 L. J. Q. B. 813 ; 77 L. T. 122 ; 61 J. P. 675 ; 13 T. L. R. 535 ; 3 Tax Cas. 577, C. A.

Annotations :—*Consd.* Lord Advocate v. Edinburgh Corpn. (1903), 4 Tax Cas. 627. *Foll.* Matthews v. Cork County Council (1910), 5 Tax Cas. 545. *Refd.* East Indian Ry. v. Secretary of State in Council of India (1905), 92 L. T. 495 ; Schulze v. Bensted (1915), 7 Tax Cas. 30.

Part VIII.—Borrowing and Loans.

SECT. 1.—POWER TO BORROW AND LEND MONEY.

SUB-SECT. 1.—INCORPORATED SOCIETIES.

Sec 1874 Act, ss. 15, 43 ; 1894 Act, ss. 1, 14.

185. Limitation on borrowing power—Method of calculation in case of permanent society—“Amount secured to society by mortgages from members”—What included.]—In ascertaining the amount for the time being secured to a building society by mtges. from its members within 1874 Act, s. 15 (2), such amount is not to be limited merely to the amount of principal secured, but covers all loans due on the members' securities at the time of the loans to the society, whether for principal, or interest, or fines, or otherwise, & all instalments not then accrued due, but secured by the mtge. & outstanding. In ascertaining the amounts advanced out of an *ultra vires* loan on security the whole amount secured is to be included, although a commission was charged for the advance & deducted from it.—*NEATH BUILDING SOCIETY v. LUCE* (1889), 43 Ch. D. 158 ; 59 L. J. Ch. 3 ; 61 L. T. 611, 615 ; 38 W. R. 122 ; 6 T. L. R. 13.

186. — “Total amount borrowed & not repaid by society.”—In calculating the extent of a building society's borrowing power, as limited by 1874 Act, s. 15 (2), “the total amount borrowed & not repaid by the society” is not to be taken as reduced by sums secured to the society from non-members ; & the amount “secured to the society by mtges. from its members” need not have been advanced to them on the value of their shares.—*Re WEST RIDING OF YORKSHIRE PERMANENT BENEFIT BUILDING SOCIETY, Ex p. PULLMAN, Ex p. CHARNOCK, Ex p. JOHNSON & GREENWOOD* (1890), 45 Ch. D. 463 ; 59 L. J. Ch. 823 ; 63 L. T. 483 ; 39 W. R. 74.

187. “Loan”—Society overdrawn banking account—Interest payable on loan.]—*Held* : a loan at interest to a society from its bankers, secured by deposit of title deeds, & made by allowing the society to overdraw its account at the bank, was a “loan” within 1874 Act, s. 15.—*LOOKER v.*

WRIGLEY, LEIGH v. WRIGLEY (1882), 9 Q. D. 397 ; 46 J. P. 758, D. C.

SUB-SECT. 2.—UNINCORPORATED SOCIETIES.

188. Validity of loans & deposits—Effect of 1875 Act, s. 1.]—The effect of the above sect., repealing 1874 Act, s. 8, is that all deposits with & loans to a building society certified under 1836 Act, made in the interval between Nov. 2, 1874, & Apr. 22, 1875, are valid, but deposits & loans made before Nov. 2, 1874, if otherwise invalid, are not made valid thereby, although they may be continued during that interval.—*Re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY* (1882), 23 Ch. D. 440 ; 52 L. J. Ch. 857 ; 48 L. T. 134 ; 32 W. R. 73, C. A. ; *varied* S. C. *sub nom.* *MURRAY v. SCOTT, AGNEW v. MURRAY, BRIMELOW v. MURRAY* (1884), 9 App. Cas. 519, H. L.

Annotations :—*Mentd.* Brooks v. Blackburn Benefit Bldg. Soc. (1884), 9 App. Cas. 857 ; Small v. Smith (1884), 10 App. Cas. 119 ; Blackburn & District Benefit Bldg. Soc. v. Cunliffe, Brooks (1885), 29 Ch. D. 902 ; *Re Middlesbrough, Redcar, Saltburn-by-the-Sea & Cleveland District Permanent Benefit Bldg. Soc.* (1885), 53 L. T. 203 ; *Re Mutual Aid Permanent Benefit Bldg. Soc.* (1885), 30 Ch. D. 434 ; Sheffield & South Yorkshire Permanent Bldg. Soc. v. Aizlewood (1889), 44 Ch. D. 412 ; *Re West London & General Permanent Benefit Bldg. Soc.*, [1894] 2 Ch. 352 ; Amalgamated Soc. of Ry. Servants v. Osborne, [1910] A. C. 87 ; Sinclair v. Brougham, [1914] A. C. 398.

189. Extent of power to borrow—Determined by rules.]—A benefit building society has no power to borrow money unless its rules specially authorise it to do so.—*Re NATIONAL PERMANENT BENEFIT BUILDING SOCIETY, Ex p. WILLIAMSON* (1869), 5 Ch. App. 309 ; 22 L. T. 284 ; 34 J. P. 341 ; 18 W. R. 388, L. J.

Annotations :—*Consd.* *Re Victoria Permanent Benefit Bldg., Investment, & Freehold Land Soc., Hill's Case, Jones' Case* (1870), L. R. 9 Eq. 605. *Distd.* Chapleo v. Brunswick Benefit Bldg. Soc. (1880), 5 C. P. D. 331. *Consd.* Murray v. Scott, Agnew v. Murray, Brimelow v. Murray (1884), 9 App. Cas. 519. *Refd.* Blackburn Bldg. Soc. v. Cunliffe, Brooks (1882), 22 Ch. D. 64, n. ; Sinclair v. Brougham, [1914] A. C. 398. *Mentd.* *Re South Wales Atlantic SS.*

Sect. 1.—Power to borrow and lend money: Sub-sect.

Co. (1876), 2 Ch. D. 763; Yorkshire Rail Wagon Co. v. Maclure (1881), 19 Ch. D. 478; Reversion Fund & Insc. v. Malson Cosway, [1913] 1 K. B. 364.

190. ———.]—A building society has no power to borrow except for the purposes & to the extent specified in its rules.—*MOYE v. SPARROW* (1870), 22 L. T. 154; 18 W. R. 400.

Annotations:—Consd. Re Victoria Permanent Benefit Bldg., Investment, & Freehold Land Soc., Hill's Case, Jones' Case (1870), L. R. 9 Eq. 605. *Distd.* Portsea Island Bldg. Soc. v. Barclay, [1894] 3 Ch. 86. *Refd.* Re Durham County Permanent Investment Land & Bldg. Soc., Davis' Case, Wilton's Case (1871), L. R. 12 Eq. 516.

191. ——— **Validity of rule giving limited borrowing power.**]—A rule empowering the trustees of a building society to borrow a limited amount of money for the purposes of the society is not illegal under 1836 Act.—*LAING v. REED* (1869), 5 Ch. App. 4; 39 L. J. Ch. 1; 21 L. T. 773; 34 J. P. 134; 18 W. R. 76, L. C. & L. J.

Annotations:—Consd. Re Victoria Permanent Benefit Bldg., Investment, & Freehold Land Soc., Hill's Case, Jones' Case (1870), L. R. 9 Eq. 605; Chapleo v. Brunswick Benefit Bldg. Soc. (1880), 5 C. P. D. 331; Murray v. Scott, Agnew v. Murray, Brimelow v. Murray (1884), 9 App. Cas. 519; Neath Bldg. Soc. v. Luce (1889), 43 Ch. D. 158. *Refd.* Re National Permanent Benefit Bldg. Soc., Ex p. Williams (1869), 5 Ch. App. 309; Allan v. Miller (1870), 22 L. T. 825; Moye v. Sparrow (1870), 18 W. R. 400; Blackburn Bldg. Soc. v. Cunliffe, Brooks (1882), 22 Ch. D. 64, n.; Sinclair v. Brougham, [1914] A. C. 398. *Mentd.* Amalgamated Soc. of Ry. Servants v. Osborne, [1910] A. C. 87.

192. ——— **Validity of rule giving unlimited borrowing power.**]—It is contrary to the spirit of 1836 Act for a building society to borrow money to an unlimited extent, & a rule purporting to authorise it to do so is invalid.—*Re VICTORIA PERMANENT BENEFIT BUILDING, INVESTMENT, & FREEHOLD LAND SOCIETY, HILL'S CASE, JONES' CASE* (1870), L. R. 9 Eq. 605; 39 L. J. Ch. 628; 22 L. T. 777; 34 J. P. 532; 18 W. R. 967.

Annotation:—Refd. Murray v. Scott, Agnew v. Murray, Brimelow v. Murray (1884), 9 App. Cas. 519.

193. ———.]—A benefit building society with £100 shares was, by one of its rules, authorised to borrow money for the purposes of the society, & in 1853 A. advanced £300 to the society upon a promissory note. In 1861 it was desired to reduce the shares from £100 to £10, & by way of effecting that object a new society was formed, which purported to take over the assets & liabilities of the old society. The interest on the £300 was regularly paid, first by the old, & afterwards by the new society. The new society having been ordered to be wound up, A. claimed to be paid the £300 out of the assets:—*Held*: the above rule of the old society was, *ultra vires*, as a rule authorising unlimited borrowing.—*Re LIVERPOOL & DISTRICT PERMANENT BENEFIT BUILDING SOCIETY, MCCONNAN'S CLAIM* (1871), 15 Sol. Jo. 177.

194. ———.]—One of the rules of a benefit building society formed under 1836 Act, authorised the trustees from time to time, as might be necessary for the purposes of the society, to borrow money at interest from any banker with whom the funds of the society should be deposited, or from any other person, to procure which the trustees might give their own personal security, & they should be indemnified out of the first funds of the society which should be received. The society received large sums of money on deposit from persons who were not members:—*Held*: the rule authorising the borrowing of money was bad, &

the deposits did not create debts upon which the society could be sued.—*Re PROFESSIONAL, COMMERCIAL, & INDUSTRIAL BENEFIT BUILDING SOCIETY* (1871), 6 Ch. App. 856; 25 L. T. 397; 19 W. R. 1153, L. J.

Annotations:—Consd. Murray v. Scott, Agnew v. Murray, Brimelow v. Murray (1884), 9 App. Cas. 519. *Refd.* Chapleo v. Brunswick Bldg. Soc. (1881), 6 Q. B. D. 696; Cunliffe, Brooks v. Blackburn Benefit Bldg. Soc. (1884), 52 L. T. 225. *Mentd.* Re West London & General Permanent Benefit Bldg. Soc., [1894] 2 Ch. 352.

195. ———.]—A rule of a benefit building society enrolled under 1836 Act authorising the society to borrow money is not invalid, merely because it omits to prescribe a limit to the borrowing power.—*MURRAY v. SCOTT, AGNEW v. MURRAY, BRIMELOW v. MURRAY* (1884), 9 App. Cas. 519; 53 L. J. Ch. 745; 51 L. T. 462; 33 W. R. 173, H. L.; *varying* S. C. *sub nom.* *Re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY* (1882), 23 Ch. D. 440, C. A.

Annotations:—Consd. Re Mutual Aid Permanent Benefit Bldg. Soc. (1885), 30 Ch. D. 434; Re West London & General Permanent Benefit Bldg. Soc., [1894] 2 Ch. 352. *Refd.* Brooks v. Blackburn Benefit Soc. (1884), 9 App. Cas. 857; Blackburn & District Benefit Bldg. Soc. v. Cunliffe, Brooks (1885), 29 Ch. D. 902; Sinclair v. Brougham, [1914] A. C. 398. *Mentd.* Small v. Smith (1884), 10 App. Cas. 119; Re Middlesbrough, Redcar, Saltburn-by-the-Sea & Cleveland District Permanent Benefit Bldg. Soc. (1885), 53 L. T. 203; Sheffield & South Yorkshire Permanent Bldg. Soc. v. Aizlewood (1889), 44 Ch. D. 412; Amalgamated Soc. of Ry. Servants v. Osborne, [1910] A. C. 87.

196. ——— **Rule enabling directors to borrow from non-members.**]—One of the rules of a benefit building society, formed under 1836 Act, provided that the society was established for the purpose of raising by monthly subscriptions & deposits on loans a fund to make advances to members of the value of their shares, etc. Another rule provided that the directors should meet at specified times, for the purpose of conducting the business of the society:—*Held*: (1) the first rule authorised the borrowing of money from persons not members of the society; (2) the second rule enabled the directors to exercise the power.—*Re MUTUAL AID PERMANENT BENEFIT BUILDING SOCIETY* (1885), 30 Ch. D. 434; 55 L. J. Ch. 111; 53 L. T. 802; 34 W. R. 143, C. A.

Annotation:—Refd. Re Birkbeck Permanent Benefit Bldg. Soc., [1912] 2 Ch. 183.

197. ——— **Limited to purposes set out in rules—Unauthorised application of funds.**]—The objects of a permanent building society, as stated in its certified rules, were to raise a fund for the purpose of enabling its members to purchase freehold land or other real or leasehold estate; to erect suitable cottages & other buildings thereon; to provide the means for the profitable investment of small savings; & in cases of accidental death to relieve the widows & families of deceased shareholders by adding the interest & estimated profits of the current year on the withdrawal of their shares at the time of death. The rules contained no borrowing power, but in August, 1867, an alteration in the rules, giving the directors "power from time to time to borrow for the purposes of the society such sums & at such rates of interest & under such terms & conditions as they might think proper & expedient," was certified by the barrister:—*Held*: the borrowing power conferred by such altered rule was strictly limited to the purposes of the society as stated in the first rule, & persons who had lent to the directors money, which was employed in a loan to another society, could not enforce their claim under the winding-up of the

PART VIII. SECT. 1, SUB-SECT. 2.

189 i. Extent of power to borrow—Determined by rules.]—A registered

building society has power to borrow, under rules giving such power with a reasonable limitation.—*COLONIAL BANK*

OF AUSTRALASIA v. DRAPER, COLONIAL BANK OF AUSTRALASIA v. PIE (1878), 4 V. L. R. 527.—*AUS.*

society.—*Re* DURHAM COUNTY PERMANENT INVESTMENT, LAND, & BUILDING SOCIETY, DAVIS' CASE, WILSON'S CASE (1871), L. R. 12 Eq. 516; 41 L. J. Ch. 124; 25 L. T. 83; 36 J. P. 164; *subsequent proceedings*, 7 Ch. App. 45, L. J.J.

Annotations:—*Consd.* Blackburn Bldg. Soc. v. Cunliffe, Brooks (1882), 22 Ch. D. 64, n. *Reid.* *Re* Guardian Permanent Benefit Bldg. Soc. (1882), 23 Ch. D. 444, n.; *Re* Payne, Young v. Payne, [1904] 2 Ch. 608.

198. — Ultra vires banking business — Right of depositors.—A building society formed in 1851 under 1836 Act, & empowered by its rules to borrow to an unlimited extent, started & developed a banking business. In 1911 the society was ordered to be wound up, & questions of priority arose between the outside creditors, the unadvanced shareholders, & the bank customers on current & deposit account, for convenience called the depositors. The assets were insufficient for payment of all the claimants in full but were more than sufficient for payment of the outside creditors, who were subsequently paid by arrangement, & the shareholders:—*Held*: (1) the power to borrow must be limited to borrowing for the proper objects of the society, & the carrying on of the banking business was *ultra vires*; (2) the depositors were not entitled to recover money paid by them on an *ultra vires* contract of loan on the footing of money had & received by the society to their use.—*SINCLAIR v. BROUGHAM*, [1914] A. C. 398; 83 L. J. Ch. 465; 111 L. T. 1; 30 T. L. R. 315; 58 Sol. Jo. 302, H. L.; *affg.* S. C. *sub nom.* *Re* BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY, [1912] 2 Ch. 183, C. A.

Annotations:—*Reid.* Brougham v. Dwyer (1913), 108 L. T. 504. *Mentd.* Leslie v. Sheill, [1914] 3 K. B. 607; Roscoe (Bolton) v. Winder, [1915] 1 Ch. 62; Hammerton v. Dysart, [1916] 1 A. C. 57; John v. Dodwell, [1918] A. C. 563; Kensington & Knightsbridge Electric Lighting Co. v. Notting Hill Electric Lighting Co. (1918), 87 L. J. K. B. 565; Banque Belge pour l'Etranger v. Hambrouck (1920), 37 T. L. R. 76.

Rules generally, see Part III., *ante*.

199. What constitutes borrowing—Overdraft at bank.—A building society's rules contained no power authorising the society to borrow money. The society's bankers allowed them to overdraw to a large amount, & deeds of borrowing members of the society were deposited with the bankers as security for the balance:—*Held*: to overdraw was to borrow.—*BROOKS & Co. v. BLACKBURN BENEFIT SOCIETY* (1884), 9 App. Cas. 857; 54 L. J. Ch. 376; 52 L. T. 225; 33 W. R. 309, H. L.; *affg.* S. C. *sub nom.* *BLACKBURN BUILDING SOCIETY v. CUNLIFFE, BROOKS & Co.* (1882), 22 Ch. D. 61, C. A.; *subsequent proceedings*, *BLACKBURN & DISTRICT BENEFIT BUILDING SOCIETY v. CUNLIFFE, BROOKS & Co.* (1885), 29 Ch. D. 902, C. A.

Annotations:—*Reid.* *Re* Guardian Permanent Benefit Bldg. Soc. (1882), 23 Ch. D. 444, n.; *Small v. Smith* (1884), 10 App. Cas. 119; *Re* Wrexham, Mold & Connah's Quay Ry., [1899] 1 Ch. 440; *Sinclair v. Brougham*, [1914] A. C. 398. *Mentd.* Wenlock v. River Dee Co. (1883), 36 Ch. D. 675, n.; Walton v. Edge (1884), 10 App. Cas. 33; Wenlock v. River Dee Co. (1887), 19 Q. B. D. 155; Wenlock v. River Dee Co. (1887), 36 Ch. D. 674; *Re* Companies Acts, *Ex p.* Watson (1888), 21 Q. B. D. 301; Neath Bldg. Soc. v. Luce (1889), 43 Ch. D. 158; Redman v. Rymer (1889), 60 L. T. 385; *Re* East & West India Dock Co. (1891), 7 T. L. R. 623; General Auction Estate & Monetary Co. v. Smith, [1891] 3 Ch. 432; Portsea Island Bldg. Soc. v. Barclay, [1895] 2 Ch. 298; *Re* Johnston Foreign Patents Co., *Re* Johnston Die Press Co., *Re* Johnston Engraving Co., *J. P. Trust v. Above Cos.*, [1904] 2 Ch. 234; A.-G. v. De Winton, [1906] 2 Ch. 106; Bannatyne v. MacIver, [1906] 1 K. B. 103; Reversion Fund & Insee. v. Maison Cosway, [1913] 1 K. B. 364.

200. — Taking money on deposit.—Taking money on deposit is equivalent to borrowing.—*Re* VICTORIA PERMANENT BENEFIT BUILDING, INVESTMENT, & FREEHOLD LAND SOCIETY, HILL'S CASE, JONES' CASE (1870), L. R. 9 Eq. 605; 39

L. J. Ch. 628; 22 L. T. 777; 34 J. P. 532; 18 W. R. 967.

Annotation:—*Mentd.* Murray v. Scott, Agnew v. Murray, Brimelow v. Murray (1884), 9 App. Cas. 519.

201. Borrowing by officers—Loan from bank on joint & several note of directors & trustees—Amount standing to credit of society—Set-off.—A benefit building society borrowed money from the bankers upon the joint & several promissory note of two of its trustees & a director. The bankers at the time of their bkpcy. held the note, & there was also a balance in their hands to the credit of the society upon current account:—*Held*: the society was entitled to set off the amount of its balance against the sum due upon the note, & the note should be delivered up on payment of the difference.—*Re* DAVIES & TROUGHTON, *Ex p.* CLENNELL (1861), 4 L. T. 60; 9 W. R. 380.

— **Liability for ultra vires borrowing.**—See Sect. 2, sub-sect. 2, *post*.

Power to lend surplus funds.—See Part IX., *post*.

SECT. 2.—EXERCISE OF BORROWING POWERS.

SUB-SECT. 1.—IN GENERAL.

See 1874 Act, s. 15.

202. Right to make repayment conditional—Production of loan pass-book by lender or person authorised—Condition precedent to repayment.—A. lent money to a building society upon the terms, in writing, that the sum lent should be repayable after the lender had given notice of his intention to withdraw it, & that no money would be paid out by the society except on production by the lender, personally or by some one with his written authority, of a loan pass-book given to him when the loan was made:—*Held*: the condition as to the production of the book was a condition precedent to the liability of the society to repay the money, & until that condition had been complied with, Stat. Limitations did not begin to run against the lender.—*ATKINSON v. BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY* (1890), 25 Q. B. D. 377; 59 L. J. Q. B. 360; 62 L. T. 857; 38 W. R. 630, C. A.

Annotation:—*Mentd.* *Re* Tidd, Tidd v. Overell, [1893] 3 Ch. 154.

203. — Right to withdraw dependent on available balance in hand—Payment in rotation.—Pltf. deposited money with a building society upon the condition that if the available balance in hand should at any time be insufficient to pay all the depositors wishing to withdraw, they should be paid in rotation according to the priority of their notices of withdrawal. Pltf. gave notice of withdrawal of his deposit, but at the time when such notice was given other depositors had already given notice of withdrawal of their deposits, so that when pltf.'s notice matured the society had not sufficient funds in hand to pay pltf.'s claim. In an action by pltf. to recover the amount of his deposit:—*Held*: (1) the meaning of the condition was that the society might postpone payment & the depositors' right to recover their deposits until there was an "available balance in hand" sufficient to pay depositors in rotation according to the priority of their notices of withdrawal, & as it was proved that at the time when the action was brought the society had no such available balance in hand, pltf. was not entitled to succeed; (2) the expression "available balance in hand" contained in the condition included not merely money actually in the hands of the society, but also money which without undue loss or delay could be realised, e.g. money invested in Consols or any other

Sect. 2.—Exercise of borrowing powers: Sub-sects. 2.]

security capable of being readily realised by the society.—*BRETT v. MONARCH INVESTMENT BUILDING SOCIETY*, [1894] 1 Q. B. 367; 63 L. J. Q. B. 237; 70 L. T. 146; 58 J. P. 367; 42 W. R. 209; 10 T. L. R. 187; 38 Sol. Jo. 183; 9 R. 141, C. A.

204. Security for loan—Unincorporated society—Deposit of mortgages held by society—Loan from bankers.]—The officers of a building society have no power to deposit the mtges. held by it as security for a loan from its bankers.—*MOYE v. SPARROW* (1870), 22 L. T. 154; 18 W. R. 400.

Annotations:—Consd. Re Durham County Permanent Investment, Land, & Bldg. Soc., Davis' Case, Wilson's Case (1871), L. R. 12 Eq. 516. *Refd. Portsea Island Bldg. Soc. v. Barclay*, [1894] 3 Ch. 86. *Mentd. Re Victoria Permanent Benefit Bldg., Investment, & Freehold Land Soc., Hill's Case, Jones' Case* (1870), L. R. 9 Eq. 605.

205. ——— Promissory note of trustees.]—A loan to a building society was secured by the promissory note of the trustees, & by a deposit of the mtge. deeds executed by members of the society:—*Held*: the official liquidator was not entitled, without payment of the money advanced, to deprive the lender of his securities.—*Re DURHAM COUNTY PERMANENT INVESTMENT, LAND, & BUILDING SOCIETY, DAVIS' CASE, WILSON'S CASE* (1871), L. R. 12 Eq. 516; 41 L. J. Ch. 124; 25 L. T. 83; 36 J. P. 164; *subsequent proceedings*, 7 Ch. App. 45, L. JJ.

Annotations:—Folld. Re Guardian Permanent Benefit Bldg. Soc. (1882), 23 Ch. D. 444, n. *Refd. Blackburn Bldg. Soc. v. Cunliffe, Brooks* (1882), 22 Ch. D. 64, n. *Mentd. Re Payne, Young v. Payne*, [1904] 2 Ch. 608.

206. ——— Directors giving equitable mortgage of specific assets—Rules charging funds & property for money borrowed.]—A rule of a benefit building society, enrolled under 1836 Act, authorised the borrowing of money, & made the money to be borrowed a first charge on the funds & property of the society. The directors borrowed large sums under the rule, for some part of which they gave as security equitable mtges. of specific assets of the society:—*Held*: the equitable mtges. were invalid, & all lenders under the rule were entitled to rank *pari passu* against the entire assets.—*MURRAY v. SCOTT, AGNEW v. MURRAY, BRIMELOW v. MURRAY* (1884), 9 App. Cas. 519; 53 L. J. Ch. 745; 51 L. T. 462; 33 W. R. 173, H. L.; *reversg. S. C. sub nom. Re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY* (1882), 23 Ch. D. 440, C. A.

Annotations:—Refd. Re Mutual Aid Permanent Benefit Bldg. Soc. (1885), 30 Ch. D. 434; *Re West London & General Permanent Benefit Bldg. Soc.*, [1894] 2 Ch. 352; *Sinclair v. Brougham*, [1914] A. C. 398. *Mentd. Brooks v. Blackburn Benefit Soc.* (1884), 9 App. Cas. 857; *Small v. Smith* (1884), 10 App. Cas. 119; *Blackburn & District Benefit Bldg. Soc. v. Cunliffe, Brooks* (1885), 29 Ch. D. 902; *Re Middlesbrough, Redcar, Salthurn-by-the-Sea & Cleveland District Permanent Benefit Bldg. Soc.* (1885), 53 L. T. 203; *Sheffield & South Yorkshire Permanent Bldg. Soc. v. Aizlewood* (1889), 44 Ch. D. 412; *Amalgamated Soc. of Ry. Servants v. Osborne*, [1910] A. C. 87.

207. ——— Power of directors to pledge personal credit of members—Rule ultra vires.]—One of the rules of a building society provided that the society was established for the purpose of raising by monthly subscriptions & deposits on loans a fund to make advances to members of the value of their shares, etc. Another rule provided that at the end of every five years a general account of the affairs of the society should be prepared, showing the gross receipts & expenditure & liabilities, & that if on taking the accounts there appeared to be a deficiency of income, by which the society might be prevented from meeting its anticipated expenditure & liabilities, the amount of such deficiency should be equitably & equally apportioned by the directors between the investing

& borrowing members, & be paid forthwith by such monthly or quarterly instalments as the directors should determine:—*Held*: the last rule did not enable the directors to pledge the individual credit of the members to the lenders of money to the society, but even if it did, & was thus *ultra vires*, as being inconsistent with the nature of a building society, that rule might be rejected, leaving the borrowing power unaffected.—*Re MUTUAL AID PERMANENT BENEFIT BUILDING SOCIETY* (1885), 30 Ch. D. 434; 55 L. J. Ch. 111; 53 L. T. 802; 34 W. R. 143, C. A.

Annotation:—Refd. Re Birkbeck Permanent Benefit Bldg. Soc., [1912] 2 Ch. 183.

208. ——— ——— ———.]—A rule purporting to empower the directors of an unincorporated society to borrow on deposit so as to bind not only its assets, but also its members personally, is *ultra vires* to that extent, & in respect of such loans the members, advanced or unadvanced, are only under a liability which is limited to the amounts payable by them under the rules.—*Re WEST LONDON & GENERAL PERMANENT BENEFIT BUILDING SOCIETY*, [1894] 2 Ch. 352; 63 L. J. Ch. 506; 70 L. T. 796; 42 W. R. 535; 10 T. L. R. 280; 38 Sol. Jo. 273; 8 R. 764; *subsequent proceedings* (1898), 78 L. T. 393, C. A.

209. ——— Incorporated society—Bond charging funds, assets, & effects—Whether a mortgage.]—The directors of an incorporated building society, having power to borrow money, gave to a depositor a bond in which the "funds, assets, & effects" of the society were declared to be held liable for due repayment of the deposit. Eventually pltf. recovered judgment in an action on her bond in the Ch. Div., & subsequently treating her bond as a mtge., commenced an action for foreclosure against the society. While that action was pending, a petition was filed & an order made for winding up the society in a county ct. Upon application of pltf., the county ct. judge refused leave to continue the foreclosure action:—*Held*: the bond was not a mtge., & a foreclosure action could not be maintained upon it.—*ANDREW v. SWANSEA CAMBRIAN BENEFIT BUILDING SOCIETY* (1880), 50 L. J. Q. B. 428; 44 L. T. 106; 45 J. P. 507; *sub nom. JONES v. SWANSEA CAMBRIAN BENEFIT BUILDING SOCIETY*, 29 W. R. 382, D. C.

Annotations:—Mentd. Re Portsea Island Bldg. Soc., [1893] 3 Ch. 205; *Re Ferndale Industrial Co-op. Soc.*, [1894] 1 Q. B. 828.

210. ——— ——— ———.]—The directors & trustees of a building society, to secure a loan, gave a charge on the assets of the society. The charge was given in accordance with a rule, whereby the directors were empowered to borrow money for the society either as representing the society & binding its assets, or on their own personal security by bond or promissory note, in which case the assets were to be charged with payments by them. The assets of the society included mtges. of real estate, & in some cases the society had foreclosed & were in possession:—*Held*: the charge was only a security by way of promise to pay by the society, & not a charge by way of mtge., & did not pass an interest in land within Mortmain Acts.—*Re GOULDEN, WALMSLEY v. RICE* (1885), 1 T. L. R. 251, C. A.

211. ——— Funds of society appropriated for repayment of loan—Good equitable assignment.]—Pltf. advanced money to a building society, for repayment of which the funds & property of the society were made liable, & brought an action for a receiver & declaration of charge. The society alleged that pltf. had no cause of action as a secured creditor, & moved to stay proceedings:—

Held: the funds of the society being appropriated for repayment of the loan, there was a good equitable assignment, & a good cause of action.—**BAKER v. LANDPORT & MID-SOMERSET BENEFIT BUILDING SOCIETY** (1912), 56 Sol. Jo. 224.

212. — Omission to indorse statutory provisions.—Enforcement against society.—Securities given by a building society may be enforced against the society, although 1874 Act, ss. 14, 15, are not indorsed thereon, the enactment in s. 15 directing this to be done being only directory.—*Re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY* (1882), 23 Ch. D. 440; 52 L. J. Ch. 857; 48 L. T. 134; 32 W. R. 73, C. A.; *varied S. C. sub nom. MURRAY v. SCOTT, AGNEW v. MURRAY, BRIMELOW v. MURRAY* (1884), 9 App. Cas. 519, H. L.

Annotations:—**Mentd.** *Brooks v. Blackburn Benefit Bldg. Soc.* (1884), 9 App. Cas. 857; *Small v. Smith* (1884), 10 App. Cas. 119; *Blackburn & District Benefit Bldg. Soc. v. Cunliffe, Brooks* (1885), 29 Ch. D. 902; *Re Middlesbrough, Redcar, Saltburn-by-the-Sea & Cleveland District Permanent Benefit Bldg. Soc.* (1885), 53 L. T. 203; *Re Mutual Aid Permanent Benefit Bldg. Soc.* (1885), 30 Ch. D. 434; *Sheffield & South Yorkshire Permanent Bldg. Soc. v. Aizlewood* (1889), 44 Ch. D. 412; *Re West London & General Permanent Benefit Bldg. Soc.*, [1894] 2 Ch. 352; *Amalgamated Soc. of Ry. Servants v. Osborne*, [1910] A. C. 87; *Sinclair v. Brougham*, [1914] A. C. 398.

SUB-SECT. 2.—EXCESSIVE EXERCISE OF BORROWING POWERS.

See 1874 Act, s. 43.

213. Liability of society—Loan applied to discharge lawful debts of society—Whether debt created.—The directors of a benefit building society, the rules of which gave no power to borrow money, borrowed money for the purpose of advancing it to their members on the security of their shares. The lender of the money afterwards presented a petition for an order to wind up the co.:—*Held*: the transaction was *ultra vires*, & petitioner had no legal or equitable debt against the co.—*Re NATIONAL PERMANENT BENEFIT BUILDING SOCIETY, Ex p. WILLIAMSON* (1869), 5 Ch. App. 309; 22 L. T. 284; 34 J. P. 341; 18 W. R. 388, L. J.

Annotations:—**Consd.** *Re Birkbeck Permanent Benefit Bldg. Soc.*, [1912] 2 Ch. 183. **Refd.** *Yorkshire Ry. Wagon Co. v. MacLure* (1881), 19 Ch. D. 478; *Blackburn Bldg. Soc. v. Cunliffe, Brooks* (1882), 22 Ch. D. 61; *Reversion Fund & Insee. v. Maison Cosway*, [1913] 1 K. B. 364; *Sinclair v. Brougham*, [1914] A. C. 398. **Mentd.** *Re Victoria Permanent Benefit Bldg., Investment, & Freehold Land Soc., Hill's Case, Jones' Case* (1870), L. R. 9 Eq. 605; *Re South Wales Atlantic S.S. Co.* (1876), 2 Ch. D. 763; *Chapleo v. Brunswick Benefit Bldg. Soc.* (1880), 5 C. P. D. 331; *Murray v. Scott, Agnew v. Murray, Brimelow v. Murray* (1884), 9 App. Cas. 519.

214. — Deeds deposited at bank for overdraft—Right of bank to retain deeds as security for repayment.—A benefit building society which had no power to borrow money, was allowed by its bankers to make large overdrafts. In 1876 a memorandum was signed by the officers of the society & confirmed by the directors, stating that certain deeds of borrowing members which had been deposited with the bankers were deposited not only for safe custody, but as a security for the balance from time to time. In 1881 an order for winding up the society was made, & the bankers claimed to retain the deeds as security for the balance of their account. No evidence was given as to the application of the money which was

drawn out by the society, but it was admitted that some part was applied in payment of members withdrawing from the society, & the remainder in payment of salaries, legal expenses, & expenses of mortgaged property. The Ct. of Appeal decided (1) the overdrafts were *ultra vires*; (2) the bankers were not creditors of the society in respect of the overdrafts, but they were entitled to hold the deeds as a security for repayment of so much only of the money advanced by them as was applied in payment of the debts & liabilities of the society properly payable & had not been repaid to the bankers, excluding payments to withdrawing members; (3) the burden of proving that lay on the bankers, & in satisfying that burden the bankers could not have the benefit of the rule in *Clayton's Case, Devayne v. Noble* (1816), 1 Mer. 57; & the ct. made an order directing inquiries, with a declaration that in making the inquiries the bankers were to be charged with all sums received by them on account of the society since it ceased to have any balance to its credit with the bankers, & that they were not to be allowed any sums advanced by them since that date which were applied in making payments to withdrawing members or otherwise than in paying such debts & liabilities of the society as aforesaid. The bankers having appealed against the order:—*Held*: without expressing any opinion upon the question of payments to withdrawing members, or the bankers' right to hold the securities, the decision & order of the Ct. of Appeal were in other respects right.—**BROOKS & Co. v. BLACKBURN BENEFIT SOCIETY** (1884), 9 App. Cas. 857; 54 L. J. Ch. 376; 52 L. T. 225; 33 W. R. 309, H. L.; *affg. S. C. sub nom. BLACKBURN BUILDING SOCIETY v. CUNLIFFE, BROOKS & Co.* (1882), 22 Ch. D. 61, C. A.; *subsequent proceedings, BLACKBURN & DISTRICT BENEFIT BUILDING SOCIETY v. CUNLIFFE, BROOKS & Co.* (1885), 29 Ch. D. 902, C. A.

Annotations:—**Consd.** *Wenlock v. River Dee Co.* (1887), 19 Q. B. D. 155; *Neath Bldg. Soc. v. Luce* (1889), 43 Ch. D. 158; *Redman v. Rymer* (1889), 60 L. T. 385. **Foll.** *Re East & West India Dock Co.* (1891), 7 T. L. R. 623. **Consd.** *Re Wrexham, Mold & Connah's Quay Ry.*, [1899] 1 Ch. 440; *Re Birkbeck Permanent Benefit Bldg. Soc.*, [1912] 2 Ch. 183; *Sinclair v. Brougham*, [1914] A. C. 398. **Refd.** *Re Guardian Permanent Benefit Bldg. Soc.* (1882), 23 Ch. D. 444, n.; *Re Companies Acts, Ex p. Watson* (1888), 21 Q. B. D. 301; *Portsea Island Bldg. Soc. v. Barclay*, [1895] 2 Ch. 298; *Bannatyne v. MacIver*, [1906] 1 K. B. 103; *Reversion Fund & Insee. v. Maison Cosway*, [1913] 1 K. B. 364. **Mentd.** *Wenlock v. River Dee Co.* (1883), 36 Ch. D. 675, n.; *Small v. Smith* (1884), 10 App. Cas. 119; *Walton v. Edge* (1884), 10 App. Cas. 33; *Wenlock v. River Dee Co.* (1887), 36 Ch. D. 674; *General Auction Estate & Monetary Co. v. Smith*, [1891] 3 Ch. 432; *Re Johnston Foreign Patents Co., Re Johnston Die Press Co., Re Johnston Engraving Co., J. P. Trust v. Above Cos.*, [1904] 2 Ch. 234; *A.-G. v. De Winton*, [1906] 2 Ch. 106.

215. — Payments by officers out of borrowed money—Right to maintain claim against society.—By r. 34 of a benefit building society it was provided that when £100 for every share given out, together with all costs & other expenses of the society, should have been fully paid, the society was to be terminated, & the trustees were to indorse a receipt on the mtge. deeds, & deliver them up to the members. Advanced members of the society brought an action against the trustees, to redeem their mtges., on the ground that their monthly instalments had all been paid, all the unadvanced members had been paid off, there was no valid subsisting debt or liability, & the society

PART VIII. SECT. 2, SUB-SECT. 2.

214 i. Liability of society—Loan applied to discharge lawful debts of society—Pledge of bonds at bank as security—Right of bank to retain bonds.—The directors of a building society,

at a time when they were alleged to have exceeded their borrowing powers, pledged certain bonds to their bankers as a security for a further loan:—*Held*: the bankers were entitled to the security of the bonds, at all events for such of their advances as had been applied

in payment of the debts & liabilities of the society which were properly payable.—**CAPE OF GOOD HOPE PERMANENT LAND, BUILDING, & INVESTMENT SOCIETY LIQUIDATORS v. STANDARD BANK** (1899), 16 S. C. 325.—S. AF.

2.—Exercise of borrowing powers: Sub-sect. 2.]

terminated on Apr. 11, 1884. There was no power for the trustees of the society to borrow, but defts., with the assent of pltfs. & other members of the society, borrowed money for the purposes of the society. Defts. claimed to stand in the place of the persons to whom they had made payments, for which the society was liable, out of the borrowed money:—*Held*: (1) if any of the officers of the society had made any payments for which the society was liable, there not being any money of the society out of which such payments could be made, such officers were entitled to stand in the place of the persons to whom such payments were made, & to maintain a claim against the society for the amount of such payments; (2) an inquiry should be directed, whether any & what payments had been made within the above declaration, & whether any & what liabilities under r. 34 were still outstanding.—*OWEN v. ROBERTS* (1887), 57 L. T. 81.

216. — Deposit note given after incorporation—In exchange for promissory notes given previously.]—Directors of an unincorporated building society, which had no borrowing powers, gave their own promissory notes for money lent for the benefit of the society. Afterwards the society was incorporated under 1874 Act, & then the directors gave the lender a deposit note for the same amount in lieu of the promissory notes. The society being wound up:—*Held*: the deposit note was not binding on the society, as the directors had no authority to borrow money.—*Re COMPANIES ACTS, Ex p. WATSON* (1888), 21 Q. B. D. 301; 57 L. J. Q. B. 609; *sub nom. Re SHEFFIELD PERMANENT BUILDING SOCIETY, Ex p. WATSON*, 59 L. T. 401; 36 W. R. 829; *sub nom. Ex p. WATSON*, 52 J. P. 742, D. C.

Annotations:—*Fold. Re Bottomgate Industrial Co-op. Soc.* (1891), 65 L. T. 712. *Dbtd. Sinclair v. Brougham*, [1914] A. C. 398.

217. — Joint & several promissory note of trustees.]—The rules of a building society authorised the trustees to borrow money for the purposes of the society, the amount not to exceed two-thirds of the amount for the time being secured by mtges. to the society. The trustees of the society borrowed £50 from pltf. & gave him a joint & several promissory note. When the loan was made the society was registered under 1836 Act, & subsequently it was incorporated under 1874 Act. The society paid the interest on the note until pltf. gave notice for repayment of the principal, when the secretary of the society wrote a letter admitting that the money was on deposit with the society, & subsequently paid £25 on account:—*Held*: notwithstanding the trustees were liable on the note, there was evidence that the money was lent to the society, & as the loan, although made before incorporation, had been made in accordance with the old rules, the society, by reason of 1874 Act, s. 15, was liable.—*HEATH v. KIDSGROVE PERMANENT BUILDING SOCIETY* (1887), 82 L. T. Jo. 449.

218. Ultra vires banking business—Sums owing from customer with credit balance—Set-off.]—Deft. occupied offices belonging to pltf. society, & he was also a customer of the society in the banking business carried on by them. The society went into liquidation in June, 1911, & at that time there was rent for two quarters due by deft. for the offices occupied by him. An arrangement was made in Sept., 1911, by the liquidator of the society & deft. for a set-off, against the amount of rent due, of £38 3s. 3d., the amount of the

dividends in the liquidation to which deft. was entitled on his current account. In Nov., 1911, it was decided by the High Ct. that the banking business carried on by the society was *ultra vires*, & that none of their customers could rely on any legal liability on the part of the society towards them. After that decision the official receiver refused to allow any set-off against the rent due from deft. & sued for the full amount. Deft. set up the arrangement of Sept., 1911, as a defence:—*Held*: there was no consideration for an agreement by way of set-off, since by the High Ct. decision of Nov., 1911, there was no debt due from the society to deft. at the time the arrangement was made.—*BIRKBECK BUILDING SOCIETY v. BIRKBECK* (1913), 29 T. L. R. 218, D. C.

219. — Recovery of overdraft to customer.]—The liquidator of a building society, which as part of its operations had carried on a banking business, subsequently held by the ct. to be *ultra vires*, brought an action for money had & received against deft., a customer of the bank, to recover a sum in respect of overdrafts due from him. Deft. set up the defence that the contract under which the money was advanced to him was *ultra vires* & that the money was not recoverable:—*Held*: the contract, being *ultra vires*, was one which the society was not competent to enter into, & did not exist in point of law, but there being nothing illegal or wrong in it, defts. had no answer to an action for money had & received.—*BROUGHAM v. DWYER* (1913), 108 L. T. 504; 29 T. L. R. 234, D. C.

220. — Right to follow assets after payment of outside creditors—Distribution *pari passu*.]—A building society formed in 1851 under 1836 Act, & empowered by its rules to borrow to an unlimited extent, started & developed a banking business. In 1911 the society was ordered to be wound up, & questions of priority arose between the outside creditors, the unadvanced shareholders, & the bank customers on current & deposit account, for convenience called the depositors. The assets were insufficient for payment of all the claimants in full, but were more than sufficient for payment of the outside creditors, who were subsequently paid by arrangement, & the shareholders:—*Held*: the assets remaining after payment of the outside creditors must be taken to represent in part money which the depositors could follow, as having been invalidly borrowed, & in part money which the society could follow, as having been wrongfully employed by its agents in the banking business, & subject to any application by any individual depositor or shareholder with a view to tracing his own money into any particular asset, & to the costs of the liquidation, ought to be distributed *pari passu* between the depositors & the unadvanced shareholders according to the amounts respectively credited to them in the books of the society at the commencement of the winding-up.—*SINCLAIR v. BROUGHAM*, [1914] A. C. 398; 83 L. J. Ch. 465; 111 L. T. 1; 30 T. L. R. 315; 58 Sol. Jo. 302, H. L.; *varying S. C. sub nom. Re BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY*, [1912] 2 Ch. 183, C. A.; *subsequent proceedings, sub nom. Re BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY*, [1915] 1 Ch. 91.

Annotations:—*Consd. Banque Belge pour l'Etranger v. Hambrouck* (1920), 37 T. L. R. 76. *Refd. Roscoe (Bolton) v. Winder*, [1915] 1 Ch. 62. *Mentd. Brougham v. Dwyer* (1913), 108 L. T. 504; *Leslie v. Shell*, [1914] 3 K. B. 607; *Hammerton v. Dysart*, [1916] 1 A. C. 57; *John v. Dodwell*, [1918] A. C. 563; *Kensington & Knightsbridge Electric Lighting Co. v. Notting Hill Electric Lighting Co.* (1918), 87 L. J. K. B. 565.

221. Personal liability of directors—Incorporated society—Loans in excess of prescribed limits—Secretary acting with authority of directors.]—

A building society was authorised to receive money on deposit up to a certain limit. The course of business authorised by the directors was, that the secretary gave a provisional receipt to the depositor, & then prepared a formal receipt, which was signed by two directors & countersigned by himself. The secretary received money on deposit to an amount exceeding the limit of the borrowing powers of the society. He appropriated to his own use a great part of the money deposited, & so managed the books of the society as to keep the directors in ignorance that the limit had been exceeded. In an action by a depositor against the directors to recover the amount of a deposit made after the limit of the borrowing powers had been reached:—*Held*: every director who was a member of the board when the deposit was received was personally liable for the amount so received.—*CROSS v. FISHER*, [1892] 1 Q. B. 467; 61 L. J. Q. B. 609; 66 L. T. 448; 56 J. P. 372; 40 W. R. 265; 8 T. L. R. 220; 36 Sol. Jo. 198, C. A.

222. ——— Amount not exceeding alternative limits.]—By the rules of a terminating society the amount to be received upon deposit or loan was limited to an amount not exceeding two-thirds of the amount for the time being secured to the society by mtges. from its members. In an action against the directors under 1874 Act, s. 43:—*Held*: they were personally liable in respect of sums received by the society on deposit or loan in excess of the limit prescribed by the rules, notwithstanding the amount received on deposit or loan did not exceed the other of the alternative limits prescribed by s. 15.—*LOOKER v. WRIGLEY*, *LEIGH v. WRIGLEY* (1882), 9 Q. B. D. 397; 46 J. P. 758, D. C.

223. Unincorporated society—Joint & several promissory notes of members of committee—Liability of signatories & persons authorising.]—The members of the committee of a building society borrowed money from their bankers for purposes not strictly within their borrowing powers, & gave a promissory note for the amount borrowed. Soon after the transaction the society suspended business. On bill filed by one of the members of the committee who signed the note, against the bankers & other members of the society to ascertain his liability:—*Held*: only the persons who signed the note, & the persons who authorised the signatures, were jointly & severally liable to make good the amount.—*MOYE v. SPARROW* (1870), 22 L. T. 154; 18 W. R. 400.

Annotations:—*Mentd.* *Re* Victoria Permanent Benefit Bldg., Investment, & Freehold Land Soc., *Hill's Case*, *Jones' Case* (1870), L. R. 9 Eq. 605; *Re* Durham County Permanent Investment Land & Bldg. Soc., *Davis' Case*, *Wilson's Case* (1871), L. R. 12 Eq. 516; *Portsea Island Bldg. Soc. v. Barclay*, [1894] 3 Ch. 86.

224. ——— Certificate given by directors—Warranty of authority.]—Pltf. lent money to a building society, established under 1836 Act, &

received the following certificate: "I. P. Benefit Building Society. This is to certify that R. has this day deposited £70 with the I. P. Benefit Building Society, for a period of three months certain, upon which interest at the rate of 5 per cent. *per annum* will be allowed." The certificate was signed, "J. W., C. L., directors." Pltf. afterwards discovered that the rules of the society did not empower it to borrow money, & sued J. W. & C. L.:—*Held*: defts. were personally liable, as the certificate amounted to a warranty on their part that the society had power to borrow money.—*RICHARDSON v. WILLIAMSON* (1871), L. R. 6 Q. B. 276; 40 L. J. Q. B. 145; 35 J. P. 728.

Annotations:—*Consd.* *Beattie v. Ebury* (1872), 7 Ch. App. 777. *Refd.* *Weeks v. Probert* (1873), L. R. 8 C. P. 427; *McCullin v. Gilpin* (1880), 5 Q. B. D. 390; *Chapleo v. Brunswick Bldg. Soc.* (1881), 6 Q. B. D. 696; *Atkins v. Wardle* (1889), 58 L. J. Q. B. 377.

225. ——— Misappropriation by treasurer of ultra vires loan.]—By the certified rules of an unincorporated building society the directors were empowered to borrow money up to a prescribed limit. The course of business was for the treasurer of the society to receive the loan & give the lender a receipt, together with an undertaking on behalf of the directors to give a promissory note of the directors for the amount, & the notes were subsequently exchanged for the receipt. Pltfs. advanced £100 to the society, paying the amount to the treasurer, & receiving from him a receipt & undertaking. That sum was never paid over to the society, but was appropriated by the treasurer to his own use, & no promissory note for the amount was procured for pltfs. At the time of the loan the society had borrowed in excess of the limit allowed by the rules. Pltfs. having sued the society & the directors to recover the amount:—*Held*: the individual directors were personally liable to pltfs. for the amount of the loan, but the society was not so liable.—*CHAPLEO v. BRUNSWICK BUILDING SOCIETY* (1881), 6 Q. B. D. 696; 50 L. J. Q. B. 372; 44 L. T. 449; 29 W. R. 529, C. A.

Annotations:—*Folld.* *Arnold v. Armitage* (1885), 1 T. L. R. 670; *Cross v. Fisher* (1891), 65 L. T. 114. *Refd.* *Firbank v. Humphreys* (1886), 2 T. L. R. 332; *Moss S.S. Co. v. Whinney*, [1912] A. C. 254; *Sun Bldg. Soc. v. Western Suburban & Harrow Rd. Bldg. Soc.*, [1920] 2 Ch. 144. *Mentd.* *Blackburn Bldg. Soc. v. Cunliffe, Brooks* (1882), 22 Ch. D. 64, n.; *Re Companies Acts, Ex p. Watson* (1888), 21 Q. B. D. 301; *Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants*, [1901] A. C. 426.

226. ——— Money in fact lent to society.]—*HEATH v. KIDSGROVE PERMANENT BUILDING SOCIETY*, No. 217, *ante*.

227. Right to recover money paid in discharge of ultra vires loan—Overdraft by directors—Money paid in mistake of law—Ratification by members.]—The bankers of an unincorporated benefit building society which had no power to borrow money, allowed the society to overdraw its account to a large extent, & the directors of the society signed a memorandum giving to the bankers a lien upon all the society's deeds, to secure all money which from time to time might be owing by the society

221 i. Personal liability of directors—Loans in excess of prescribed limits—Credit given to society.]—One of the rules of a building society provided that the directors should have power to borrow any sum for the purposes of the society not exceeding two-thirds of the amount secured to the society by mtges. from its members. The directors at a time when such limit had been exceeded *bona fide* accepted a deposit from a third person:—*Held*: there were no damages for which the directors in the absence of fraud, could be held liable, inasmuch as the depositor gave credit to the society, & his loss

was due to inability of the society to pay, & not to the fact that there was no authority to borrow.—*LANGFORD v. MOORE* (1900), 17 S. C. 1.—S. AF.

d. Personal liability of members.]—Persons dealing with a building society must make themselves acquainted with its rules, & where, under such rules, the directors have power to borrow money not exceeding a certain limit, the members are not bound, in case the limit is exceeded, to pay such excess except to the extent to which the society benefited by the excessive borrowing.—*Re CAPE OF GOOD HOPE*

PERMANENT BUILDING SOCIETY (1898), 15 S. C. 323; 8 C. T. R. 360.—S. AF.

e. What constitutes unauthorised borrowing—Acceptance of deposit after limit exceeded.]—The directors of a society at a time when the amount they were empowered by the rules to borrow had been exceeded *bona fide* accepted a deposit from a third person:—*Held*: the acceptance of the deposit at a time when the limit had been exceeded was an unauthorised borrowing.—*LANGFORD v. MOORE* (1900), 17 S. C. 1; 9 C. T. R. 405.—S. AF.

Sect. 2.—Exercise of borrowing powers: Sub-sect. 2. Parts IX. & X. Sect. 1.]

to the bankers on the account. Annual balance sheets, which showed the amount due to the bankers, were sent to all the members of the society, & adopted at the annual meetings. The society was afterwards ordered to be wound up, & it having been decided that the overdraft was *ultra vires*, as the rules did not give any borrowing powers, the official liquidators commenced an action against the bankers to recover all money which had been paid to the bankers by the society, & applied by them in discharge of the advance to the society:—*Held*: (1) the acts of the directors, being unauthorised, could not be considered as acts of the society, & were not binding on it, & pl'tfs. were not prevented from recovering the money, though the directors acted under a mistake of law; (2) the acts of the directors had not been ratified by the fact that no member of the society

had raised any question on the balance sheet; (3) the bankers must be allowed to stand in the place of the withdrawing members who had been paid with the money advanced, who, if they had not been so paid off, would be entitled to priority to the continuing members; (4) the bankers were entitled to a lien on any mtge. securities taken by the society for advances made out of the money advanced by the bankers, & they were entitled to such securities according to their order of priority, & they ought not to be postponed to other securities granted to the society in respect of advances made out of its other funds.—**BLACKBURN & DISTRICT BENEFIT BUILDING SOCIETY v. CUNLIFFE, BROOKS & Co.** (1885), 29 Ch. D. 902; 54 L. J. Ch. 1091; 53 L. T. 741; 1 T. L. R. 504, C. A.

Annotations:—**Folld.** *Re Companies Acts, Ex p. Watson* (1888), 21 Q. B. D. 301. **Consd.** *Neath Bldg. Soc. v. Luce* (1889), 43 Ch. D. 158; *Re Wroxham, Mold & Connah's Quay Ry.*, [1899] 1 Ch. 440. **Overd.** *Sinclair v. Brougham*, [1914] A. C. 398. **Refd.** *Redman v. Rymer* (1880), 60 L. T. 385.

Part IX.—Investment or Other Application of Surplus Funds.

See Friendly Societies Act, 1829 (c. 56), ss. 13, 31; Friendly Societies Act, 1834 (c. 40), s. 9; 1836 Act, s. 4; 1874 Act, s. 25; 1894 Act, ss. 16 (1) (b), 17.

228. Incorporated society—Funds invested in name of trustees under direction of board—Not trust funds subject to Trust Investment Act, 1889 (c. 32).]—Funds of a benefit building society invested in the names of trustees for the society under the direction of the board are not trust funds subject to the powers conferred by the above Act.—*Re NATIONAL PERMANENT MUTUAL BENEFIT BUILDING SOCIETY* (1889), 43 Ch. D. 431; 59 L. J. Ch. 403; 62 L. T. 596; 38 W. R. 475; *sub nom.* *MANCHESTER ROYAL INFIRMARY, DISPENSARY & LUNATIC HOSPITAL v. A.-G.*, *Re NATIONAL PERMANENT MUTUAL BENEFIT BUILDING SOCIETY*, 6 T. L. R. 129.

229. — Power to invest in India 3 per cent. stock—"Interest guaranteed by authority of Parliament."]—On a petition in the purchase of the above stock, the interest on which was charged upon the revenues of India by East India Loan Act, 1873 (c. 32), s. 11:—*Held*: the stock did not come within the authority given by 1874 Act, s. 25, as interest which was charged by an Act of Parliament primarily on a particular fund was not "guaranteed by authority of Parliament" within s. 25.—*Re NATIONAL PERMANENT MUTUAL BENEFIT BUILDING SOCIETY*, [1890] W. N. 117.

230. — Sale of investments to—Duty of seller to inquire into sufficiency of funds.]—1874 Act, s. 25, which empowers a society, in accordance with its rules, to invest in certain securities any portion of its funds "not immediately required for its purposes," imposes no obligation on persons who sell investments to a building society to see that the society is possessed of such funds. The object of the sect. is to limit the range of investments which

the society may purchase, & not to place any other limit on its power to invest; & a contract entered into by the society for the purchase of authorised investments is *intra vires* the society, although it had not sufficient surplus funds to pay for the investments whether at the date of entering into the contract or afterwards. *Qu.*: whether the ct. could make a decree against the society for specific performance in such a case.—**SUN BUILDING SOCIETY v. WESTERN SUBURBAN & HARROW ROAD BUILDING SOCIETY**, [1920] 2 Ch. 144; 89 L. J. Ch. 492; 123 L. T. 423; 36 T. L. R. 536; 64 Sol. Jo. 549.

231. Unincorporated society—Power to lend money on mortgage to members.]—A benefit building society established under 1836 Act is not precluded from lending money on mtge. to its own members.—**CUTBILL v. KINGDOM** (1847), 1 Exch. 494; 17 L. J. Ex. 177; 10 L. T. O. S. 114; 154 E. R. 210.

Annotations:—**Folld.** *Morrison v. Glover* (1849), 4 Exch. 430. **Refd.** *Grimes v. Harrison* (1859), 26 Beav. 435. **Mentd.** *Ex p. Payne* (1849), 18 L. J. Q. B. 197; *Burbidge v. Cotton* (1851), 5 De G. & Sm. 17; *Fleming v. Self* (1854), 3 De G. M. & G. 997; *R. v. Trafford* (1854), 4 E. & B. 122; *Farmer v. Smith* (1859), 4 H. & N. 196; *Wright v. Deley* (1866), 4 H. & C. 209; *Mulkern v. Lord* (1879), 4 App. Cas. 182.

232. — — —.]—A building society may lend money to one of its own members on mtge., & the security will, under Friendly Societies Act, 1829 (c. 56), s. 21, vest in the treasurer or trustees for the time being.—**MORRISON v. GLOVER** (1849), 4 Exch. 430; 19 L. J. Ex. 20; 14 L. T. O. S. 204; 14 J. P. 84; 154 E. R. 1281.

Annotations:—**Mentd.** *Doe d. Morrison v. Glover* (1850), 15 Q. B. 103; *Hankin v. Bennett* (1852), 21 L. J. Ex. 326; *Reeves v. White* (1852), 17 Q. B. 995; *Fleming v. Self* (1854), Kay, 518; *R. v. Trafford* (1854), 1 Jur. N. S. 252; *Prentice v. London* (1875), L. R. 10 C. P. 679; *Huckle v. Wilson* (1877), 26 W. R. 98; *Mulkern v. Lord* (1879), 4 App. Cas. 182; *Hack v. London Provident Bldg. Soc.* (1883), 23 Ch. D. 103; *Municipal Bldg. Soc. v. Kent* (1884),

PART IX.

1. Incorporated society—Power to buy, sell & mortgage—Freehold & leasehold estates.]—Building societies have, under 1874 Act, all the ordinary powers incident to ownership, & may buy, sell & mtge. freehold & leasehold estates.—*Re PREMIER PERMANENT BUILDING SOCIETY* (1890), 16 V. L. R. 643.—**AUS.**

to take money on deposit—To lend—To act as agent.]—The powers of an incorporated society included the right to take money on deposit, which gave the society one of the characteristics of a banking business; the right to lend money on security, & the right to do agency business. The directors in order to have money available at the times it would be required, had a system of

depositing moneys of the society at interest with similar societies, such deposits being repayable at dates which would suit the above objects, all within 12 months:—*Held*: such deposits would be *intra vires* unless negatived expressly by the memorandum of association.—**AUSTRALIAN MUTUAL INVESTMENT & BUILDING SOCIETY v. WELLS** (1897), 18 N. S. W. Eq. 61.—**AUS.**

9 App. Cas. 260; *Western Suburban & Notting Hill Permanent Benefit Bldg. Soc. v. Martin* (1886), 17 Q. B. D. 66; *Municipal Permanent Investment Bldg. Soc. v. Richards* (1888), 39 Ch. D. 372; *Winter v. Wilkinson*, [1915] 1 Ch. 317.

233. — Power to purchase land.]—A benefit building society is not precluded from investing its funds in the purchase of a real estate.—*MULLOCK v. JENKINS* (1851), 14 Beav. 628; 21 L. J. Ch. 65; 18 L. T. O. S. 203; 51 E. R. 426.

*Annotations:—**Reid. Grimes v. Harrison* (1859), 26 Beav. 435. *Mentd. Hughes v. Layton* (1864), 10 Jur. N. S. 513; *Laing v. Reed* (1869), 39 L. J. Ch. 3, n.

234. — Discretion of directors.]—A rule of a benefit building society directed that unemployed money should be invested "in such manner & upon such legal security" as the board of directors should deem necessary:—*Held*: it might be invested in the purchase of freeholds.—*GRIMES v. HARRISON* (1859), 26 Beav. 435; 28 L. J. Ch. 823; 33 L. T. O. S. 115; 23 J. P. 421; 5 Jur. N. S. 528; 53 E. R. 966; *subsequent proceedings*, 27 Beav. 198.

*Annotations:—**Reid. Re Kent Benefit Bldg. Soc.* (1861), 1 Drew. & Sm. 417; *R. v. D'Eyncourt* (1864), 9 L. T. 712. *Mentd. Laing v. Reed* (1869), 39 L. J. Ch. 3, n.; *Thompson v. Planet Benefit Bldg. Soc.* (1873), L. R. 15 Eq. 333.

235. — Borrowing money for purchase.]—The committee of a benefit building society cannot authorise the borrowing of money to buy land with, & it is not certain that they can purchase land.—*Re KENT BENEFIT BUILDING SOCIETY* (1861), 1 Drew. & Sm. 417; 30 L. J. Ch. 785; 4 L. T. 610; 25 J. P. 805; 7 Jur. N. S. 1045; 9 W. R. 686; 62 E. R. 439.

236. — Effect of unauthorised investment—Right to follow.]—The directors of a building society deposited money, in a manner unauthorised by their rules, with a finance co., the manager of which was also manager of the building society. Afterwards the deposit was called in, & the directors of the finance co. gave a cheque for the amount to

their manager, to be paid by him to the building society. He appropriated it to his own use. A bill was then filed by the trustees of the building society to recover the money from the finance co.:

—*Held*: (1) the manager held the money as agent for the finance co. until he should pay it to some person competent to give a receipt on behalf of the building society, & as he never paid it over, the money must be taken to be still in the hands of the finance co., which was liable to repay it to the building society; (2) as it was trust money a suit to recover it was maintainable, & the finance co. must repay the money, with interest.—*HARDY v. METROPOLITAN LAND & FINANCE Co.* (1872), 7 Ch. App. 427; 41 L. J. Ch. 257; 26 L. T. 407; 20 W. R. 425, L.JJ.

*Annotation:—**Reid. Re Coltman, Coltman v. Coltman* (1881), 19 Ch. D. 64.

237. — Illegality of society—Right to enforce subscriptions due—Remedy of members.]—A society was registered under 1836 Act as a benefit building society, but was converted into & called a freehold land society, & a plot of land bought & allotted among its members. The land was paid for partly by members' subscriptions & partly by borrowed money, for which the society was liable. The society did not appear to have been conducted at any time in the usual way benefit building societies were:—*Held*: though the funds had been misapplied, the society was not illegal, & that subscriptions due under the rules could be enforced from members. *Seem*: the remedy of members not assenting to the conduct of affairs by the society was in a ct. of equity for a breach of trust or injunction against future misapplication of the funds.—*R. v. D'EYNCOURT* (1864), 4 B. & S. 820; 9 L. T. 712; 28 J. P. 116; 122 E. R. 667; *sub nom. HUGHES v. D'EYNCOURT*, 3 New Rep. 420; 12 W. R. 408; *sub nom. HUGHES v. LAYTON*, 33 L. J. M. C. 89; 10 Jur. N. S. 513.

Part X.—Disputes.

See, generally, ARBITRATION, Vol. II., pp. 350 et seq., 634.

SECT. 1.—PROVISION OF SPECIAL TRIBUNALS.

See Friendly Societies Act, 1829 (c. 56), ss. 27, 28; Friendly Societies Act, 1834 (c. 40), s. 8; 1836 Act, s. 4; 1874 Act, ss. 16 (9), 34, 35; 1884 Act, s. 2.

238. In rules—Ouster of jurisdiction of court—Unincorporated society.]—By the rules of a building society, duly enrolled under 1836 Act, it was provided that all matters in dispute should be referred to two justices of the peace, in pursuance of Friendly Societies Act, 1829 (c. 56), s. 27. On a motion for a *mandamus* to a county ct. judge to proceed & hear a plaint levied by a member against an officer of the society:—*Held*: the jurisdiction of the county ct. did not extend to any disputes arising between the members of any such societies.—*Ex p. PAYNE* (1849), 5 Dow. & L. 679; 18 L. J. Q. B. 197; 13 Jur. 634.

*Annotations:—**Consd. Reeves v. White* (1852), 17 Q. B. 995; *Huckle v. Wilson* (1877), 2 C. P. D. 410. *Reid. Armitage v. Walker* (1855), 2 K. & J. 211; *Callaghan v. Dolwin* (1869), L. R. 4 C. P. 288; *Davies v. Second Chatham Permanent Bldg. Soc., Mackenzie v. Everton & West Derby Permanent Benefit Bldg. Soc.* (1889), 61 L. T. 680.

239. —]—The Ct. of Ch. is not the proper forum for the litigation of disputes

between the members of a building society.—*TROTT v. HUGHES* (1850), 16 L. T. O. S. 260.

*Annotations:—**Consd. Mullock v. Jenkins* (1851), 14 Beav. 628; *Thompson v. Planet Benefit Bldg. Soc.* (1873), L. R. 15 Eq. 333.

240. —]—The summary remedy provided by Friendly Societies Act, 1829 (c. 56), & 1836 Act, s. 4, for the settlement of disputes by arbn. is exclusive & ousts the superior cts. of jurisdiction.—*REEVES v. WHITE* (1852), 17 Q. B. 995; 21 L. J. Q. B. 169; 18 L. T. O. S. 271; 16 J. P. 118; 16 Jur. 637; 117 E. R. 1562.

*Annotations:—**Consd. Davies v. Second Chatham Permanent Bldg. Soc., Mackenzie v. Everton & West Derby Permanent Benefit Bldg. Soc.* (1889), 61 L. T. 680. *Reid. Callaghan v. Dolwin* (1869), L. R. 4 C. P. 288; *Huckle v. Wilson* (1877), 2 C. P. D. 410.

241. —]—In any proceedings at law or in equity respecting a benefit building society, the primary consideration for the ct. is that the Legislature has provided a cheap & summary mode of settling any question concerning their affairs by arbn., with the intention carefully to provide that these societies should not be subject to expensive litigation.—*ARMITAGE v. WALKER* (1855), 2 K. & J. 211; 26 L. T. O. S. 182; 20 J. P. 53; 2 Jur. N. S. 13; 69 E. R. 756.

*Annotations:—**Consd. Callaghan v. Dolwin* (1869), L. R. 4 C. P. 288; *Davies v. Second Chatham Permanent Bldg. Soc., Mackenzie v. Everton & West Derby Permanent Benefit Bldg. Soc.* (1889), 61 L. T. 680. *Mentd. Walker v. General Mutual Bldg. Soc.* (1887), 36 Ch. D. 777.

Sect. 1.—Provision of special tribunals. Sects. 2 & 3. Sub-sect. 1.]

242. ————.]—Friendly Societies Act, 1829 (c. 56), s. 27, incorporated in 1836 Act, providing for the reference to arbitrators or justices of the peace of internal disputes between benefit building societies & their members is not merely permissive, but is imperative, & ousts the jurisdiction of the ct.—*THOMPSON v. PLANET BENEFIT BUILDING SOCIETY* (1873), L. R. 15 Eq. 333; 42 L. J. Ch. 364; 28 L. T. 549; 21 W. R. 474.

Annotations:—Consd. Huckle v. Wilson (1877), 2 C. P. D. 410. *Mentd. Johnson v. Altrincham Permanent Benefit Bldg. Soc.* (1883), 49 L. T. 568.

————— **What are “disputes.”**—See Sect. 3, sub-sect. 2, *post*.

243. ———— **Incorporated Society.**—When the rules of a building society established under 1874 Act, state, pursuant to s. 16 (9) of the Act, that disputes between the society & its members shall be settled by arbn., the jurisdiction of the ct. to entertain actions relating to such disputes is ousted thereby.—*WRIGHT v. MONARCH INVESTMENT BUILDING SOCIETY* (1877), 5 Ch. D. 726; 46 L. J. Ch. 649.

Annotations:—Consd. Lord v. Mulkern (1878), 47 L. J. Ch. 228. *Folld. Hack v. London Provident Bldg. Soc.* (1883), 23 Ch. D. 103. *Consd. Municipal Bldg. Soc. v. Kent* (1884), 9 App. Cas. 260; *Norton v. Counties Conservative Permanent Benefit Bldg. Soc.*, [1895] 1 Q. B. 246. *Refd. Western Suburban & Notting Hill Permanent Benefit Bldg. Soc. v. Martin* (1886), 17 Q. B. D. 66; *Re Knight & Tabernacle Permanent Bldg. Soc.*, [1891] 2 Q. B. 63.

244. ————.]—The rules of a building society provided that disputes between the society & members should be settled by arbn., that there should be five arbitrators, & that, in the case of any dispute, three arbitrators should be chosen by lot:—*Held*: the jurisdiction of the ct. was ousted.—*NORTON v. COUNTIES CONSERVATIVE PERMANENT BENEFIT BUILDING SOCIETY*, [1895] 1 Q. B. 246; 64 L. J. Q. B. 214; 71 L. T. 790; 59 J. P. 149; 43 W. R. 178; 11 T. L. R. 92; 39 Sol. Jo. 95; 14 R. 59, C. A.

Annotation:—Refd. Botten v. City & Suburban Permanent Benefit Bldg. Soc. (1895), 72 L. T. 375.

————— **What are “disputes.”**—See Sect. 3, sub-sect. 1, *post*.

SECT. 2.—PROCEDURE.

See Friendly Societies Act, 1829 (c. 56), s. 27; Friendly Societies Act, 1834 (c. 40), s. 7; 1836 Act, s. 4; 1874 Act, ss. 34, 36; 1894 Act, s. 20.

245. Neglect of directors to determine dispute—Decision condition precedent to arbitration—Mandamus to directors.—The rules of a benefit building society provided that, in the event of a dispute arising between a member & the board, the question must be referred to an arbitrator, but it was a condition precedent to arbn. that the directors should have decided the question in dispute one way or the other, the right to demand

arbn. arising only in cases “in which the decision of the directors should be deemed unsatisfactory.” A member of the society having died, his exor. gave notice to the society to pay over a certain sum, but the directors did nothing in the matter at all, & the exor. moved for a rule *nisi* for a *mandamus* to compel the directors to hear & determine the matter:—*Held*: the rule should be granted.—*Ex p. YOUNG* (1896), 40 Sol. Jo. 338.

246. Appointment of arbitrators—After action commenced—Stay of proceedings.—The rules of a building society provided that every dispute between the society & any member, on which the decision of the board should not be deemed satisfactory, should be settled by a reference to arbn., pursuant to 1874 Act, & that five arbitrators should be elected by the members at a general meeting, & in case of dispute the names of the arbitrators should be written on pieces of paper, & placed in a box, & the three whose names were first drawn out by the complaining party should be the arbitrators to decide the matter in dispute. A dispute arose between an investing member & the society as to the amount which he was entitled to receive on withdrawal, & ultimately he brought an action against the society to enforce his claim. Up to that time no arbitrators had been elected under the rules. After the service of the writ a general meeting of the members was held, & five persons were elected as arbitrators. Upon a summons by the society to stay further proceedings in the action, & that the dispute might be referred to arbn. in pursuance of the rules:—*Held*: the rule contemplated the appointment of a standing body of arbitrators, out of whom three were to be chosen by lot to decide any particular dispute, & the society could not, after a litigation had commenced to which they were parties, select the tribunal to decide it, & the summons must be dismissed.—*CHRISTIE v. NORTHERN COUNTIES PERMANENT BENEFIT BUILDING SOCIETY* (1889), 43 Ch. D. 62; 59 L. J. Ch. 210; 61 L. T. 796; 38 W. R. 280.

Annotation:—Consd. Norton v. Counties Conservative Permanent Benefit Bldg. Soc., [1895] 1 Q. B. 246.

247. ————.]—By one of the rules of a benefit building society it was provided that disputes should be settled by reference to arbn., that five arbitrators should be elected by the board of directors, & that in each case of dispute three of such arbitrators, chosen by lot, should decide the matters in difference, & that vacancies in the office of arbitrators should be filled up by the board of directors. A dispute having arisen between a member who had given notice of withdrawal & the society, the member brought an action against the society for the amount which he alleged to be due to him. The writ was issued on Sept. 18, 1894. On Oct. 24, the society took out a summons to stay all proceedings in the action, & to refer the matters in dispute to arbn. At the date of the

PART X. SECT. 1.

243 i. In rules—Ouster of jurisdiction of court—Incorporated society—Effect of failure to object to jurisdiction.—The rules of a building society, incorporated under 1874 Act, provided that all matters in dispute between it & any member should be referred to the Registrar of Building Societies. A member of the society having fallen into arrear in repayment by instalments of an advance made by the society, the society, in terms of a rule providing for such a case, raised an action for the member's removal from the property disposed to the society in security of the loan. Defender stated no plea

to the effect that the jurisdiction of the ct. was excluded, & on the merits the Lord Ordinary decerned for removal. Defender reclaimed:—*Held*: having taken a judgment on the merits without objection to the jurisdiction defender could not thereafter be allowed to maintain that the jurisdiction was excluded.—*DUNDEE PROVIDENT PROPERTY INVESTMENT CO. v. MACDONALD* (1884), 21 Sc. L. R. 383; 11 R. (Ct. of Sess.) 537.—*SCOT*.

PART X. SECT. 2.

h. Appointment of arbitrator—Failure to elect—Action sustainable.—By the rules of a society incorporated

under 1874 Act it was provided that disputes between the society & any of its members should be decided by arbitrators, but there was no provision as to the manner in which the arbitrators should be elected, & no arbitrators were elected at the first general meeting of the society. A dispute having occurred between the society & one of its members, the society brought an action against the member in the Sheriff Ct.:—*Held*: the Sheriff had jurisdiction to entertain the action at common law, & his decision was subject to appeal.—*GALASHIELS PROVIDENT BUILDING SOCIETY v. NEWLANDS* (1893), 30 Sc. L. R. 730.—*SCOT*.

issue of the writ there were only three arbitrators, but on Nov. 29 the directors appointed two additional arbitrators making the number up to five, as required by the rules:—*Held*: all proceedings in the action should be stayed, & the matters in dispute should be referred to arbn. pursuant to the rules of the society.—*NORTON v. COUNTIES CONSERVATIVE PERMANENT BENEFIT BUILDING SOCIETY*, [1895] 1 Q. B. 246; 64 L. J. Q. B. 214; 71 L. T. 790; 59 J. P. 149; 43 W. R. 178; 11 T. L. R. 92; 39 Sol. Jo. 95; 14 R. 59, C. A.

Annotation:—*Reid*. *Botten v. City & Suburban Permanent Benefit Bldg. Soc.* (1895), 72 L. T. 375.

—*Compare* No. 268, *post*.

248. — Mandamus to directors.—The rules of a building society provided that disputes between the society & the members should be settled by arbn., that five arbitrators should be elected by the board of directors, & that in each case of dispute the matters in difference should be decided by three of such arbitrators, to be selected by lot:—*Held*: if the society neglected to appoint arbitrators in accordance with their rules, the proper course for the member was to apply for a *mandamus* to compel them to do so.—*NORTON v. COUNTIES CONSERVATIVE PERMANENT BENEFIT BUILDING SOCIETY*, [1895] 1 Q. B. 246; 64 L. J. Q. B. 214; 71 L. T. 790; 59 J. P. 149; 43 W. R. 178; 11 T. L. R. 92; 39 Sol. Jo. 95; 14 R. 59, C. A.

Annotation:—*Mentd*. *Botten v. City & Suburban Permanent Benefit Bldg. Soc.* (1895), 72 L. T. 375.

249. — Directors never asked to appoint.—Where the directors of a benefit building society had never been asked to appoint an arbitrator, & consequently had not refused to do so:—*Held*: the ct. would not grant a *mandamus* to compel the directors to appoint an arbitrator.—*Ex p. YOUNG* (1896), 40 Sol. Jo. 338.

250. Notice of intention to proceed—Service of.—A rule of a benefit building society provided that all summonses, circulars & notices should be deemed duly served by putting same into the post, addressed to the members according to the last entry on the register given by them for that purpose:—*Held*: the rule only related to the ordinary business of the society, & did not apply to the case of notices of appointments by arbitrators for the purpose of proceeding with a reference.—*HILTON v. HILL* (1863), 9 L. T. 383; 27 J. P. 760.

251. Statement of case by arbitrators—Power of court to order—Award made after rule obtained—But before notice of rule.—The power given to the ct. by Arbn. Act, 1889 (c. 49), s. 19, to order an arbitrator to state in the form of a special case for the opinion of the ct., any question of law arising in the course of the reference, applies to arbn. under 1874 Act.

In an arbn. under 1874 Act one of the parties to the arbn. obtained at chambers an order *nisi* calling upon the arbitrators to show cause why they should not be required to state a case for the opinion of the ct. Later on the same day, but without having had notice of the order *nisi*, the arbitrators made & signed their award:—*Held*: the jurisdiction of the ct. was not ousted, & the order *nisi* was rightly made absolute.—*TABERNACLE PERMANENT BUILDING SOCIETY v. KNIGHT*, [1892] A. C. 298; 62 L. J. Q. B. 50; 67 L. T. 483; 56 J. P. 709; 41 W. R. 207; 8 T. L. R. 616; 36 Sol. Jo. 538, H. L.; *affg.* S. C. *sub nom.* *Re KNIGHT & TABERNACLE PERMANENT BUILDING SOCIETY*, [1891] 2 Q. B. 63, C. A.; *subsequent proceedings*, [1892] 2 Q. B. 613, C. A.

Annotations:—*Consd.* *Re Spillers & Baker*, [1897] 1 Q. B. 312; *Re Montgomery, Jones, & Liebenthal* (1898), 78

L. T. 406. *Reid*. *Re Gough & Liverpool Corpn.* (1892), 36 Sol. Jo. 270; *Barnard v. Tomson*, [1894] 1 Ch. 374; *Re Palmer & Hosken*, [1898] 1 Q. B. 131; *Lobitos Oilfields v. Admiralty Comrs.* (1917), 86 L. J. K. B. 1444. *Mentd.* *Re Kent County Council & Sandgate L. B.* (1895), 72 L. T. 725.

252. Enforcement of award—Inquiry into validity on application to enforce—No imputation of corruption or misconduct.—Where there is no imputation of corruption or misconduct against the arbitrators appointed under 1836 Act, a ct. of equity is bound, by the spirit & letter of the Act, in no way to disturb an award made under it, in the case of withdrawing members, or to inquire into the validity of such award.

Where the rules of a benefit building society authorised members to withdraw their shares, & provided that such members should be entitled to receive the net amount of their subscriptions paid with interest, & also a share of the profits, & a principal sum & interest only were awarded:—*Held*: the ct. would not calculate whether the amounts were correct according to the rules, or whether the principal sum included profits or not.—*ARMITAGE v. WALKER* (1855), 2 K. & J. 211; 26 L. T. O. S. 182; 20 J. P. 53; 2 Jur. N. S. 13; 69 E. R. 756.

Annotations:—*Consd.* *Callaghan v. Dolwin* (1869), L. R. 4 C. P. 288; *Davies v. Second Chatham Permanent Benefit Bldg. Soc.*, *Mackenzie v. Everton & West Derby Permanent Benefit Bldg. Soc.* (1889), 61 L. T. 680. *Mentd.* *Walker v. General Mutual Bldg. Soc.* (1887), 36 Ch. D. 777.

253. — Jurisdiction of justices.—A benefit building society was, in 1852, duly registered under 1836 Act, as a benefit society, but in 1855 the society bought freehold land, & allotted it among the members, such land being paid for partly by members' subscriptions, & partly by borrowed money. In 1855, L., one of the members, who agreed to take an allotment of land, & to pay as usual his subscriptions, ceased to pay his subscriptions, & the matter was afterwards referred to arbitrators, who made an award that L. owed £69 to the society. Application having been made to a police magistrate to enforce payment:—*Held*: however irregular & incompetent it might have been in the society to purchase land & convert itself into a freehold land society, yet the society was not thereby dissolved, & all the magistrate had to do was to see whether the society was enrolled, & the award duly made according to the rules, leaving any member to take proceedings in equity if he thought fit.—*R. v. D'EYNCOURT* (1864), 4 B. & S. 820; 9 L. T. 712; 28 J. P. 116; 122 E. R. 667; *sub nom.* *HUGHES v. D'EYNCOURT*, 3 New Rep. 420; 12 W. R. 408; *sub nom.* *HUGHES v. LAYTON*, 33 L. J. M. C. 89; 10 Jur. N. S. 513.

254. — Bad in part — Whether severable.—Where an award directed a sum to be paid for costs, which the arbitrator had no power to do, except by a rule made after the member had given notice to withdraw:—*Held*: that part of the award was bad, but, being separable, it did not vitiate the rest.—*ARMITAGE v. WALKER* (1855), 2 K. & J. 211; 26 L. T. O. S. 182; 20 J. P. 53; 2 Jur. N. S. 13; 69 E. R. 756.

Annotations:—*Mentd.* *Callaghan v. Dolwin* (1869), L. R. 4 C. P. 288; *Walker v. General Mutual Bldg. Soc.* (1887), 36 Ch. D. 777; *Davies v. Second Chatham Permanent Benefit Bldg. Soc.*, *Mackenzie v. Everton & West Derby Permanent Benefit Bldg. Soc.* (1889), 61 L. T. 680.

SECT. 3.—WHAT DISPUTES MUST BE REFERRED.

SUB-SECT. 1.—INCORPORATED SOCIETIES.

See 1884 Act, s. 2.

Sect. 3.—What disputes must be referred : Sub-sects. 1 & 2.]

255. Dispute between society & advanced member—Relationship of mortgagor & mortgagee—Action for account against society.]—The rules of a building society established under 1874 Act, stated that disputes between the society & its members should be settled by arbn. A borrowing member of the society brought an action against the society for an account of what was due to it under his mtge., alleging that in order to complete a sale of the mortgaged property he had been compelled to pay the sum claimed by the society, without having time to investigate the accounts, of which he disputed the accuracy & impeached various specific items. On motion by defts. for a stay of proceedings:—*Held*: the dispute was one which must be settled by arbn.—**WRIGHT v. MONARCH INVESTMENT BUILDING SOCIETY** (1877), 5 Ch. D. 726; 46 L. J. Ch. 649.

Annotations:—*Expld.* Lord v. Mulkorn (1878), 47 L. J. Ch. 228. *Foll.* Hack v. London Provident Bldg. Soc. (1883), 23 Ch. D. 103. *Consd.* Municipal Bldg. Soc. v. Kent (1884), 9 App. Cas. 260; *Re Knight & Tabernacle Permanent Bldg. Soc.*, [1891] 2 Q. B. 63; *Norton v. Counties Conservative Permanent Benefit Bldg. Soc.*, [1895] 1 Q. B. 246. *Refd.* Western Suburban & Notting Hill Permanent Benefit Bldg. Soc. v. Martin (1886), 17 Q. B. D. 66.

256. ———.]—By the rules of a building society incorporated under 1874 Act, it was provided, pursuant to s. 16 (9), that a reference of every matter in dispute between the society & any member of the society should be referred to the arbn. of the Registrar of Friendly Societies. Pltf., who was an advanced member of the society & had executed a mtge. for securing his subscriptions & fines in respect of the advance, commenced an action against the society for an account in respect of the mtge. transaction:—*Held*: the jurisdiction of the ct. was ousted, & the society was entitled to have the dispute referred to arbn.—**HACK v. LONDON PROVIDENT BUILDING SOCIETY** (1883), 23 Ch. D. 103; 52 L. J. Ch. 541; 48 L. T. 247; 31 W. R. 392, C. A.

Annotations:—*Distd.* French v. Municipal Permanent Bldg. Soc. (1884), 53 L. J. Ch. 743. *Consd.* Municipal Bldg. Soc. v. Kent (1884), 9 App. Cas. 260. *Foll.* Walker v. General Mutual Bldg. Soc. (1887), 36 Ch. D. 777. *Consd.* *Re Knight & Tabernacle Permanent Bldg. Soc.*, [1891] 2 Q. B. 63; *Norton v. Counties Conservative Permanent Benefit Bldg. Soc.*, [1895] 1 Q. B. 246. *Refd.* Western Suburban & Notting Hill Permanent Benefit Bldg. Soc. v. Martin (1886), 17 Q. B. D. 66. *Mentd.* *Re Whiting, Ormond v. De Launay*, [1913] 2 Ch. 1.

257. ———.]—**Action for money due under covenant in mortgage.]**—When the rules of a benefit building society governed by 1874 Act provide for the settlement by arbn. of disputes between the society & any of its members, the High Ct. has no jurisdiction to entertain an action by the society against a member for money due to it under covenants in mtge. deeds executed by the member, as such, to the society.—**MUNICIPAL**

PERMANENT INVESTMENT BUILDING SOCIETY v. KENT (1884), 9 App. Cas. 260; 53 L. J. Ch. 743; 51 L. T. 6; 48 J. P. 532; 32 W. R. 631, H. L.

Annotations:—*Distd.* French v. Municipal Permanent Bldg. Soc. (1884), 53 L. J. Ch. 743. *Consd.* Western Suburban & Notting Hill Permanent Benefit Bldg. Soc. v. Martin (1886), 17 Q. B. D. 609; *Buckle v. Lord*, (1887), 56 L. J. Ch. 437; *Re Royal Liver Friendly Soc.*, (1887), 35 Ch. D. 332. *Foll.* Walker v. General Mutual Bldg. Soc. (1887), 36 Ch. D. 777. *Consd.* Municipal Permanent Investment Bldg. Soc. v. Richards (1888), 39 Ch. D. 372; *Re Knight & Tabernacle Permanent Bldg. Soc.* (1891), 62 L. T. 204; *Norton v. Counties Conservative Permanent Benefit Bldg. Soc.*, [1895] 1 Q. B. 246. *Refd.* *Crosfield v. Manchester Ship Canal Co.*, [1904] 2 Ch. 123.

258. ———.]—**Action to set aside sale of mortgaged property—Collusion & fraud.]**—By the rules of a building society registered under 1874 Act, it was provided that disputes between the society & its members should be settled by arbn. The society sold to a member the property comprised in a mtge. executed to the society by other members:—*Held*: an action by the mtgor. members to set aside the sale upon the ground of collusion & fraud was not a dispute liable to be referred to arbn. within either the society's rules or 1874 Act, s. 34.—**FRENCH v. MUNICIPAL PERMANENT BUILDING SOCIETY** (1884), 53 L. J. Ch. 743; 50 L. T. 567.

259. ———.]—**Action for breach of covenant in mortgage—1884 Act.]**—A rule of a building society which provides that any dispute arising between the society & any member thereof shall be referred to arbn. is no bar to an action by the society in its capacity of mtgee. against one of its members in his capacity of mtgor. for breach of any covenant contained in the mtge.—**WESTERN SUBURBAN & NOTTING HILL PERMANENT BENEFIT BUILDING SOCIETY v. MARTIN** (1886), 17 Q. B. D. 609; 55 L. J. Q. B. 382; 54 L. T. 822; 51 J. P. 36; 34 W. R. 630; 2 T. L. R. 672, C. A.

Annotation:—*Consd.* Municipal Permanent Investment Bldg. Soc. v. Richards (1888), 39 Ch. D. 372.

260. Dispute between society & withdrawing member—Whether member giving notice liable to be treated as member—Construction of rule.]—By one of the rules of a benefit building society formed under 1874 Act, it was provided that a member might by notice in writing withdraw, & should be entitled, "provided there shall be sufficient funds available," to receive within one month after the notice, or earlier if the board should think fit, the subscriptions he had paid on his shares. Another rule provided that the board should have power to determine all matters of dispute between the society & any member or person claiming on account of any member, & that if the party should be dissatisfied with their decision, the matter should be referred to arbn. A member gave notice to withdraw. The society declined to pay his subscriptions at the end of the month, on the ground that they had not sufficient funds in hand;

PART X. SECT. 3, SUB-SECT. 1.

255 i. Dispute between society & borrowing member—Relationship of mortgagor & mortgagee—Ejectment against mortgagee.]—Rules of a building society provided for arbn. in cases of any dispute between it & a member. The society without arbn. brought ejectment against a borrowing member who was a mtgee. in default:—*Held*: to render the rule applicable in bar of the action, it must be shown that there was a dispute between the society & deft. *quâ* member.—**DELANEY v. SANDHURST BENEFIT BUILDING & INVESTMENT SOCIETY** (1879), 5 V. L. R. 189.—**AUS.**

k. Dispute between society &

matured member—Whether liable to be treated as member—Construction of rule.]—A rule of a building society that "any dispute between the society & a member or any person claiming through a member & the directors on any matter shall be referred to arbn." does not apply to the holder of unpaid matured shares, whose "connection with the society" has, under its rules, "ceased & determined" upon maturity of his shares.—**SYME v. UNITED VICTORIA PERMANENT BUILDING SOCIETY** (1904), 29 V. L. R. 671, 917.—**AUS.**

260 i. Dispute between society & withdrawing member—Whether liable to be treated as member—Construction of rule.]—The rules of a building society pro-

vided that "any shareholder or any person claiming by or through any shareholder . . . feeling aggrieved by any decision of the directors or shareholders, of whatever nature such may be, shall appeal to a board of arbitrators":—*Held*: a member who had given notice of withdrawal, but had not received payment of the value of his shares, was still a shareholder in the sense of the rule above quoted; & a plea by the society that the dispute between it & the shareholder, as to whether he could be paid out in ordinary course, was one which fell under the clause of arbn. sustained.—**MITCHELL v. CALEDONIAN PROPERTY INVESTMENT BUILDING SOCIETY** (1886), 23 Sc. L. R. 651.—**SCOT.**

the member contended that they had:—*Held*: though the retired member might be in some sense a creditor, he was still so far a member as to be bound by the rules, & the dispute must be referred to arbn.—*WALKER v. GENERAL MUTUAL BUILDING SOCIETY* (1887), 36 Ch. D. 777; 57 L. T. 574; 52 J. P. 278; 3 T. L. R. 847, C. A.

Annotations:—*Consd.* *Municipal Permanent Investment Bldg. Soc. v. Richards* (1888), 39 Ch. D. 372. *Refd.* *Davies v. Second Chatham Permanent Benefit Bldg. Soc.*, *Mackenzie v. Everton & West Derby Permanent Benefit Bldg. Soc.* (1889), 61 L. T. 680; *Sibun v. Pearce* (1890), 44 Ch. D. 354.

261. — — — — —.]—Pltf. became a member of deft. society in 1883, & in March, 1887, gave a notice of withdrawal to the society. More than a month after the notice had been served the society was incorporated under 1874 Act, certain alterations were made in the rules, & in July, 1887, a certificate of registration of the alteration of the rules was granted. The original rules of the society provided that the rules might be added to, repealed, or altered & amended. The rules of 1887 provided that all disputes between the society & members should be settled by reference to arbn.:—*Held*: (1) pltf., although he had given notice of withdrawal, remained a member of the society, & the dispute between him & the society must be referred to arbn.; (2) where the rule referred to arbn. all disputes arising or that might arise regarding the construction of the rules, such a dispute as the above must be referred.—*DAVIES v. SECOND CHATHAM PERMANENT BENEFIT BUILDING SOCIETY, MACKENZIE v. EVERTON & WEST DERBY PERMANENT BENEFIT BUILDING SOCIETY* (1889), 61 L. T. 680, D. C.

Annotation:—*Mentd.* *Pepe v. City & Suburban Permanent Bldg. Soc.*, [1893] 2 Ch. 311.

262. Dispute between society & officers—Misappropriation of money received to use of society.—A building society brought an action against a former director to recover money of the society improperly received & retained by him:—*Held*: the claim was not made against deft. in his capacity of member, but as being in a fiduciary position, & having received money for which he ought to account, and the question was not one which ought to be referred to arbn., the dispute not being between the society & a member in his capacity of member.—*MUNICIPAL PERMANENT INVESTMENT BUILDING SOCIETY v. RICHARDS* (1888), 39 Ch. D. 372; 58 L. J. Ch. 8; 59 L. T. 883; 37 W. R. 181, C. A.

Annotation:—*Mentd.* *Winter v. Wilkinson*, [1915] 1 Ch. 317.

SUB-SECT. 2.—UNINCORPORATED SOCIETIES.

263. Dispute between society & shareholder—Claim for subscriptions & fines.—A rule of a benefit building society provided that a committee should determine all disputes which should arise respecting the construction of the rules of the society, or any of the clauses, matters, or things therein contained, & also of any additions, alterations, or amendments which should or might thereafter arise between the trustees, officers, & other members of the society:—*Held*: the trustees might, notwithstanding, bring an action against a member for the amount of his subscriptions & fines.—*OUTBILL v. KINGDOM* (1847), 1 Exch. 494; 17 L. J. Ex. 177; 10 L. T. O. S. 114; 154 E. R. 210.

Annotations:—*Consd.* *Morrison v. Glover* (1849), 4 Exch. 430; *Ex p. Payne* (1849), 5 Dow. & L. 679; *Expld.* *Wright v. Deeley* (1866), 4 H. & C. 209. *Refd.* *Fleming v. Self* (1854), 3 Do G. M. & G. 997; *R. v. Trafford* (1854), 4 E. & B. 122; *Mulkern v. Lord* (1879), 4 App. Cas. 182. *Mentd.* *Burbridge v. Cotton* (1851), 5 Do G. & Sm. 17; *Farmer v. Smith* (1859), 4 H. & N. 196; *Grimes v. Harrison* (1859), 26 Beav. 436.

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264. Action against administrator of deceased member.—A building society's rules provided for the settlement of disputes by arbn. After the death of a member of the society, certain fines & subscriptions became due, for which the trustees sued his administrator in the county ct.:—*Held*: the administrator was a member of the society, & had been so treated by them, & a rule should be made absolute for a prohibition to the county ct. to restrain proceedings, that the dispute might be settled by arbn. under the rules.—*KNOX v. SHEPHERD* (1860), 2 L. T. 351.

265. Dispute between society & transferee of shares—Claim to be admitted to membership.—By the rules of a benefit building society, constituted under Friendly Societies Act, 1829 (c. 56), and 1836 Act, it was provided that disputes between the trustees & "any one or more of the members of the society, or any person or persons claiming on account of any member or members," should be referred to arbn. F., who had been the holder of shares in the society, transferred them to P., but defts., trustees of the society, refused to recognise P. as a member. P. sued to recover the value of the shares:—*Held*: as defts. denied that P. was a member, the question whether he was entitled to the value of the shares could not be referred to arbn. under the rules of the society, & the action was maintainable.—*PRENTICE v. LONDON* (1875), L. R. 10 C. P. 679; 44 L. J. C. P. 353; 33 L. T. 251; 39 J. P. 711.

Annotations:—*Folld.* *Willis v. Wells*, [1892] 2 Q. B. 225. *Distd.* *Stone v. Liverpool Marine Soc.* (1894), 10 R. 592. *Folld.* *Palliser v. Dale*, [1897] 1 Q. B. 257. *Appld.* *Taylor v. National Amalgamated Apprvd. Soc.*, [1914] 2 K. B. 352. *Refd.* *Lord v. Mulkern* (1878), 38 L. T. 265; *Winter v. Wilkinson*, [1915] 1 Ch. 317.

266. Dispute between society & advanced member—Relationship of mortgagor & mortgagee—Action for breach of covenants in mortgage.—A rule of a building society, requiring disputes between the society & any member thereof to be referred to arbn., applies only to matters in dispute between the society & any member, as member.

A building society lent money to a member on mtgc. of leasehold property, & the member covenanted to observe & fulfil the rules of the society, & also to pay the rent reserved by the lease. The trustees of the society sued for breaches of both the covenants:—*Held*: as some part of pltf.' claim was not a matter in dispute between the society & deft. as member, but only as mtgor., the society was not bound by its rule to refer to arbn. the subject-matter of the action. *Qu.*: whether, in such case, if pltf. had declared only for the matter in dispute between the society & deft. as member, they would have been bound to refer.—*MORRISON v. GLOVER* (1849), 4 Exch. 430; 19 L. J. Ex. 20; 14 L. T. O. S. 204; 14 J. P. 84; 154 E. R. 1281.

Annotations:—*Expld.* *Reeves v. White* (1852), 17 Q. B. 995; *R. v. Trafford* (1854), 1 Jur. N. S. 252. *Folld.* *Prentice v. London* (1875), L. R. 10 C. P. 679. *Appld.* *Mulkern v. Lord* (1879), 4 App. Cas. 182. *Consd.* *Hack v. London Provident Bldg. Soc.* (1883), 23 Ch. D. 103. *Expld.* *Municipal Bldg. Soc. v. Kent* (1884), 9 App. Cas. 260. *Consd.* *Municipal Permanent Investment Bldg. Soc. v. Richards* (1888), 39 Ch. D. 372; *Palliser v. Dale* (1897), 66 L. J. Q. B. 236. *Refd.* *Fleming v. Self* (1854), Kay, 518; *Western Suburban & Notting Hill Permanent Benefit Bldg. Soc. v. Martin* (1886), 17 Q. B. D. 66; *Winter v. Wilkinson*, [1915] 1 Ch. 317. *Mentd.* *Hankin v. Bennett* (1852), 21 L. J. Ex. 326; *Huckle v. Wilson* (1877), 26 W. R. 98.

267. — — — — —.]—One of the rules of a building society provided that the board for the time being should determine all disputes which might arise concerning the affairs of the co. or respecting the construction of the rules or any of the clauses or things therein contained, & also

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of any bye-laws, additions, alterations & amendments, which should, or might, or might thereafter arise between the trustees, officers, or other shareholders of the co. ; & that the decision of the board, if satisfactory, should be conclusive, but if not satisfactory, reference should be made to arbn. A shareholder had received an advance, & executed a mtge. deed, whereby he covenanted to pay the subscriptions & interest payable on his shares, according to the rules of the society. The society, brought an action on the covenant :—*Held* : that was not a dispute between the society & deft. as shareholder, but as mtgor., & the case was not within the rule & the action was maintainable.—*FARMER v. GILES* (1860), 5 H. & N. 753 ; 30 L. J. Ex. 65 ; 2 L. T. 387 ; 24 J. P. 663 ; 8 W. R. 649 ; 157 E. R. 1381.

Annotations :—*Distd.* Priestley v. Hopwood (1864), 4 New Rep. 239. *Consd.* Municipal Bldg. Soc. v. Kent (1884), 9 App. Cas. 260.

268. — Neglect of society to appoint arbitrators.]—A declaration, in covenant, set out an indenture of mtge. between the trustees of a benefit building society & deft., a member, by which, in consideration of £600, appropriated & paid to deft., in respect of his shares, deft. mortgaged land to the trustees, for the use & benefit of the society, & covenanted to observe all the rules of the society, & to make all payments, in respect of his shares, which were required by the rules. Breaches : (1) that deft. did not pay certain monthly instalments, according to r. 19 ; (2) that he did not pay the subscriptions upon his shares, according to r. 13 ; (3) that he did not pay certain fines incurred by him, under rr. 13, 14, by non-payment of the instalments & subscriptions. Pleas : (1) that r. 33 provided that the directors should decide upon all disputes that might arise between the society & any member, respecting the construction of or any omission in the rules, or respecting any other matter relating to the society & such member, & that the decisions of the directors, if satisfactory to both parties, should be conclusive, but, if not satisfactory, such dispute should be referred to arbitrators ; that the causes of action were matters in dispute between the society & deft. as a member, respecting matters relating to the society ; that arbitrators were duly appointed according to the rules, & continued to be arbitrators thenceforth, etc. ; & that deft. never had notice of or assented to any decision of the directors, & had always been ready & willing, as the directors & pltf. well knew, to refer the matters to the arbitrators ; (2) that r. 18 declared that, before any member should be allowed to receive the amount of the appropriation mentioned in the rule, he should deliver to the manager a statement in writing containing the nature & situation of the premises intended to be offered as security, & if, after a survey, & report made to the directors, they were satisfied that the premises were sufficient security, they should have the title examined & approved, & then £200 should be advanced by the association upon the member executing a mtge. to them of the property purchased by the appropriation, or other property ; that r. 19 provided that, if, after execution of a mtge., a member failed, for six monthly nights, to pay & observe all subscriptions, payments & regulations, the directors should appoint a person to collect the rents & profits of the premises, & if those were insufficient, or if the member refused to allow or empower such collection, or, if required, himself to collect & pay, the directors were empowered to sell the property mortgaged, that the causes of action were in

respect of subscriptions & other payments, due from deft. for more than six calendar months after the execution by him, as a member, of the mtge. deed ; & that deft., after his execution of the deed, neglected for six monthly nights to pay & perform his subscriptions, payments & regulations ; that the mortgaged premises always had been & were sufficient security ; & that, if the directors had appointed a person to collect the rents & profits, the proceeds would have sufficed to discharge all costs of collection, & reimburse to the association all the subscriptions & other payments ; & that deft. had always been ready & willing to allow & empower such collection, but that neither the directors nor the trustees had appointed any person to collect the rents & profits, or required deft. to collect them himself. Replication to plea 1, that the rules were duly certified, allowed & enrolled, & the first meeting of the society after such enrolment was held, before deft. became a member or executed the mtge. deed ; that, by accident, mistake & oversight on the part of the society & its officers & members, no arbitrators were elected or appointed, according to r. 33, at such meeting or afterwards ; & that, when deft. became a member, & when the causes of action accrued, & at the commencement of the suit, there were no arbitrators to whom any such matters as mentioned in the rule could be referred. Without this, that arbitrators were duly appointed, etc. :—*Held* : (1) the declaration showed a right of action in pltf. as trustees, under Friendly Societies Act, 1829 (c. 56), s. 21, & 1836 Act, s. 4 ; (2) plea 1 was good, inasmuch as the summary remedy provided for the settlement of disputes by arbn. was exclusive, and ousted the superior courts of jurisdiction ; (3) the traverse, in the replication to plea 1, of the allegation that arbitrators had been duly appointed, was a sufficient answer to such plea ; (4) the power to collect rents, or to sell, given to the directors by r. 19, did not prevent bringing an action on the express covenant to pay the subscriptions.—*REEVES v. WHITE* (1852), 17 Q. B. 995 ; 21 L. J. Q. B. 169 ; 18 L. T. O. S. 271 ; 16 J. P. 118 ; 16 Jur. 637 ; 117 E. R. 1562.

Annotations :—*Apld.* Davies & Second Chatham Permanent Benefit Bldg. Soc., Mackenzie v. Everton & West Derby Permanent Benefit Bldg. Soc. (1889), 61 L. T. 686. *Refd.* Callaghan v. Dolwin (1869), L. R. 4 C. P. 288 ; Huckle v. Wilson (1877), 2 C. P. D. 410.

Failure to appoint arbitrators generally, *see* cases in Sect. 2, *ante*.

269. — Suit for redemption of security.]

—The provisions for arbn. of disputes between a friendly society & its members, in Friendly Societies Act, 1829 (c. 56), ss. 27, 28, incorporated into 1836 Act, do not apply to questions arising in a suit by a member against a building society for the redemption of a security given by him for his future contributions on his receiving his share in advance, because no means are provided for working out a decree for redemption, delivery of deeds, etc., & the jurisdiction of a ct. of equity is not ousted in such a case.—*FLEMING v. SELF* (1854), 3 De G. M. & G. 997 ; 3 Eq. Rep. 14 ; 24 L. J. Ch. 29 ; 24 L. T. O. S. 101 ; 18 J. P. 772 ; 1 Jur. N. S. 25 ; 3 W. R. 89 ; 43 E. R. 390, L. C.

Annotations :—*Consd.* Mulkern v. Lord (1879), 4 App. Cas. 182 ; Hack v. London Provident Bldg. Soc. (1883), 23 Ch. D. 103. *Refd.* R. v. Trafford (1854), 4 E. & B. 122 ; Armitage v. Walker (1855), 2 Jur. N. S. 13 ; Municipal Bldg. Soc. v. Kent (1884), 9 App. Cas. 260 ; Huckle v. Lordonny (1887), 56 L. J. Ch. 437. *Mentd.* Archer v. Harrison (1857), 7 De G. M. & G. 404 ; Farmer v. Smith (1859), 4 H. & N. 196 ; Smith v. Pilkington (1859), 1 De G. F. & J. 120 ; Sheffield & South Yorkshire Permanent Bldg. Soc. v. Aislewood (1889), 44 Ch. D. 412.

270. ——A member of a benefit building society, the rules of which contained one

for referring to arbn. any dispute between the society & any member thereof, had, upon having the amount of his shares advanced to him, executed a mtge. of premises to the trustees, under the rules of the society, to secure payment of the subscriptions, interest, & bonus payable by the rules of the society in respect of those shares. Subsequently he claimed to redeem his mtge. for a less sum than the trustees, as mtgees., were willing to accept, & upon their refusal to refer the dispute to arbn., obtained an order of two justices for the delivery to him of the mtge. deed:—*Held*: that was not a dispute which could be referred to arbn., & a *certiorari* should be granted to remove the order of the justices for want of jurisdiction.—*R. v. TRAFFORD* (1854), 4 E. & B. 122; 24 L. J. M. C. 20; 24 L. T. O. S. 308; 19 J. P. 6; 1 Jur. N. S. 252; 119 E. R. 47.

Annotations:—*Consd.* *Mulkern v. Lord* (1879), 4 App. Cas. 182; *Municipal Bldg. Soc. v. Kent* (1884), 9 App. Cas. 260. *Refd.* *Farmer v. Giles* (1860), 5 H. & N. 753.

271. ———.]—Resp. was a member of a building society formed under 1836 Act, & not registered under 1874 Act. As such member he had mortgaged property to the society to a large amount. In a suit brought by him for a redemption of the property & an account, deft. asked that the matter might be referred to arbn., in accordance with the rules of the society:—*Held*: Friendly Societies Act, 1829 (c. 56), s. 27, was not applicable to a dispute where the relation of mtgor. & mtgee. existed.—*MULKERN v. LORD* (1879), 4 App. Cas. 182; 48 L. J. Ch. 745; 40 L. T. 594; 43 J. P. 492; 27 W. R. 510, H. L.; *affg.* S. C. *sub nom.* *LORD v. MULKERN* (1878), 47 L. J. Ch. 228, C. A.

Annotations:—*Consd.* *Hack v. London Provident Bldg. Soc.* (1883), 23 Ch. D. 103. *Expld. & Distd.* *Municipal Bldg. Soc. v. Kent* (1884), 9 App. Cas. 260. *Consd.* *Western Suburban & Notting Hill Permanent Benefit Bldg. Soc. v. Martin* (1886), 17 Q. B. D. 66. *Fold.* *Buckle v. Lordonny* (1887), 56 L. J. Ch. 437. *Refd.* *Municipal Permanent Investment Bldg. Soc. v. Richards* (1888), 58 L. J. Ch. 8; *Catt v. Wood*, [1908] 2 K. B. 458; *Winter v. Wilkinson*, [1915] 1 Ch. 317.

272. ———.]—An advanced member of a benefit building society which was not incorporated under 1874 Act, brought an action for redemption of his mtge., & for an account:—*Held*: pltf. was entitled to maintain the action, as it was not a case of dispute between the society & a member which could be referred to arbn.—*BUCKLE v. LORDONNY* (1887), 56 L. J. Ch. 437; 56 L. T. 273; 51 J. P. 422; 35 W. R. 360; 3 T. L. R. 369.

273. Dispute between society & withdrawing member—Respecting construction of rule—Injunction to restrain mismanagement.]—Where a shareholder of a benefit building society had given notice that he should withdraw the sum advanced by him, as he was at liberty to do by the rules of the society, he was not allowed to restrain by injunction the directors of the society from parting with the funds of the society in their hands, on the ground of his having a primary lien upon the funds for a return of the subscriptions made by him, or of an apprehended mismanagement of those funds.—*TROTT v. HUGHES* (1850), 16 L. T. O. S. 260.

Annotations:—*Consd.* *Thompson v. Planet Benefit Bldg. Soc.* (1873), L. R. 15 Eq. 333. *Refd.* *Mullock v. Jenkins* (1851), 14 Beav. 628.

274. Determinable by board of

PART X. SECT. 3, SUB-SECT. 2.

1. Dispute between society & withdrawing member—Whether member giving notice liable to be treated as member—As to amount payable on withdrawal.]—*Held*: a member of a building society, who had fully paid up his shares, & was in terms of the

rules entitled to withdraw after due notice & to receive the amount of his shares standing at his credit, did not cease to be a shareholder, after having given notice, on the expiration of the period of notice, but continued to be a shareholder till he should be paid out, & a dispute between him & the society

management.]—Among the rules of a building society was one which provided, that any member who should be desirous of withdrawing from the society any share or shares, should be allowed to do so on giving two months' notice in writing of his intention to the secretary, subject to certain deductions for expenses, provided that the deductions should not extend to widows & children of deceased members, & who should always have a priority in cases of withdrawal. Another rule provided, that the board of management for the time being, or the major part of them, should determine all disputes which might arise respecting the construction of the rules, or of any of the clauses, matters, or things therein contained, & also of any additions, alterations, or amendments which should or might thereafter arise between the board & any member of the society, or persons claiming on account of a member, & in the event of their decision being unsatisfactory, then to be referred to arbn. Pltf., a member of the society, gave notice to the secretary, that he wished to withdraw the amount of his shares. Previously to his giving such notice, other members had also given similar notices, & as their notices expired, they were paid the sums of money due to them, in consequence of which there was not sufficient money at the society's bankers to meet pltf.'s claim. Defts. alleged that they had the right to pay claims in the order in which they fell due, which pltf. disputed, & refused to refer the matter to arbn., but brought his action for the sum due to him:—*Held*: that was a matter arising between the board of management & a member of the society as such, & pltf. was bound to submit to arbn., & was precluded from bringing an action.—*WRIGHT v. DEELEY* (1866), 4 H. & C. 209; 30 J. P. 631.

Annotations:—*Consd.* *Huckle v. Wilson* (1877), 2 C. P. D. 410; *Walker v. General Mutual Bldg. Soc.* (1887), 36 Ch. D. 777. *Refd.* *Johnson v. Altrincham Permanent Benefit Bldg. Soc.* (1883), 48 J. P. 24; *Davies v. Second Chatham Permanent Benefit Bldg. Soc.*, *Mackenzie v. Everton & West Derby Permanent Benefit Bldg. Soc.* (1889), 61 L. T. 680. *Mentd.* *Sibun v. Pearce* (1890), 44 Ch. D. 354.

275. ——— Sult for amount of subscriptions due—Inquiry as to funds.]—A bill by a retiring member of a benefit building society against the trustees, to recover pltf.'s share was supported, & inquiries & accounts were directed, as a rule to refer to arbn. did not oust the jurisdiction of the ct. in such a case.—*SMITH v. LLOYD* (1859), 26 Beav. 507; 53 E. R. 994.

Annotation:—*N.F. Thompson v. Planet Benefit Bldg. Soc.* (1873), L. R. 15 Eq. 333.

276. ———.]—Pltf. & his wife, members of a building society of which defts. were trustees, gave notice of withdrawal & sued defts. for the amount of their subscription, an account & injunction:—*Held*: an inquiry should be directed as to whether defts. had funds, notwithstanding an objection that the arbn. rule ousted the jurisdiction of the ct.—*DOUBLEDAY v. HOSKING* (1869), L. R. 15 Eq. 344, n.

Annotation:—*Expld. & N.F. Thompson v. Planet Benefit Bldg. Soc.* (1873), L. R. 15 Eq. 333.

277. ——— Matters of internal dispute.]—It is contrary to the language of Friendly Societies Act, 1829 (c. 56), & against the policy of the law, that internal disputes between the members or

as to the amount which he was entitled to receive fell to be determined by arbn. under a rule, by which disputes between shareholders & the directors were to be so determined.—*MITCHELL v. CALEDONIAN PROPERTY INVESTMENT BUILDING SOCIETY* (1886), 23 Sc. L. R. 651; 13 R. (Ct. of Sess.) 918.—*SCOT.*

Sect. 3.—What disputes must be referred. Sub-sect. 2.

office holders of a building society & the society should be the subject of actions at law & suits in equity.

A bill, filed by a member of a building society, who wished to withdraw his shares, against the society, their trustees & directors, to have principal & interest paid him, stated that the rules were duly certified, & were, "so far as material," as followed. It then set out certain rules, numbered 12, 13, & 14, but no rule as to referring disputes to arbn. It set out a letter containing an offer by the directors to refer all matters in dispute between pltf. & them to arbn. "under the rules," & stated that defts. sometimes alleged that the dispute ought to be referred to arbn., but that pltf. charged that, having regard to the relief thereafter prayed, he was not bound to refer the dispute to arbn., & prayed (*inter alia*) that it might be declared that pltf. was entitled to the benefit of rr. 12, 13, of the society:—**Held**: the ct. was able to take judicial notice of the rule of the society for referring disputes to arbn., though it was not set out in the bill.

Where pltf. alleged misconduct against the directors of a building society in extending the business of the society to that of a bank of deposit, but did not state when the extension was made, & prayed no relief on the ground of the alleged misconduct, the ct., on demurrer, treated the allegation as immaterial.

A bill by a holder of shares in a building society against the society & their directors alleged misconduct against the directors in respect of acts which, for anything that appeared, might have been authorised by the rules of the society as stated by the bill, & prayed that pltf. was not bound by certain new rules that had been passed, & prayed the benefit of certain of the original rules, & for relief against the directors personally:—**Held**: that was a dispute for the decision of which arbitrators were the proper authority, & demurrers by the society & by the directors must be allowed.—**THOMPSON v. PLANET BENEFIT BUILDING SOCIETY** (1873), L. R. 15 Eq. 333; 42 L. J. Ch. 364; 28 L. T. 549; 21 W. R. 474.

Annotations:—**Refd.** *Huckle v. Wilson* (1877), 2 C. P. D. 410; *Johnson v. Altrincham Permanent Benefit Bldg. Soc.* (1883), 49 L. T. 568.

278. Effect of notice of withdrawal.]

—Defts. were trustees of a benefit building society enrolled pursuant to 1836 Act, & the statement of claim alleged that pltf. became a member of the

society, & was the holder of first-class shares, & during his membership paid his subscriptions, that by a rule of the society any member holding first-class shares desiring to withdraw from the society, should, after giving three months' notice, receive back the whole amount paid by him for subscriptions, that pltf. gave the requisite notice of withdrawal, & there then became due to him from the society £35 8s. 6d., which pltf. was entitled to be paid according to the rule:—**Held**: the statement of claim was bad, for it alleged a dispute between a building society & a member thereof, & a rule must be assumed to exist referring disputes of that kind to arbn. or justices, & the mere notice of withdrawal given & assented to would not prevent the application of the rule.—**HUCKLE v. WILSON** (1877), 2 C. P. D. 410; 26 W. R. 98.

Annotations:—**Refd.** *Johnson v. Altrincham Permanent Benefit Bldg. Soc.* (1883), 49 L. T. 568. **Mentd.** *Davies v. Second Chatham Permanent Benefit Bldg. Soc.*, *MacKenzie v. Everton & West Derby Permanent Benefit Bldg. Soc.* (1889), 61 L. T. 680.

279. — — — — —.]—A statement of claim alleged that pltf. was an unadvanced member of deft. society, which was certified & enrolled pursuant to 1836 Act, & up to July 10, 1882, subscribed money to the society in respect of three paid up shares amounting to £227 10s. which, according to the rules of the society, were of the value of £303 4s. 4d., that pltf. gave notice to withdraw, & defts. refused to repay the £303 4s. 4d.: **Held**: the statement of claim was bad, for it disclosed a dispute between a building society & a member, & it must be assumed that a rule existed referring such a dispute to arbn.—**JOHNSON v. ALTRINCHAM PERMANENT BENEFIT BUILDING SOCIETY** (1883), 49 L. T. 568; 48 J. P. 24, D. C.

280. Dispute between society & officer—Restitution of misappropriated property.]—The committee of a benefit building society authorised the vice-president to purchase a real estate for the society, & furnished him with part of the funds. He purchased, but appropriated the estate to himself:—**Held**: (1) the trustees, in whom the funds & property ought to be vested, were entitled to sue on behalf, etc., to compel a restitution of the estate; (2) the jurisdiction was not ousted, by a rule of the society for referring disputes to arbn.—**MULLOCK v. JENKINS** (1851), 14 Beav. 628; 21 L. J. Ch. 65; 18 L. T. O. S. 203; 51 E. R. 426.

Annotations:—**Refd.** *Hughes v. Layton* (1864), 10 Jur. N. S. 513; *Laing v. Reed* (1869), 39 L. J. Ch. 3, n. **Mentd.** *Grimes v. Harrison* (1859), 26 Beav. 435.

Part XI.—Accounts.

See Friendly Societies Act, 1829 (c. 56), ss. 14, 33; 1836 Act, s. 4; 1874 Act, ss. 16 (8), 24, 40; 1894 Act, ss. 2, 11, 21, 25 (1).

281. Audited accounts—Whether conclusive—Right of members to impeach for fraud.]—One of the rules of a building society provided for an annual audit of accounts, & that after the auditing & signing of the accounts the treasurer should not be answerable for mistakes, omissions, or errors afterwards proved in the accounts. In an action by members against the treasurer for accounts:—**Held**: though the audited accounts must be received as *prima facie* evidence, the rule afforded no protection against the right of the members

to impeach the accounts on the ground of fraud.—**HOLGATE v. SHUTT** (1884), 27 Ch. D. 111; 53 L. J. Ch. 774; 51 L. T. 433; 32 W. R. 773, C. A.; *subsequent proceedings*, 28 Ch. D. 111, C. A.

282. — — — Auditor not appointed in accordance with Act & rules.]—The rules of a building society provided that the books should be audited every twelve months by auditors appointed by the society, but contained no provision as to the appointment of auditors. Friendly Societies Act, 1829 (c. 56), s. 33, provided that the accounts of such societies should be audited by two or more members of the society appointed for that purpose. In an action by members of the

society against the secretary, an order was made for an account of all money & property come to the hands of deft. In taking such account deft. claimed to treat as settled accounts, accounts which had been audited by one person only, who had always acted as auditor of the society, but who was not a member. The ct. having dismissed a summons asking that the accounts might be disregarded as not being audited in accordance with the rules:—*Held*: the accounts had not been properly audited, & the order must be discharged, without prejudice to the right of deft. to show that the accounts ought to be treated as settled accounts on any ground other than that they had been audited in accordance with the Act & rules.—*HOLGATE v. SHUTT* (1884), 28 Ch. D. 111; 54 L. J. Ch. 436; 51 L. T. 673; 49 J. P. 228, C. A.

283. Annual statutory accounts—Inclusion of leaseholds of which society in possession as mortgagees—Acknowledgment of mortgagor's title.]—A mtge. by a member of a building society to the society provided that, if the mtgor. paid all the instalments according to the rules of the society, the society would “at any time thereafter, upon the request of the mtgor.,” endorse the mtge. deed with a receipt, & that it should thereupon be vacated. It also provided that, upon default in payment of any of the instalments, the balance of the advance unpaid should immediately become due, & that the society might thereupon enter into possession. The mtgor. being in default, the society entered into possession & received the rents for a period of over twelve years. Within the period of twelve years before action brought, the mtge. & the amount outstanding had been included, under the heading of mtges., in balance-sheets of the society signed by the auditors & delivered to the committee:—*Held*: the title of the mtgor. was barred under Real Property Limitation Act, 1874 (c. 57), s. 7, & the committee were not the mtgor.'s agents to receive acknowledgments of his title contained in the balance-sheets.—*WILSON v. WALTON & KIRKDALE PERMANENT BUILDING SOCIETY* (1903), 19 T. L. R. 408.

Annotation:—Held. Re Metropolis & Counties Permanent Investment Bldg. Soc., Gatfield's Case, [1911] 1 Ch. 698.

284. ———.]—A member of a building society mortgaged leaseholds to the society to secure an advance of £400 on her shares repayable with interest by monthly instalments extending over ten years. The rules of the society provided that when the claims of the society upon any mortgaged property had been satisfied the statutory receipt should be indorsed upon the mtge. at the expense of the mtgor. The deed conveyed the property to the society upon trust to permit the mtgor. to receive the rents until default in payment of any instalment, & upon default, to enter into possession of the rents & to apply same in payment of all sums due from the mtgor. & to pay the balance, if any, to the mtgor.; the deed also contained a trust for sale. In 1887 the mtgor. made default & the society went into possession & managed the property, treating it in their books as a mtge. transaction, & by 1902 all sums payable under the deed were satisfied. After 1902 the society entered the rents to a suspense account in their ledger until 1910, when the society was ordered to be wound up; the same year the lease of the property expired. In the winding up the mtgor. claimed the surplus rents standing to the credit of the suspense account, on the ground that the society were trustees thereof for her & that Stat. Limitations did not apply:—*Held*: (1) the deed, though in form of trust, was in substance a mtge., & Stat. Limitations commenced to run when the society took possession in 1887, & the claim of the mtgor. was barred; (2) the annual statutory accounts which the society published pursuant to 1874 Act, s. 40, & in which the leaseholds were included in the properties of which the society were in possession as mtgees., were not acknowledgments of the mtgor.'s title within Real Property Limitation Act, 1874 (c. 57), s. 7, so as to preclude the operation of that sect.—*Re METROPOLIS & COUNTIES PERMANENT INVESTMENT BUILDING SOCIETY, GATFIELD'S CASE*, [1911] 1 Ch. 698; 80 L. J. Ch. 387; 104 L. T. 382.

Part XII.—Amalgamation and Transfer.

See 1874 Act, s. 33; 1877 Act, s. 5; 1894 Act, s. 19.

285. Unincorporated society—Amalgamation illegal—Transfer of assets & liabilities to new society—Recovery of money lent to old society.]—A benefit building society with £100 shares was, by one of its rules, authorised to borrow money for the purposes of the society, & in 1853 A. advanced £300 to the society upon a promissory note. In 1861 it was desired to reduce the shares from £100 to £10, & by way of effecting that object a new society was formed, which purported to take over the assets & liabilities of the society.

The interest on the £300 was regularly paid, first by the old, & afterwards by the new, society. The new society having been ordered to be wound up, A. claimed to be paid the £300 out of the assets:—*Held*: (1) for one society to take over the mass of assets & liabilities of another society was *ultra vires*; (2) it being illegal for the new society to undertake a liability to A. for the £300, acquiescence could not validate the transaction.—*Re LIVERPOOL & DISTRICT PERMANENT BENEFIT BUILDING SOCIETY, MCCONNAN'S CLAIM* (1871), 15 Sol. Jo. 177.

PART XII.

m. Banking company & building society—Administration of assets as one fund.]—The directors & shareholders of a building society which had been successfully carried on determined to form a banking co. which was to absorb the business of the society. The society purported to sell all its assets to the banking co. & the co. took over all the liabilities of the society, & thenceforward for many years the co. carried on its business in the old buildings of the society, having the same

directors, & its manager being the secretary of the society. The co. advanced money to the society in its business. No contract was ever executed, nor were the assets of the society actually transferred to the co. The society had no power thus to sell its business, though it was within the powers of the co. to make the purchase. The society went into liquidation, & the co. also went into liquidation, & the question was raised as to the right of the co. to prove upon the assets of the society in respect of the advances made to it:—*Held*: that inasmuch as

the affairs of the two institutions had become so inextricably mixed up under the so-called amalgamation or sale of the assets of the society to the co., the ct. should order the assets of both institutions to be administered in the winding-up as if they formed one institution only.—*Re METROPOLITAN PERMANENT BUILDING & INVESTMENT SOCIETY* (1900), 20 V. L. R. 625.—**AUS.**

n. Building society reconstructing Companies Acts—Rights of shareholders.]—A building society sold all its

Part XIII.—Dissolution.

See, generally, COMPANIES.

SECT. 1.—INCORPORATED SOCIETIES.

SUB-SECT. 1.—DISSOLUTION BY INSTRUMENT.

See 1874 Act, s. 32 (3); 1894 Act, ss. 9–11.

286. General effect of instrument.]—An instrument of dissolution under 1874 Act, s. 32, is not equivalent in its operation to a winding-up order made by the ct.—*KEMP v. WRIGHT*, [1895] 1 Ch. 121; 64 L. J. Ch. 59; 71 L. T. 650; 59 J. P. 133; 43 W. R. 213; 39 Sol. Jo. 43; 7 R. 631, C. A.

Annotation:—Mentd. Botten v. City & Suburban Permanent Bldg. Soc., [1895] 2 Ch. 441.

287. Signature to instrument — Who may sign — Infant.]—An infant member of a building society can consent to dissolution of the society.—*DENNISON v. JEFFS*, [1896] 1 Ch. 611; 65 L. J. Ch. 435; 74 L. T. 270; 44 W. R. 476; 12 T. L. R. 251; 40 Sol. Jo. 335.

Annotation:—Reid. Rudd v. James (1896), 74 L. T. 714.

288. — — — Agent.]—A building society incorporated under 1874 Act purported to be dissolved by an instrument of dissolution, to which one member's signature had been affixed by an agent:—*Held*: signature by an agent duly authorised was good.—*DENNISON v. JEFFS*, [1896] 1 Ch. 611; 65 L. J. Ch. 435; 74 L. T. 270; 44 W. R. 476; 12 T. L. R. 251.

Annotation:—Consd. Rudd v. James (1896), 74 L. T. 714.

289. — — — Unpaid withdrawing member.]—The rules of a benefit building society provided that a member who had given notice of withdrawal should cease to take part in the affairs of the society:—*Held*: members who had given notice of withdrawal, but had not received their money, were still members of the society, & were to be taken into account in ascertaining the statutory majority of members required by 1874 Act, s. 32, to sign an instrument of dissolution.—*SIHUN v. PEARCE* (1890), 44 Ch. D. 354; 63 L. T. 123; 38 W. R. 658; 6 T. L. R. 262, C. A.

Annotation:—Reid. Pope v. City & Suburban Permanent Bldg. Soc., [1893] 2 Ch. 311.

290. — — — Who must sign—All joint holders of share.]—For the purpose of consenting to dissolution of a building society joint holders of a share are to be considered one member, & must all sign the instrument of dissolution.—*DENNISON v. JEFFS*, [1896] 1 Ch. 611; 65 L. J. Ch. 435; 74 L. T. 270; 44 W. R. 476; 12 T. L. R. 251; 40 Sol. Jo. 335.

Annotation:—Mentd. Rudd v. James (1896), 74 L. T. 714.

291. — — — Sufficiency of signature—Shares held both jointly & severally.]—A member of a building society who holds shares both jointly & severally need not sign the instrument of dissolution in more than one place to testify consent in respect of all his shares.—*DENNISON v. JEFFS*, [1896] 1 Ch. 611; 65 L. J. Ch. 435; 74 L. T. 270; 44 W. R. 476; 12 T. L. R. 251; 40 Sol. Jo. 335.

Annotation:—Mentd. Rudd v. James (1896), 74 L. T. 714.

assets to a new co. under Cos. Act, 1874, & shares in the new co. were to be issued to the shareholders in the old co. in place of the old shares as part of the consideration:—*Held*: a shareholder in the old co. who had not dissented from the scheme within the period provided by s. 212, nor taken up his shares in the new co., was not entitled to maintain a suit against the directors of the old co. to make good their

breaches of trust. His only remedy was to petition the ct. to make an order compulsorily winding up the old co.—*GILMOUR v. NEWCASTLE PERMANENT INVESTMENT & BUILDING SOCIETY* (1897), 18 N. S. W. Eq. 84.—*AUS.*

PART XIII. SECT. 1, SUB-SECT. 1.

288 i. Signature to instrument—Who may sign—Agent.]—*Held*: (1) the

292. Necessity for signature of both duplicates.]—The signature of a member of a building society to one only of the two duplicate instruments of dissolution is inoperative.—*DENNISON v. JEFFS*, [1896] 1 Ch. 611; 65 L. J. Ch. 435; 74 L. T. 270; 44 W. R. 476; 12 T. L. R. 251; 40 Sol. Jo. 335.

Annotation:—Mentd. Rudd v. James (1896), 74 L. T. 714.

293. Priority in repayment—Of withdrawing members over other members—Expiry of notice of withdrawal before date of dissolution.]—A building society having suffered loss, passed a resolution in July, 1889, to reduce the amount of its shares from £12 to £10. The rules at that date entitled any unadvanced member to withdraw his payments on account of shares by giving one month's notice, such withdrawing members to be paid in rotation, but not more than one withdrawing member was entitled to be paid at any one monthly meeting. In Feb., 1890, altered rules were adopted entitling members to withdraw amounts standing to their credit by giving one month's written notice, the amount due in respect of shares to be five-sixths of the net amount paid on them. In 1892 an instrument of dissolution, under 1874 Act, s. 32, was executed & registered. Some members had given notice of withdrawal before the losses were known, others before the reduction of the shares, others after the reduction. One member had not assented to the reduction. Other members had not given notice of withdrawal:—*Held*: all the members were bound by the reduction, & the rule as to priority of payment applied to all who had given a month's notice of withdrawal which had matured before the date of the instrument of dissolution.—*BARNARD v. TOMSON*, [1894] 1 Ch. 374; 63 L. J. Ch. 488; 70 L. T. 306; 8 R. 585.

Annotations:—Consd. Re Ambition Investment Bldg. Soc., [1896] 1 Ch. 89. *Mentd.* Sixth West Kent Mutual Bldg. Soc. v. Hills, [1899] 2 Ch. 60.

294. — — — .]—In a building society incorporated in 1880 under 1874 Act, notice was given on June 26, 1895, for a meeting on July 10, to consider the question of dissolution. On Aug. 8, at the adjourned meeting, a resolution was carried for voluntarily winding up. On Nov. 1 the deed of dissolution was registered. The notices of withdrawal given by different members under the rules of the society had matured before the four above-mentioned dates respectively:—*Held*: the members who gave notice of withdrawal prior to the date of the resolution for winding up were entitled to the surplus assets in priority to the other members.—*Re COUNTIES CONSERVATIVE PERMANENT BENEFIT BUILDING SOCIETY, DAVIS v. NORTON*, [1900] 2 Ch. 819; 69 L. J. Ch. 798; 49 W. R. 71; 44 Sol. Jo. 699.

295. — — — According to priority of notices.]—Upon the construction of one of the rules:—*Held*: notices of withdrawal, which by that rule became effective on or before a certain date, were entitled to payment in priority to notices received

word "signatures" in 1874 Act, s. 32 (3), means signatures of the members themselves; (2) signatures adhibited by the mandatories of members cannot be reckoned in calculating whether the instrument was signed by the requisite number of members.—*SECOND EDINBURGH & LEITH 493RD STARR-BOWKETT BUILDING SOCIETY v. AITKEN* (1892), 19 R. (Ct. of Sess.) 603; 20 Sc. L. R. 456.—*SCOT.*

after that date, there being nothing to negative the presumption that charges took effect in order of date.—*BOTTEN v. CITY & SUBURBAN PERMANENT BENEFIT BUILDING SOCIETY* (1895), 72 L. T. 87; 39 Sol. Jo. 218; *affd.* 72 L. T. 375, C. A.

296. — Variation of rights by instrument.—It is competent for the members of a building society by an instrument of dissolution under 1874 Act, s. 32, to vary the rights of members under the rules, by a provision in the instrument that members who have given notice of withdrawal shall have no preference or priority over members who have not given such notice.—*KEMP v. WRIGHT*, [1894] 2 Ch. 462; 64 L. J. Ch. 59; 71 L. T. 650; 58 J. P. 588; 43 W. R. 213; 1 Mans. 308; *reversd.* on another point, [1895] 1 Ch. 121, C. A.

Annotation:—*Consd.* *Botten v. City & Suburban Permanent Bldg. Soc.*, [1895] 2 Ch. 441.

297. — Necessity for special meeting.—It is not competent for the members of a building society by an instrument of dissolution executed under 1874 Act to vary the rights of members under the rules of the society by a provision taking away the priority of withdrawing members over those who have given no notice of withdrawal, unless the variation has been specially sanctioned at a special meeting held under s. 18, of which notice has been given under the rules of the society.—*BOTTEN v. CITY & SUBURBAN PERMANENT BUILDING SOCIETY*, [1895] 2 Ch. 441; 64 L. J. Ch. 609; 72 L. T. 722; 44 W. R. 12; 11 T. L. R. 418; 39 Sol. Jo. 504; 13 R. 591.
Annotation:—*Refd.* *Allen v. Gold Reefs of West Africa, Same v. Same*, [1900] 1 Ch. 656.

298. — Of executor of deceased member—Over withdrawing members.—In a building society incorporated in 1880 under 1874 Act, notice was given on June 26, 1895, for a meeting on July 10, to consider the question of dissolution. On Aug. 8, at the adjourned meeting, a resolution was carried for voluntarily winding-up. On Nov. 1 the deed of dissolution was registered. One member had died before June 26 without giving notice of withdrawal:—*Held*: the deceased member took precedence of all persons who had given notice of withdrawal, & his exors. took priority accordingly.—*Re COUNTIES CONSERVATIVE PERMANENT BENEFIT BUILDING SOCIETY, DAVIS v. NORTON*, [1900] 2 Ch. 819; 69 L. J. Ch. 798; 49 W. R. 71; 44 Sol. Jo. 699.

299. Effect on advanced member—Covenant to pay by instalments—Whether liable to pay balance forthwith—1894 Act, s. 10.—Upon an instrument of dissolution taking effect, advanced members who have covenanted in accordance with the rules to pay up their advances by instalments cannot be compelled to pay up forthwith the balances due from them on their securities.

The above sect. applies to a society, the dissolution of which was begun before but was not completed at the time when that sect. came into operation.—*KEMP v. WRIGHT*, [1895] 1 Ch. 121; 64 L. J. Ch. 59; 71 L. T. 650; 59 J. P. 133; 43 W. R. 213; 39 Sol. Jo. 43; 7 R. 631, C. A.

Annotation:—*Consd.* *Botten v. City & Suburban Permanent Bldg. Soc.*, [1895] 2 Ch. 441.

300. Liability of trustees of dissolution—De-

faulting trustee—Inactive co-trustee—Liability for costs of action.—A person accepting the trusteeship of a deed of dissolution of a building society, who trusts entirely to his co-trustee without inquiry, so that money is lost, does not act "honestly & reasonably" in accordance with Judicial Trustee Act, 1896 (c. 35), s. 3 (1), so as to excuse him from his breach of trust; he is entitled as trustee to his costs, charges, & expenses properly incurred by him, but may be ordered to pay the costs of an action brought to recover the money lost by his co-trustee.

The trustee of a deed of dissolution of a building society was ordered to pay pltf.'s costs of an action for an account, where, through his negligence & complete reliance on his co-trustee, who had absconded, defalcation to the extent of some £400 had taken place, which the trustee had himself made good.—*Re SECOND EAST DULWICH 745TH STARR-BOWKETT BUILDING SOCIETY* (1899), 68 L. J. Ch. 196; 79 L. T. 726; 47 W. R. 408; 43 Sol. Jo. 206.

SUB-SECT. 2.—WINDING-UP UNDER COMPANIES ACTS.

See 1874 Act, ss. 14, 32 (4); 1894 Act, ss. 8, 10.

301. "Winding-up" — Meaning — 1874 Act, s. 32 (4).—In the above sub-sect. the term "winding up" means winding-up under Cos. Acts, 1862 (c. 89) & 1867 (c. 131).—*Re SUNDERLAND 32ND UNIVERSAL BUILDING SOCIETY* (1888), 21 Q. B. D. 349; 37 W. R. 95, D. C.

Annotation:—*Refd.* *Re Portsea Island Bldg. Soc.*, [1893] 3 Ch. 205.

302. Against whom order may be made—Society whose registry has been cancelled—1894 Act, s. 6.—A winding-up order may be made against a building society whose registry has been cancelled under the above sect.—*Re GROSVENOR HOUSE PROPERTY ACQUISITION & INVESTMENT BUILDING SOCIETY* (1902), 71 L. J. Ch. 748; 50 W. R. 630.

303. In county court—Power of judge to state special case—Companies (Winding-up) Act, 1890 (c. 63), s. 3 (3).—The above Act applies to the winding up in county cts. of building societies registered under 1874 Act, & the county ct. judge has power to state the facts in the form of a special case for the opinion of the High Ct. under 1890 Act, s. 3 (3).—*Re PORTSEA ISLAND BUILDING SOCIETY*, [1893] 3 Ch. 205; 62 L. J. Ch. 845; 69 L. T. 138; 41 W. R. 587; 9 T. L. R. 529; 37 Sol. Jo. 582; 3 R. 646.

Annotation:—*Mentd.* *Re Ferndale Industrial Co-op. Soc.*, [1894] 1 Q. B. 828.

304. — Stay of proceedings—Refusal to allow foreclosure action to proceed—Appeal from county court.—The winding-up provisions of Cos. Acts, 1862 (c. 89) & 1867 (c. 131), are applicable to societies registered under 1874 Act.

Defts. were an incorporated society established under 1874 Act. The directors, being empowered by the rules of the society to borrow money, accepted a loan from pltf., giving as security a bond, by which it was declared that all the funds,

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o. In Recorder's Court—Power of recorder to summon witnesses—Companies (Consolidation) Act, 1908, ss. 174, 215.—An order was made by the recorder of L., under 1874 Act, s. 32 (4), to wind up under the supervision of his ct. a building society; upon an application of the liquidators, summonses were issued to directors to appear before the recorder for examination

in relation to proceedings against them for misfeasance or breach of trust in the management of the affairs of the society. Upon motion of the directors so summoned to make absolute a conditional order for the issue of a writ of prohibition to prohibit such examination by the recorder:—*Held*: under Cos. (Consolidation) Act, 1908, ss. 174, 215, the recorder had jurisdiction to summon before him for

examination & to examine officers of a society being wound up before him, with a view to his determining whether there was such a *prima facie* case against them of misfeasance or breach of trust in relation to the society, as would induce him to direct proceedings to be taken against them in the High Ct.—*R. (McCLEAN) v. LONDONDERRY RECORDER*, [1911] 2 I. R. 553; 45 I. L. T. 159.—*IR.*

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assets, & effects of the society should be held liable for the repayment. Defts. failing to repay the loan, pltf. sued them on the bond, & having recovered judgment commenced an action of foreclosure in the Ct. of Ch., which action was pending when a petition was filed in the county ct., & an order was made for the winding-up of deft. society. The county ct. judge having refused to grant pltf. leave to continue the action of foreclosure:—*Held*: the appeal would lie by virtue of Cos. Act, 1867, s. 43.—**ANDREW v. SWANSEA CAMBRIAN BENEFIT BUILDING SOCIETY** (1880), 50 L. J. Q. B. 428; 44 L. T. 106; 45 J. P. 507; *sub nom.* **JONES v. SWANSEA CAMBRIAN BENEFIT BUILDING SOCIETY**, 29 W. R. 382, D. C.
Annotations:—**Consd.** *Re Portsea Island Bldg. Soc.*, [1893] 3 Ch. 205. **Mentd.** *Re Ferndale Industrial Co-op. Soc.*, [1894] 1 Q. B. 828.

305. — Transfer of proceedings to High Court—C. C. R., 1892, r. 146.]—*Semble*: notwithstanding the above rule, there was no power to transfer from the City of London Ct. or any county ct. to the High Ct. the winding-up of a society registered under 1874 Act.—*Re REAL ESTATES Co.*, [1893] 1 Ch. 398; 62 L. J. Ch. 213; 68 L. T. 24; 41 W. R. 157; 9 T. L. R. 118; 37 Sol. Jo. 102; 3 R. 192.

306. Voluntary winding-up—Claim for repayment of ultra vires loan—Made by summons.]—A building society established under 1874 Act (c. 89) may be wound up voluntarily under Cos. Acts, 1862 (c. 89) and 1867 (c. 131).

In such a winding-up a claim for repayment of money lent to deft. out of the funds of the society contrary to its rules may be made by summons.—*Re SUNDERLAND 32ND UNIVERSAL BUILDING SOCIETY* (1888), 21 Q. B. D. 349; 37 W. R. 95, D. C.

Annotation:—**Reid.** *Re Portsea Island Bldg. Soc.*, [1893] 3 Ch. 205.

307. — By resolution according to rules—Supervision order—Power of liquidators.]—Under its rules a building society could be dissolved if the dissolution were resolved on by a vote of three-fourths of the members present at a special general meeting, & liquidators could be appointed to conduct the winding-up. A resolution was passed by the requisite majority at such a meeting "that the society be wound up voluntarily," & two liquidators were appointed:—*Held*: (1) the resolution operated as a dissolution of the society under its rules within 1874 Act, s. 32 (2), & was not an attempt to wind up voluntarily under s. 32 (4); (2) the liquidators had power under s. 32 to sell & transfer mtge. securities belonging to the society.—**SUN BUILDING SOCIETY v. WESTERN SUBURBAN & HARROW ROAD BUILDING SOCIETY**, [1920] 2 Ch. 144; 89 L. J. Ch. 492; 123 L. T. 423; 36 T. L. R. 536; 64 Sol. Jo. 549.

308. Transfer of shares after winding-up—Right of transferee to be registered as owner—Discretion of court.]—After an order has been made for compulsorily winding-up a building society, a co. bought up a number of shares in the society, which were transferred to their nominees. It appeared that there would be a surplus of assets in the winding-up, & one of the transferees

applied for a rectification of the register by the insertion of his name as the owner of shares, with a view to obtaining the right to vote at meetings held in the winding-up:—*Held*: no sufficient reason was shown for the application, which must be refused.—*Re ONWARD BUILDING SOCIETY*, [1891] 2 Q. B. 463; 60 L. J. Q. B. 752; 65 L. T. 516; 56 J. P. 260; 40 W. R. 26, C. A.

Annotation:—**Reid.** *Re National Bank of Wales*, Taylor, Phillips & Rickards' Cases, [1897] 1 Ch. 298.

309. Proceedings for misfeasance—"Officer"—Solicitor with fixed salary acting as financial manager.]—W., a solicitor, was appointed & acted as sole solr. to a society, incorporated under 1874 Act, at an annual salary out of which he was to provide offices, clerks, etc., & undertook to pay over to the society all fees & costs paid to him by clients of the society. An order was subsequently made for the compulsory winding-up of the society, & pursuant to the rules under Cos. (Winding-up) Act, 1890 (c. 63), application was made by the official receiver to bring to the notice of the ct. certain acts of misfeasance committed by W., & for an order that he should contribute to the assets of the society sums received by him as officer thereof:—*Held*: although *prima facie* a solr. was not any more an officer of a society than was a banker, yet inasmuch as W. had agreed to do all the work that the society had for him to do in consideration of a fixed salary, & to forego as far as the members of the society were concerned all the ordinary rules with regard to payment, & as he had acted practically as the society's financial manager, he was an officer of the society within s. 10 of the above Act, & as such his estate was liable to contribute to the assets of the society all sums that he had received as "officer" of the society.—*Re LIBERATOR PERMANENT BENEFIT BUILDING SOCIETY* (1894), 71 L. T. 406; 10 T. L. R. 537; 2 Mans. 100; 15 R. 149, D. C.

Annotations:—**Mentd.** *Re London & General Bank*, [1895] 2 Ch. 166; *Re Western Counties Steam Bakeries & Milling Co.*, [1897] 1 Ch. 617; *Re Carpenter & Bristol Corpn.*, [1907] 2 K. B. 617; *Re Harper's Ticket Issuing & Recording Machine* (1912), 29 T. L. R. 63.

310. Liability to contribute—Advanced members—Advance extinguished pro tanto by total amount of instalments paid—Relief on payment of balance.]—A building society, registered under 1874 Act, had for its objects, (1) to form a good investment for investors; (2) to advance to shareholders money for building & other purposes, to a not greater extent than the amount of their shares, on their granting a bond for same over heritable security. The rules provided that the shares were to be limited to £25; that a shareholder who had not received an advance was to pay up his shares by monthly instalments; & when such instalments with profits amounted to £25 per share he was to be paid out. As to a member who had received an advance, it was provided that he should pay up his advance by monthly instalments on his shares with interest at the rate of 5 per cent. on the loan. It was also provided that members could withdraw on giving a month's notice. On withdrawal by an unadvanced member, he was to receive the whole instalments paid on his shares with interest. On withdrawal by

p. Transfer of shares—Liability of transferor.]—A deed executed for the purpose of transferring stock, has not the effect of exempting the transferor from being placed on the list of contributories, unless such transfer is completed in accordance with the rules of the society.—*Re ST. JOHN BUILDING SOCIETY* (1889), 28 N. B. R. 597.—**CAN.**

q. — — — Transfer before winding up.]—Where a shareholder of a society has prior to an application for winding up, transferred shares in the society *bona fide*; the transferor is not liable to be placed on the list of contributories, even though the transfer was made for the purpose of avoiding his liability for calls, with the knowledge that the society was in insolvent

circumstances, & that the transferee was unable to meet any calls that might be made upon him, & although the consideration for the transfer was merely nominal, or even though he paid the transferee money to induce him to accept the transfer.—*Re PROVINCIAL BUILDING SOCIETY* (1891), 30 N. B. R. 628.—**CAN.**

a borrowing member, he was to pay up the whole of his debt, interest, & penalties, after deducting the amount of the monthly instalments paid upon his shares with interest calculated thereon. A. took shares for the sole purpose of obtaining an advance. He executed a bond in common form as security, & the society granted him a back-letter, to the effect that they agreed not to enforce the bond so long as the regular payments of the instalments, interest, & other sums due upon his shares were paid. A. regularly paid his instalments with interest charged on the whole sum lent. Losses having been incurred, the society was in Feb., 1880, ordered to be wound up voluntarily. There were no outside creditors. In July, 1880, A. gave notice, under the rules, of withdrawal to the liquidators, & claimed a discharge of his bond on his paying to them the difference between his loan & the amount *in cumulo* of the instalments paid by him, with interest added. The liquidators denied his right to withdraw after liquidation, unless he paid up the whole loan & left the instalments to be refunded according to the result of the liquidation:—*Held*: (1) the advance had *pro tanto* been extinguished by the total amount of the instalments paid by A.; (2) from & after the date of the winding-up order A. had a right to redeem his security by paying to the liquidators the difference between his advance & his instalments with interest added thereon as against excess of interest which he had been charged, & on payment of such difference, with interest thereon, he was entitled to be relieved of all further liability as a contributory or otherwise.—*BROWNIE v. RUSSELL* (1883), 8 App. Cas. 235; 48 L. T. 881; 47 J. P. 757, H. L.

Annotations:—*Fold*. Tosh v. North British Bldg. Soc. (1886), 11 App. Cas. 489. *Consd.* *Re* Middlesborough, Redcar, & Saltburn, etc., Bldg. Soc. (1889), 58 L. J. Ch. 771; London Provident Bldg. Soc. v. Morgan, [1893] 2 Q. B. 266; Kemp v. Wright, [1895] 1 Ch. 121. *Distd.* *Re* Counties Conservative Permanent Benefit Bldg. Soc., Davis v. Norton, [1900] 2 Ch. 819. *Reid*. Buckle v. Lordonny (1887), 56 L. J. Ch. 437; *Re* Sunderland 36th Universal Bldg. Soc. (1890), 24 Q. B. D. 394; *Re* Britannia Permanent Benefit Bldg. Soc. (1891), 65 L. T. 196; Durham & Northumberland Working Men's Permanent Bldg. Soc. v. Davidson (1892), 61 L. J. Q. B. 473; Barnard v. Tomson, [1894] 1 Ch. 374. *Mentd.* Cunliffe, Brooks v. Blackburn & District Benefit Bldg. Soc. (1884), 54 L. J. Ch. 376; *Re* West London & General Permanent Benefit Bldg. Soc., [1894] 2 Ch. 352; *Re* Ambition Investment Bldg. Soc. (1895), 73 L. T. 508; Sixth West Kent Mutual Bldg. Soc. v. Hills, [1899] 2 Ch. 60.

311. ——— Outside creditors—Liability to pay up all future instalments.—Resps. were advanced members of a building society, registered & incorporated under 1874 Act. By the terms of the deed of mtge., on the security of which the

311 i. Liability to contribute—Advanced members—Outside creditors—Liability to pay up by instalments.—Borrowing members of a building society incorporated under 1874 Act, who were not, under the rules, entitled to share in its profits, & whose contributions were not necessary in order to the payment of the creditors of the society, could not be compelled on its liquidation to repay their debts otherwise than by instalments, as stipulated in their bonds.—*SCOTTISH PROPERTY INVESTMENT CO. BUILDING SOCIETY v. BOYD* (1884), 12 R. (Ct. of Sess.) 127; 22 Sc. L. R. 43.—*SCOT*.

311 ii. ——— Liability to pay up all future instalments.—On the winding-up of a building society, members who have received advances repayable in instalments become liable to pay forthwith the full balance owing by them.—*Re CAPE OF GOOD HOPE PERMANENT BUILDING SOCIETY* (1898), 15 S. C. 323; 8 C. T. R. 360.—*S. AF*.

r. ——— Holders of shares or stock

advance to resps. was made, the sum advanced together with the interest thereon was to be repaid by instalments spread over a period of twenty-one years. By one of the rules of the society, borrowers were at liberty to redeem their mtges. on giving a certain notice, the amount of the redemption money payable in such case being the total amount of the future instalments of principal & interest less a certain discount on all money paid in advance of the due dates. Before the expiration of the twenty-one years, & while the mtge. remained unredeemed, the society was ordered to be wound up. At the date of the winding-up there were outside creditors of the society:—*Held*: resps. were liable to be placed on the list of contributories, & as such were compellable to pay immediately the future instalments of principal & interest provided by the mtge. deed, less the discount to which they would have been entitled upon a voluntary redemption under the society's rule in that behalf.—*LONDON PROVIDENT BUILDING SOCIETY v. MORGAN*, [1893] 2 Q. B. 266; 62 L. J. Q. B. 544; 69 L. T. 595; 57 J. P. 696; 42 W. R. 157; 9 T. L. R. 576; 37 Sol. Jo. 634; 5 R. 510, D. C.

Annotation:—*Reid*. Kemp v. Wright, [1894] 2 Ch. 462.

312. ——— Unadvanced members—Shares withdrawn within year of winding-up.—Members of a building society incorporated under 1874 Act, who had investing shares payable by monthly subscriptions, & upon which no advance had been made, gave due notice of withdrawal & received the estimated amount of their shares under the rules of the society before the shares were fully paid up or matured. The society was, within a year afterwards, wound up in the county ct., under the winding-up clauses of Cos. Acts, & the judge, on the application of creditors, made an order declaring that holders of such shares not matured at the commencement of the winding-up were, notwithstanding withdrawal, liable to contribute to the assets of the society to the extent to which their shares were in arrear at the commencement of the winding-up, & that the extent to which such shares should be deemed to be in arrear was the extent of the total amount of subscriptions which became payable prior to the winding-up, together with fines & interest:—*Held*: the order was wrong, for on withdrawal of their shares, the holders ceased to be members of the society, & no amount was in arrear within 1874 Act, s. 14, & they were not liable at law or in equity to contribute to its debts within Cos. Act, 1862 (c. 89), s. 200.—*Re SHEFFIELD & SOUTH YORKSHIRE PERMANENT BUILDING SOCIETY* (1889),

of matured stock, after maturity, demanded payment & refused to accept any new certificates or dividends:—*Held*: not liable.—*Re ST. JOHN BUILDING SOCIETY* (1889), 28 N. B. R. 597.—*CAN*.

t. ——— Acceptance of dividends.—Holders of matured stock made a demand of payment thereof after maturity, but, after making demand, accepted payment of dividends:—*Held*: liable.—*Re ST. JOHN BUILDING SOCIETY* (1889), 28 N. B. R. 597.—*CAN*.

u. ——— demand for payment.—Holders of paid up shares or investing stock, which matured previous to the commencement of the winding-up proceedings, never demanded payment thereof:—*Held*: not liable.—*Re ST. JOHN BUILDING SOCIETY* (1889), 28 N. B. R. 597.—*CAN*.

v. ——— Matured members—Demand for payment—No acceptance of new certificates or dividends.—Holders

b. ——— Father of minor.—The father of a minor holding shares in the society is not liable to be made a

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22 Q. B. D. 470; 58 L. J. Q. B. 265; 60 L. T. 186; 53 J. P. 375; 5 T. L. R. 192, D. C.

Annotation:—Consd. Sibun v. Pearce (1890), 44 Ch. D. 354.

See, also, cases in Part VII., Sect. 4, ante.

313. Priority in repayment—Of withdrawing members over other members—Notices given when society known to be insolvent.]—One of the rules of certain building societies provided as follows: "On & after the expiration of the first twelve months, any member may withdraw the subscription money which he may have contributed, with such an amount of interest as may be determined by the committee, such member to give notice of his intention to withdraw in writing to the secretary, & should more than one member give notice to withdraw at one time, the member so giving notice shall be paid in rotation, according to the priority of notice, provided always that the society shall not be required or obliged to make such payment as aforesaid, until they have sufficient funds in hand for that purpose, & also to meet the then existing legal liabilities of the society":—*Held*: the rule provided only for withdrawal from the societies while they were or were believed to be solvent, & notices of withdrawal, which were given or which matured at a time when the societies were known to be insolvent, though before the actual date of the winding-up order in each case, did not entitle the shareholders who had given them to be paid the amount of their subscriptions in priority to other shareholders in the winding-up.—*Re SUNDERLAND 36TH UNIVERSAL BUILDING SOCIETY (1890), 24 Q. B. D. 394; 59 L. J. Q. B. 217; 62 L. T. 293; 38 W. R. 509; 6 T. L. R. 199, D. C.*

Annotations:—Appld. Barnard v. Tomson, [1894] 1 Ch. 374. Follld. Sixth West Kent Mutual Bldg. Soc. v. Shove (1895), [1899] 2 Ch. 64, n. Consd. Re Ambition Investment Bldg. Soc., [1896] 1 Ch. 89. Refd. Sixth West Kent Mutual Bldg. Soc. v. Hills, [1899] 2 Ch. 60. Mentd. Re Gwawr-y-Gweithyr Industrial & Provident Soc., Dovey v. Morgan, [1901] 2 K. B. 477.

314. ——— Preferential shareholders.]

—On a special case to obtain the opinion of the ct. on the following questions: (1) whether the C. shares (*see* No. 315, *post*) were preferential as regarded capital, or only as regarded payment of interest, (2) whether a new rule passed in 1889 (*see* No. 315, *post*) was *ultra vires* or otherwise invalid, (3) in what priority, if any, the society ought to pay withdrawn shares:—*Held*: (1) as to the first question, the C. shares in respect of which notice of withdrawal was not given before

contributory, even though he paid the purchase-money.—*Re ST. JOHN BUILDING SOCIETY (1889), 28 N. B. R. 597.—CAN.*

c. — *Husband of married woman.*—Where a married woman is a shareholder the husband is not liable as a contributory, whether the shares were purchased with his money, or with the separate money of his wife.—*Re ST. JOHN BUILDING SOCIETY (1889), 28 N. B. R. 597.—CAN.*

d. — *Mortgagors.*—The rules of an incorporated society provided for three classes of shares, viz. monthly investing shares, paid up investing shares & capitalized shares or stock. By the rules advances were to be made only to members. Mtgors. were required to subscribe their names in a book containing the rules, by which they agreed to become holders of shares to the amount of the loan, & the mtgs. recited that the mtgors. were members for a number of shares equal to the loan. It was not intended

that they should make payment on account of the shares, & they never did so, the object of the managers in inserting the recital in the mtge. evidently being an attempted compliance with the rule that advances were only to be made to members. The society went into liquidation, & on an application to place the mtgors. on the list of contributories, as members of the society:—*Held*: they were not liable.—*Re ST. JOHN BUILDING SOCIETY (1889), 28 N. B. R. 597.—CAN.*

e. — *Personal representatives of deceased member—Joint shareholders.*—In the case of the death of one of two joint shareholders, the estate of the deceased shareholder is not liable.—*Re ST. JOHN BUILDING SOCIETY (1889), 28 N. B. R. 597.—CAN.*

f. — *Representative character.*—A rule declared that personal representatives of a deceased member should be entitled to his shares & all benefit & advantages accruing thereupon, & should be subject to the rules,

the change of rules in 1889, were preferential as regarded payment of interest only, & not as regarded payment of capital, but the holders of those C. shares who gave notice to withdraw before the change of rules, were entitled to be preferred over holders of shares who had not given notice; (2) as to the second question, the new rule was invalid in so far as it varied any then subsisting rights of members.—*SIXTH WEST KENT MUTUAL BUILDING SOCIETY v. SHOVE (1895), [1899] 2 Ch. 64, n.; 68 L. J. Ch. 482, n.; 81 L. T. 87, n.; 39 Sol. Jo. 601.*

Annotation:—Refd. Sixth West Kent Mutual Bldg. Soc. v. Hills, [1899] 2 Ch. 60.

315. ———.]—When a building society is known to be insolvent, no rule can be passed altering the rights of the members of the society, so as necessarily to affect their rights *inter se* in respect of liability or in respect of distribution of assets, to the injury of some of such members, for the benefit or advantage of others, even although it may be a rule which could properly be made by a society not in contemplation of liquidation. But a rule passed with the object of facilitating realisation of assets & enabling the society to get rid of burdensome obligations may legitimately be passed by a building society which is known to be insolvent, as auxiliary to its existing rules.

A building society issued preferential shares, known as C. shares, the proprietors of which were entitled to be paid interest in lieu of bonus & other periodical profits. The remaining shares, known as A. & B. shares, were issued on ordinary conditions. A new rule, passed in 1889, of the society provided as follows: "After Dec. 31, 1890, no further advances shall be made upon shares then existing. From & after the passing of this rule the withdrawal of shares, other than C. shares, by priority of notice shall cease, & all funds derived from repayment of advances, from realisation of properties in possession, or from any other source, shall be applied first, to the expenses of management & secretary's salary, the payment of capital & interest on C. shares, & the remainder *pro rata* to the repayment from time to time of the subscriptions standing to the credit of the holders of unadvanced shares, until the total assets of the society shall have been realised & distributed." At that date the society was known to be insolvent. By a further rule, passed in 1891, it was provided as follows: "In order to facilitate the realisation of any properties now or at any time in possession of the society, the directors shall have power to sell same or any part thereof to any member, &

& liable to the same payments as if they were original members:—*Held*: personal representatives were liable to be placed on the list of contributories, though only in their representative character.—*Re ST. JOHN BUILDING SOCIETY (1889), 28 N. B. R. 597.—CAN.*

g. — *Order of priority.*—There is no order of priority in their liability to contribute towards outside creditors, as between the holders of fixed or permanent capital stock, holders of unmatured investing stock, & holders of matured shares who have accepted dividends.—*Re ST. JOHN BUILDING SOCIETY (1889), 28 N. B. R. 597.—CAN.*

h. *Priority in repayment—Of matured shareholders.*—Holders of shares which had matured prior to liquidation have no priority of repayment, but must rank *pari passu* with the other shareholders.—*Re YORK COUNTY LOAN & SAVINGS CO. (1908), 11 O. W. R. 888.—CAN.*

receive in payment, either wholly or in part, any fully paid-up or subscription shares held by the member, whether under notice of withdrawal or not, provided that such shares shall be taken subject to the deduction of any withdrawal fee in force for the time being." At the time the 1891 rule was passed the only creditors of the society were members of the society in respect of their shares. The assets from all sources of the society were not sufficient to repay in full to members the capital sums due on their shares:—*Held*: (1) the 1889 rule was invalid so far as it sought to give priority in respect of capital to the holders of C. shares, who had not given notice of withdrawal before the change in the rules, over holders of A. & B. shares, but the C. shares retained their preferential right to interest; (2) the 1891 rule was not *ultra vires*, & unless the power thereby given were exercised with the fraudulent purpose of benefiting a particular member, the directors could not be made liable for a breach of trust; (3) the C. shareholders were entitled by the terms of the original contract to payment of interest, notwithstanding the society was insolvent.—*SIXTH WEST KENT MUTUAL BUILDING SOCIETY v. HILLS*, [1899] 2 Ch. 60; 68 L. J. Ch. 476; 81 L. T. 86; 47 W. R. 647.

316. — Notices not maturing until after resolutions.]—A member who had given a notice of withdrawal, which matured before the passing of resolutions for dissolution:—*Held*: to have thereby acquired a right to repayment in priority to the other members.

Members who had given notices of withdrawal, which matured after the passing of resolutions for dissolution:—*Held*: to have acquired no priority.—*Re AMBITION INVESTMENT BUILDING SOCIETY*, [1896] 1 Ch. 89; 65 L. J. Ch. 113; 73 L. T. 508; 44 W. R. 141; 2 Mans. 607.

Annotation:—*Reid*. *Sixth West Kent Mutual Bldg. Soc. v. Hills*, [1899] 2 Ch. 60.

317. — Of representatives of deceased or insane members—Of holders of paid-up shares.]—A building society incorporated under 1874 Act, by its rules provided for withdrawals (1) by representatives of deceased or insane members, (2) by members unadvanced on notice. After payment of withdrawn shares to the representatives of deceased or insane members, the persons holding unadvanced shares paid up for the subscribed term were to have the preference, & were to be paid in full, & in rotation, according to their respective subscriptions being fully discharged:—*Held*: the priority of payments should be (1) to representatives of deceased or insane members who had applied to withdraw; (2) to holders of realised shares; (3) to those who had given notice of withdrawal of their paid-up shares, according to the priority of their notice.—*THOMPSON v. ATLAS PERMANENT BUILDING SOCIETY* (1894), 97 L. T. Jo. 218, C. A.

318. — Of withdrawing depositor over other depositors—Of outside creditors.]—A registered co., carrying on business in the nature of that of a building society, had power to receive money by way of deposit from any person or partnership. Deposits were withdrawable upon giving a certain notice, according to the amount thereof. In Dec., 1881, C. deposited £300 with the co., upon which interest was duly paid until June, 1884. In Dec., 1884, C. gave notice that he required to withdraw his deposit, but same was not repaid, nor was any date fixed for its repayment. In Jan., 1885, a petition was presented for the winding-up of the co., & it was ordered to be wound up.

The question arose whether, in the distribution of the funds of the co. C. & all other unpaid depositors, who had given notice of withdrawal of their deposits before the date of the presentation of the petition, were entitled to rank as creditors of the co. in priority to those depositors who had not given such notice at that time:—*Held*: there was no priority as between the depositors, or between them & the outside creditors, but they must all rank *pari passu*.—*Re PROGRESSIVE INVESTMENT & BUILDING SOCIETY LTD.*, *Ex p. CORBOLD* (1886), 54 L. T. 45.

SECT. 2.—UNINCORPORATED SOCIETIES—WINDING-UP UNDER COMPANIES ACTS.

SUB-SECT. 1.—PROCEDURE.

319. Jurisdiction to wind up—Under Winding-up Acts, 1848 (c. 45) & 1849 (c. 108).]—A benefit building society of the ordinary kind, certified under 1836 Act, is within the above Acts.—*Re ST. GEORGE'S BUILDING SOCIETY* (1857), 4 Drew. 154; 27 L. J. Ch. 96; 29 L. T. O. S. 310; 21 J. P. 501; 3 Jur. N. S. 683; 5 W. R. 771; 62 E. R. 60.

Annotation:—*Folld*. *Re National Industrial & Provident Soc.* (1861), 25 J. P. 726.

320. Under Companies Act, 1862 (c. 89). In chancery.]—The Ct. of Ch. has jurisdiction under the above Act to wind up benefit building societies.—*Re NO. 3 MIDLAND COUNTIES BENEFIT BUILDING SOCIETY* (1864), 4 De G. J. & Sm. 468; 33 L. J. Ch. 739; 29 J. P. 613; 11 Jur. N. S. 229; 46 E. R. 1000, L.J.J.

Annotations:—*Mentd*. *Re Chatham Co-op. Industrial Soc.* (1864), 28 J. P. 532; *Re London & Suburban Bank*, [1892] 1 Ch. 604.

321. — Less than seven members.]—A petition was presented for the winding-up of a building society, which in June, 1866, consisted of thirty members, but at the date of the petition of only five. It was not registered under the above Act:—*Held*: there was jurisdiction where the society had formerly consisted of more than seven members, & it should be wound up.—*Re NATIONAL PERMANENT BENEFIT BUILDING SOCIETY*, *Ex p. WILLIAMSON*, [1867] W. N. 225; *revid.* on other grounds (1869), 5 Ch. App. 309, L.J.

Annotations:—*Mentd*. *Re Victoria Permanent Benefit Bldg. Investment, & Freehold Land Soc.*, *Hill's Case*, *Jones' Case* (1870), L. R. 9 Eq. 605; *Re South Wales Atlantic S.S. Co.* (1876), 2 Ch. D. 763; *Chapleo v. Brunswick Benefit Bldg. Soc.* (1880), 5 C. P. D. 331; *Yorkshire Rail Wagon Co. v. Maclure* (1881), 19 Ch. D. 478; *Blackburn Bldg. Soc. v. Cunliffe*, *Brooks* (1882), 22 Ch. D. 64, n.; *Murray v. Scott*, *Agnew v. Murray*, *Brimelow v. Murray* (1884), 9 App. Cas. 519; *Reversion Fund & Insee. v. Maison Cosway*, [1913] 1 K. B. 364; *Sinclair v. Brougham*, [1914] A. C. 398.

322. How far winding-up order binding.]—The ct. has no jurisdiction under the above Act, s. 199, to make an order for the winding-up of an unregistered building society, whose members are not more than seven in number. Such an order, if made, might be binding on the society, but would not be binding on an outsider who challenged it.—*Re BOWLING & WELBY'S CONTRACT*, [1895] 1 Ch. 663; 64 L. J. Ch. 427; 72 L. T. 411; 43 W. R. 417; 39 Sol. Jo. 345; 2 Mans. 257; 12 R. 218, C. A.

Annotations:—*Reid*. *Re New York & Continental Line* (1909), 54 Sol. Jo. 117. *Mentd*. *James v. Buena Ventura Nitrate Grounds Syndicate* (1895), 11 T. L. R. 568; *Llewellyn v. Kasintoe Rubber Estates*, [1914] 2 Ch. 670.

Sect. 2.—Unincorporated societies—winding-up under Companies Acts: Sub-sect. 1.]

323. ——— Society certified in 1868 under 1836 Act.]—A building society was established & certified in 1868 under 1836 Act, but was never incorporated. Early in 1900 the society was found to be insolvent, & subsequently a creditor petitioned for a winding-up order. *Semble*: 1836 Act having been repealed by 1894 Act, s. 25, the society came within the class of cos. forbidden by Cos. Act, 1862, s. 4, & there was no jurisdiction to wind it up under Cos. Acts.—*Re ILFRACOMBE PERMANENT MUTUAL BENEFIT BUILDING SOCIETY*, [1901] 1 Ch. 102; 70 L. J. Ch. 66; 84 L. T. 146; 17 T. L. R. 44; 45 Sol. Jo. 103.

324. Who may petition—Creditor—Lender of ultra vires loan.]—The directors of a benefit building society, the rules of which gave no power to borrow money, borrowed money for the purpose of advancing it to their members on the security of their shares. The lender of the money afterwards presented a petition for an order to wind up the society:—*Held*: the transaction was *ultra vires*, & petitioner had no legal or equitable debt against the society, & the petition must be dismissed.—*Re NATIONAL PERMANENT BENEFIT BUILDING SOCIETY*, *Ex p.* WILLIAMSON (1869), 5 Ch. App. 309; 22 L. T. 284; 34 J. P. 341; 18 W. R. 388, L. J.

Annotations:—*Reid*. *Re South Wales Atlantic S.S. Co.* (1876), 2 Ch. D. 763; *Sinclair v. Brougham*, [1914] A. C. 398. *Mentd.* *Re Victoria Permanent Benefit Bldg. Investment & Freehold Land Soc.*, *Hill's Case*, *Jones' Case* (1870), L. R. 9 Eq. 605; *Chapleo v. Brunswick Benefit Bldg. Soc.* (1880), 5 C. P. D. 331; *Yorkshire Rail Wagon Co. v. Maclure* (1881), 19 Ch. D. 478; *Blackburn Bldg. Soc. v. Cunliffe, Brooks* (1882), 22 Ch. D. 64, n.; *Murray v. Scott, Agnew v. Murray, Brimelow v. Murray* (1884), 9 App. Cas. 519; *Reversion Fund & Insee. v. Maison Cosway*, [1913] 1 K. B. 364.

325. ——— Unadvanced member—Who has given proper notice of withdrawal—Form of petition.]—An order to wind up a benefit building society whose rules do not give it express power to borrow, may be obtained on the petition of a person, who, under the rules of the society, has deposited money therein with a view of becoming a shareholder, but before becoming one, has given proper notice to withdraw the money & been unable to obtain it. But such petition must not be a mere creditor's petition, but must express that petitioner is a creditor in respect of money advanced by him as a member of the society, which he has given notice to withdraw.—*Re QUEEN'S BENEFIT BUILDING SOCIETY* (1871), 6 Ch. App. 815; 40 L. J. Ch. 381; 19 W. R. 762, L. J.

Annotations:—*Reid*. *Re Blackburn & District Benefit Bldg. Soc.* (1883), 24 Ch. D. 421; *Re Horsham Industrial & Provident Soc.* (1894), 70 L. T. 801.

326. When order made—Discretion of court to refuse.]—On a shareholder's petition to wind up a co. not registered under Cos. Acts, a building society registered under 1836 Act, but not incorporated under 1874 Act, the ct. may in its discretion refuse to make any order, notwithstanding there is no other way in which such a co. can be wound up under those Acts.—*Re SECOND COMMERCIAL BENEFIT BUILDING SOCIETY, LTD.* (1879), 48 L. J. Ch. 753.

327. ——— Petition by unpaid withdrawing member—No substantial interest of petitioner.]—F. in 1853 paid up the full amount payable upon

ten shares in a benefit building society, & thereupon became a member of it. The rules provided that, any member not having received an advance might withdraw the balance to his credit on notice, but such withdrawal would be subject to his proportion of expenses & other deductions. In 1854 F., being entitled to do so, gave the notice, but the money was not repaid to him, & three years later a resolution was passed by the society which, in effect, left the losses to be exclusively borne by persons who were members antecedently to the resolution. The resolution was admitted to be bad, as being *ultra vires* of the society, but money was borrowed on the faith of it, & the claims of the lenders obtained a priority against the members. These claims were shown to exceed the value of the whole assets of the society. At the time F. was absent from England, but was aware of the position & proceedings, & twelve years after presented a winding-up petition:—*Held*: the petition must be dismissed, as F. had no such substantial interest in the society's assets as would entitle him to support it, & had acquiesced in the resolution complained of.—*Re LONDON PERMANENT BENEFIT BUILDING SOCIETY* (1869), 21 L. T. 8; 17 W. R. 717, L. J.

328. ——— Society not insolvent.]—By the rules of a benefit building society it was provided that any member holding investment shares, who should be desirous of withdrawing his investment, should be allowed to do so upon giving a month's notice in writing, & that if several members should give notice at one time they should be paid in rotation according to priority of notice. Provisions were also made for the reference of disputes to arbitration. A., the holder of five investment shares representing £250, gave notice of withdrawal. The society had previously received notices from a large number of members of their desire to withdraw their investment shares to the amount of about £350,000, which sum then remained to be paid. Subsequently, alterations were made in the rules, & it was provided that payment to withdrawing members of their shares should be made by instalments. A., not having been paid, at the expiration of the month gave the statutory notice under Cos. Act, 1862 (c. 89), s. 199, & subsequently presented a petition for winding-up the society. The society was perfectly solvent, but time was required to realise the assets:—*Held*: petitioner as a withdrawing member was in a different position to an outside creditor, & was not entitled *ex debito justitiæ* to an order for winding up the society, & the ct., in the exercise of its discretion, would dismiss the petition with costs.—*Re PLANET BENEFIT BUILDING & INVESTMENT SOCIETY* (1872), L. R. 14 Eq. 441; 41 L. J. Ch. 738; 27 L. T. 638; 20 W. R. 935.

Annotations:—*Reid*. *Walker v. General Mutual Bldg. Soc.* (1887), 36 Ch. D. 777; *Re Horsham Industrial & Provident Soc.* (1894), 70 L. T. 801.

329. ——— Petition by advanced member—Contrary to wishes of majority.]—A petition was presented by four members of a permanent benefit building society, formed under 1836 Act, whose shares had been advanced on mtge., for winding up the society. One of the rules of the society gave the trustees powers to borrow any money

PART XIII. SECT. 2, SUB-SECT. 1.

323 i. Jurisdiction to wind up—Under Companies Act, 1862—Society certified in 1873 under Act of 1836.]—In a petition by a creditor for the winding up, under Cos. Act, 1862, s. 199, of a building society, consisting of more

than twenty persons, & established & certified in 1873 under 1836 Act, the ct. granted a winding-up order, holding that the society, having been in 1873 formed in pursuance of 1836 Act did not fall within the class of cos. forbidden by Cos. Act, 1862, s. 4, & that in virtue of Interpretation Act, 1889, s. 38, the

repeal of 1836 Act by 1894 Act did not affect rights or liabilities acquired or incurred by the society under the repealed Act.—*SMITH'S TRUSTEES v. IRVINE & FULLARTON PROPERTY INVESTMENT & BUILDING SOCIETY* (1903), 6 F. (Ct. of Sess.) 99.—**SCOT.**

that might be necessary for the purposes of the society, under which considerable sums of money had been borrowed on deposit, & some of the depositors pressed for their money, which the society was unable to pay without calling on their members. The committee of the society had accordingly proposed that the business should be transferred to another company & the society wound up, to which the great majority of the shareholders had agreed. After the petition was presented, the creditors of the society executed a release to petitioners from their debts, & the committee offered to effect a transfer of their mtges. :—*Held* : (1) as the release of petitioners operated as a release to the whole society, petitioners were under no direct or indirect liability in respect of the existing debts ; (2) the society being one of unlimited liability, & the rule as to borrowing *ultra vires*, the insolvency was not proved ; (3) the interest which petitioners had in the profits, as advanced members, was not sufficient to induce the ct. to make a winding-up order contrary to the wishes of the great majority of the other members, & the petition must be dismissed, but without costs.—*Re PROFESSIONAL, COMMERCIAL, & INDUSTRIAL BENEFIT BUILDING SOCIETY* (1871), 6 Ch. App. 856 ; 25 L. T. 397 ; 19 W. R. 1153, L. J.J.

Annotations :—*Re*ld. *Murray v. Scott, Agnew v. Murray, Brimelow v. Murray* (1884), 9 App. Cas. 519 ; *Re West London & General Permanent Benefit Bldg. Soc.*, [1894] 2 Ch. 352. *Mentd.* *Chapleo v. Brunswick Bldg. Soc.* (1881), 6 Q. B. D. 696 ; *Cunliffe, Brooks v. Blackburn Benefit Bldg. Soc.* (1884), 52 L. T. 225.

330. ——— Petition by unadvanced shareholder—Contrary to rules.—A building society, not registered under 1874 Act, having lost part of its funds, but still having enough to pay its creditors, one of its unadvanced shareholders liable to contribute to losses presented a petition for a winding-up order under Cos. Acts, 1862 (c. 89) & 1867 (c. 131), at the same time totally disregarding the provisions of the society's rules as to winding-up. Before the hearing a scheme of reconstruction & registration under 1874 Act was resolved upon by the shareholders & depositors, not one of whom supported petitioner at the hearing :—*Held* : the ct. having a discretion whether to make a winding-up order or not, the circumstances were such that the ct. was not satisfied that it was "just & equitable" to wind up the society & would not exercise its jurisdiction under Cos. Acts.—*Re LONDON & METROPOLITAN COUNTIES BENEFIT BUILDING & INVESTMENT SOCIETY* (1889), 1 Meg. 135.

331. ——— Petition by creditor refusing to accept composition—Order of no advantage to creditor.—A building society was established & certified in 1868 under 1836 Act, but was never incorporated. Early in 1900 the society was found to be insolvent, & a winding-up petition was then presented against the society, but C., one of its creditors, did not appear on that petition, which was withdrawn, all the other undisputed creditors of the society agreeing to accept 12s. 6d. in the pound, which was paid to them. There was nothing for distribution amongst the shareholders, as the assets when sold did not realise enough to pay the composition. The balance of that was provided by the directors out of their own pockets, & they took an assignment of the claims of the assenting creditors, & retained in hand enough to pay, & offered C. 12s. 6d. in the pound on his debt. C. refused the offer, & petitioned for a winding-up order, alleging irregularities by the society's officers, & that an investigation into its affairs was necessary. The ct. was of opinion that

nothing substantial would result from a winding-up order :—*Held* : on the above facts, the petition must be dismissed.—*Re ILFRACOMBE PERMANENT MUTUAL BENEFIT BUILDING SOCIETY*, [1901] 1 Ch. 102 ; 70 L. J. Ch. 66 ; 84 L. T. 146 ; 17 T. L. R. 44 ; 45 Sol. Jo. 103.

332. Appeal—Jurisdiction of Court of Appeal—Society incorporated after notice of appeal.—A petition for a compulsory winding-up of a building society was presented in the Ch. Ct. of the County Palatine of Lancaster, under the provisions of Cos. Act, 1862 (c. 89), Part II., relating to the winding-up of unregistered cos., the society being established under 1836 Act, & at the date of the presentation of the petition not having become incorporated under 1874 Act. The petition was dismissed & notice of appeal given, but between the date of the notice of appeal & the hearing thereof, the society obtained a certificate of incorporation under 1874 Act :—*Held* : the Ct. of Appeal had no jurisdiction to entertain the appeal, as the society, having become incorporated, was no longer subject to the jurisdiction of that ct.—*Re OLD SWAN & WEST DERBY PERMANENT BENEFIT BUILDING SOCIETY, Ex p. EVATT* (1887), 57 L. T. 381, C. A.

333. Costs—Petition dismissed.—When a winding-up petition is dismissed, the ct. will not, even if it thinks the petition was a *bonâ fide* one, give petitioner costs. The most that will be done is to dismiss the petition without costs.—*Re TYNESIDE PERMANENT BENEFIT BUILDING SOCIETY* (1885), 20 L. J. N. C. 130.

334. ——— Society pleading its own illegality.—Where a winding-up petition by a creditor was dismissed (*see* No. 331, *ante*), but the society had resisted the petition on the ground that it was a non-existent society for the purpose of winding-up (*see* No. 323, *ante*) :—*Held* : the society was not entitled to costs.—*Re ILFRACOMBE PERMANENT MUTUAL BENEFIT BUILDING SOCIETY*, [1901] 1 Ch. 102 ; 70 L. J. Ch. 66 ; 84 L. T. 146 ; 17 T. L. R. 44 ; 45 Sol. Jo. 103.

335. ——— Security for—Summons by official liquidator against manager—Delay.—A building society, formed in accordance with 1836 Act, was being wound up, & a summons was brought in Dec., 1882, by the official liquidator, under Cos. Act, 1862 (c. 89), s. 165, against the manager. The summons was dismissed, but was, at the request of the official liquidator, adjourned into ct. in Jan., 1884. On a summons by the manager, under s. 69, for security for costs on the ground of delay, & that the assets of the society were insufficient to pay the costs of the first summons :—*Held* : the ct. had general jurisdiction to order the official liquidator to give security for costs before any further proceedings were taken in the matter.—*Re SEVENTH EAST CENTRAL BUILDING SOCIETY* (1884), 51 L. T. 109.

Annotation :—*Consd. Re Strand Wood Co.*, [1904] 2 Ch. 1.

336. Appointment of liquidators—Provisional liquidator—Before hearing of petition.—A provisional liquidator will not in general be appointed before the hearing of a winding-up petition not presented by the building society, unless the ct. is satisfied that the petition is unopposed.—*Re CILFODEN BENEFIT BUILDING SOCIETY* (1868), 3 Ch. App. 462, L. J.J.

Annotations :—*Re*ld. *West Worthing Waterworks, Baths, & Assembly Rooms Co.* (1868), 18 L. T. 849 ; *London & Manchester Industrial Asscn.* (1875), 1 Ch. D. 466.

337. Vesting of property in liquidators—Application for vesting order—Ex parte.—A vesting order under Cos. Act, 1862 (c. 89), s. 203, cannot except in special circumstances be obtained *ex p.*

Sect. 2.—Unincorporated societies—winding-up under Companies Acts: Sub-sects. 1 & 2.]

—*Re ALBION MUTUAL PERMANENT BUILDING SOCIETY* (1888), 57 L. J. Ch. 248; *subsequent proceedings*, 48 Ch. D. 410, n.

338. ——— In name of society.]—A motion was made in the name of the official liquidator of an unincorporated building society, which was in course of being wound up compulsorily under Cos. Act, 1862 (c. 89), for an order, pursuant to s. 203, vesting in the liquidator certain property then vested in the sole surviving trustee of the society, & that the liquidator might be at liberty to exercise any of the powers conferred on him by s. 95 without the sanction or intervention of the ct.:—*Held*: subject to the notice of motion being amended by making it in the name of the society instead of in that of the official liquidator, the usual vesting order should be granted.—*Re BRITANNIA PERMANENT BENEFIT BUILDING SOCIETY* (1890), 63 L. T. 304.

339. ——— Land subject to rentcharge—Personal liability of liquidators for arrears.]—An order having been made for the winding-up of an unincorporated building society under Cos. Act, 1862 (c. 89), the ct. directed under s. 203 that certain land, which was vested in trustees for the society, subject to a rentcharge, should vest in the official liquidators, appointed for the purposes of the winding-up, by their official name. Pltfs., the owners of the rentcharge upon such land, sued the liquidators in their personal capacity to recover arrears of the rentcharge from them as terre-tenants:—*Held*: such action ought to be stayed as being manifestly groundless.—*GRAHAM v. EDGE* (1888), 20 Q. B. D. 683; 57 L. J. Q. B. 406; 58 L. T. 913; 4 T. L. R. 442; 36 W. R. 529, C. A.; *subsequent proceedings, sub nom. Re BLACKBURN & DISTRICT BENEFIT BUILDING SOCIETY, Ex p. GRAHAM* (1889), 42 Ch. D. 343, C. A.

Annotation:—*Refd. Re Ebsworth & Tidy's Contract* (1889), 42 Ch. D. 23.

340. ——— Repudiation of land by liquidators—Proof for arrears accruing after repudiation.]—An unincorporated building society were mtgees. in possession of land subject to a rentcharge created by deed. The society was wound up under Cos. Act, 1862 (c. 89), & the liquidators for some time paid the rentcharge. Then, finding that the annual value of the property was not equal to the rentcharge, they obtained leave from the ct. to get rid of the land, & gave notice to the tenant in occupation of the land & to the owner of the rentcharge that they repudiated the land. The owner of the rentcharge claimed to prove in the winding-up for arrears which had accrued since the repudiation:—*Held*: (1) the society were only liable so long as they were owners of the land; (2) the liquidators had sufficiently repudiated the ownership of the land, & no subsequent claim could be made for the rentcharge.—*Re BLACKBURN & DISTRICT BENEFIT BUILDING SOCIETY, Ex p. GRAHAM* (1889), 42 Ch. D. 343; 59 L. J. Ch. 183; 61 L. T. 745; 38 W. R. 178; 5 T. L. R. 565; 2 Meg. 1, C. A.

Annotations:—*Refd. Re Herbage Rents, Greenwich Charity Comrs. v. Green*, [1896] 2 Ch. 811; *Cundiff v. Fitzsimmons*, [1911] 1 K. B. 513.

341. ——— Exercise of powers without sanction of court—Power of sale—Conveyance not executed by all liquidators.]—A mtge. was made to the

trustees of an unincorporated building society. The mtge. deed provided that, in case of default by the mtgor., the property should be held upon trust that the trustees for the time being should, if & when required by the directors of the society, sell the property. An order was made for the winding-up of the society, as an unregistered co., under Cos. Act, 1862 (c. 89), s. 199. By a subsequent order six directors of the society were appointed liquidators, & it was ordered that all the acts required or authorised by the Act to be done by the official liquidators might be done by any two of them. By another order it was ordered, following s. 203, that all such property real & personal, including all interest, claims & rights in, to & out of property real & personal, & including things in action, as might belong to or be vested in the society, or to or in any person or persons in trust for or on behalf of the society, should vest in the official liquidators, & in pursuance of s. 96, that they should be at liberty to exercise any of the powers conferred on them by s. 95 without the sanction or intervention of the ct. After that, two of the six liquidators, without any further sanction of the ct., sold the mortgaged property, & executed a deed by which they purported to convey it to the purchaser in fee, freed & discharged from the mortgage debt:—*Held*: (1) the power of sale was validly exercised; (2) the conveyance only passed the legal estate in two-sixths of the property.—*Re EBSWORTH & TIDY'S CONTRACT* (1889), 42 Ch. D. 23; 58 L. J. Ch. 665; 60 L. T. 841; 37 W. R. 657, C. A.

Annotations:—*Mentd. Re Bryant & Cullingford to Barningham* (1889), 62 L. T. 53; *Re Stamford, Spalding & Boston Banking Co. & Knight's Contract*, [1900] 1 Ch. 287.

342. ——— Propriety of.]—A motion was made by the official liquidator of an unincorporated building society, which was in course of being wound up compulsorily under Cos. Act, 1862 (s. 89), for an order, pursuant to s. 203, vesting in the liquidator certain property then vested in the sole surviving trustee of the society, & that the liquidator might be at liberty to exercise any of the powers conferred on him by s. 95 without the sanction or intervention of the ct.:—*Held*: the right to exercise the powers conferred by s. 95, without the sanction or intervention of the ct., could not be allowed, it being improper to make the order in such general terms.—*Re BRITANNIA PERMANENT BENEFIT BUILDING SOCIETY* (1890), 63 L. T. 304.

SUB-SECT. 2.—LIABILITY TO CONTRIBUTE.

343. General rule.]—The liability of members of a building society, registered under 1836 Act, for its ordinary debts, such as rent, rates & taxes, does not depend on the doctrine of partnership, or on the contract of the members *inter se*, but on the doctrine of principal & agent, & if the assets are insufficient, the members, both advanced & unadvanced, are liable as contributories for such ordinary debts, if incurred while they are members.

Circumstances (*see* No. 344, *post*) in which:—*Held*: neither the advanced nor unadvanced members were liable to contribute, beyond the amounts payable on their shares under the rules & tables, to pay the deficiency due to depositors.—*Re WEST LONDON & GENERAL PERMANENT*

PART XIII. SECT. 2, SUB-SECT. 2.

k. Advanced & unadvanced shares.]—A shareholder who held forty shares of the society of the nominal value of £1,000 obtained an advance

of £500 from the society:—*Held*: that in the winding up he was to be treated as having received payment by anticipation of twenty completed shares & as a holder of twenty un-

advanced shares, & not as having obtained a loan on the security of his forty shares.—*NORTH BRITISH BUILDING SOCIETY v. M'LELLAN* (1887), 14 R. (Ct. of Sess.) 827.—SCOT.

BENEFIT BUILDING SOCIETY, [1894] 2 Ch. 352; 63 L. J. Ch. 506; 70 L. T. 796; 42 W. R. 535; 10 T. L. R. 280; 38 Sol. Jo. 273; 8 R. 764; *subsequent proceedings* (1898), 78 L. T. 393, C. A.

344. — For costs of winding-up & realisation.]—A building society, registered under 1836 Act, had lent money to its advanced members in respect of their shares in the society. Some of the mtges. by the advanced members secured the principal advanced, & such sums as might become payable to the society under the mtge., or the rules or bye-laws, or "in any other way." The other mtges. secured the mtgor.'s instalments, subscriptions, fines, & other sums payable according to the rules. The rules provided for the release of a member's security on his paying the amount due for principal, interest, fines, & other payments, & empowered the trustees, for the purposes of the society, to borrow sums up to a certain limit, at interest, & in order to procure such loans, to give their personal security, with a right to be indemnified out of the first funds of the society which should be received, but neither the rules nor the deposit receipts given under them purported to give any security to the depositors upon the funds or assets of the society. The shares of both advanced & unadvanced members were of the same nominal value. The assets of the society, when it was ordered to be wound up, were sufficient to pay the ordinary creditors, but not the depositors also, in full:—*Held*: (1) the actual costs of realising the properties as they existed at the commencement of the winding-up must first be paid out of the assets as they then existed, & the rest of such assets must be applied in paying ordinary debts & loans on deposits, *pro rata*; (2) to meet the estimated costs of winding-up, other than costs of realisation, a call must be made on all the members, both advanced & unadvanced, in proportion to their shares, & the deficiency due to the ordinary creditors must also be met by calls on all the members.—*Re WEST LONDON & GENERAL PERMANENT BENEFIT BUILDING SOCIETY*, [1894] 2 Ch. 352; 63 L. J. Ch. 506; 70 L. T. 796; 42 W. R. 535; 10 T. L. R. 280; 38 Sol. Jo. 273; 8 R. 764; *subsequent proceedings* (1898), 78 L. T. 393, C. A.

345. Shareholder—Not director or member of executive committee—Forfeiture of shares by non-payment of fines.]—A shareholder of a benefit building society, who has forfeited his shares by nonpayment of fines, etc., although he is neither a director nor member of the executive committee, is liable to be put on the list of contributories on the winding-up of the society.—*Re ST. GEORGE'S BENEFIT BUILDING SOCIETY*, *Ex p. FOOTE, JENNINGS, & DEARSLEY* (1858), 32 L. T. O. S. 69; 6 W. R. 766.

346. — Director & member of executive committee—No payments made—Share book signed.]—A shareholder of a benefit society, who is a director & member of the executive committee, & who had paid nothing, but has signed the share book, is liable as a contributory on the winding-up of the society.—*Re ST. GEORGE'S BENEFIT BUILDING SOCIETY*, *Ex p. FOOTE, JENNINGS, & DEARSLEY* (1858), 32 L. T. O. S. 69; 6 W. R. 766.

347. — Appointed director—Subscription paid—Share book not signed.]—A shareholder of a benefit society, who has been appointed a director & paid a subscription, but has not signed the share book, is liable as a contributory to the

debts & liabilities of the concern.—*Re ST. GEORGE'S BENEFIT BUILDING SOCIETY*, *Ex p. FOOTE, JENNINGS, & DEARSLEY* (1858), 32 L. T. O. S. 69; 6 W. R. 766.

348. Past advanced or investing members—Satisfaction of liabilities before winding-up.]—Past members of a building society, whether advanced or investing members, who have satisfied all their liabilities to the society in accordance with the rules before the commencement of the winding-up of the society, are not liable to contribute with members at the date of the winding-up to the losses of the society.—*Re WEST RIDING OF YORKSHIRE PERMANENT BENEFIT BUILDING SOCIETY*, *Ex p. PULLMAN*, *Ex p. CHARNOCK*, *Ex p. JOHNSON & GREENWOOD* (1890), 45 Ch. D. 463; 59 L. J. Ch. 823; 63 L. T. 483; 39 W. R. 74.

349. Unadvanced members—For call adjusting rights inter se.]—A permanent building society having fallen into difficulties, in consequence of the defalcation of a secretary, was wound up by order of the ct. By the rules of the society, shares might be taken at & commence from different times, but the ultimate value of each share was to be £120, & members were to continue to pay their subscriptions monthly for fourteen years, or until all shares of the same date should have attained the full value of £120. The rules also provided that the funds of the society should belong to the members in proportion to the time they had been subscribers, & that at the end of fourteen years from the date of each share, or when the accumulated subscriptions with interest amounted to £120 the unadvanced shareholders, *i.e.*, those to whom no advance of their shares had been made on mtge., should be repaid £120 per share. At the winding-up of the society, the assets were insufficient to repay in full the unadvanced shareholders the amount they had paid upon their shares. Some of those shareholders had paid up the greater part of their shares, whilst others who had recently become shareholders had paid up much less. A call had been made by the official liquidator upon all the shareholders for the purpose of satisfying the claims of the unadvanced shareholders, but had been already discharged as to the advanced shareholders:—*Held*: the order must also be discharged as to the unadvanced shareholders, & the assets must be distributed among the unadvanced shareholders *pro rata* under the society's rules, in proportion to the time for which they had subscribed to the society.—*Re DONCASTER PERMANENT BUILDING SOCIETY* (1867), L. R. 4 Eq. 579; 36 L. J. Ch. 871; 32 J. P. 3.

Annotations:—*Consd. Buckle v. Lordonny* (1887), 56 L. J. Ch. 437; *Re Middlesborough, Redcar, & Saltburn, etc., Bldg. Soc.* (1889), 58 L. J. Ch. 771.

350. — To extent of sum due at date of winding-up.]—A building society formed under 1836 Act, but not registered under 1874 Act, was ordered to be wound up. All the debts of the society had been paid, & there was a sum of surplus assets for the division amongst the members. The rules provided (*inter alia*) that when it should be deemed advisable to bring the operations of the society to a termination, a general meeting should be held, which should have power to dissolve the society, & when all payments due to the society by members or any other person had been satisfied, & the debts of the society

1. *Fine—Right to enforce.]—*A society provided that members in arrears two fortnightly instalments should pay a fine. The liquidator admitted that at the date of the last

balance-sheet of the society no fines had been levied on certain members, & that it was not the practice of the society to exact fines in terms of the rule:—*Held*: the liquidator was not

entitled to enforce the rule in the winding-up.—*NORTH BRITISH BUILDING SOCIETY v. M'LELLAN* (1887), 14 R. (Ct. of Sess.) 827.—*SCOT.*

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paid, the stock of the society should be divided among the members according to the respective number of unadvanced shares which each member might have standing at his credit in the books, & allowing the fair proportionate rate of profit upon each such share according to the duration of their payments to the society:—*Held*: the unadvanced members were free from all liability beyond what they were bound to contribute up to the commencement of the winding-up.—*Re MIDDLESBOROUGH, REDCAR, & SALT BURN, ETC., BUILDING SOCIETY* (1889), 58 L. J. Ch. 771; 5 T. L. R. 516.

Annotations:—*Mentd.* *Re Britannia Permanent Benefit Bldg. Soc.* (1891), 65 L. T. 196; *London Provident Bldg. Soc. v. Morgan*, [1893] 2 Q. B. 266; *Kemp v. Wright*, [1894] 2 Ch. 462.

351. — For amount due on preference shares.]—A building society issued under its rules paid up preference shares at a guaranteed rate of interest, the holders not being liable to contribute to losses nor to participate in profits. The ordinary members were liable under the rules, whether on withdrawing their shares, or on repaying advances thereon, or on redeeming their securities, for a fair proportion of the losses, expenses, bad debts, & other charges of the society. The society was wound up & there was a deficiency of assets:—*Held*: the ordinary members were liable for the full amount due on the preference shares, including interest thereon since the date of the winding-up order, & those members who had not received advances on their shares must satisfy that liability by submitting to a deduction from their claim against the assets.—*Re RELIANCE PERMANENT BENEFIT BUILDING SOCIETY* (1892), 61 L. J. Ch. 453; 66 L. T. 823; 8 T. L. R. 525; 36 Sol. Jo. 461.

352. Advanced members — Towards money due to unadvanced members — Subscriptions fully paid up.]—The rules of a permanent building society provided that advanced shareholders, on paying their subscriptions for fourteen years, should hold their property released from the mtge. to the society. The society having got into difficulties, was ordered to be wound up. Upon the question, whether advanced members ought to be placed upon the list of contributories:—*Held*: they ought for the purpose of discharging the debts due to third parties, but having paid all the subscriptions that would become due up to the end of fourteen years, they were not liable to calls for the purpose of paying to the unadvanced members the money due to them from the society.—*Re DONCASTER PERMANENT BUILDING SOCIETY* (1866), L. R. 3 Eq. 158; 15 L. T. 270; 31 J. P. 310; 15 W. R. 102; *subsequent proceedings* (1867), L. R. 4 Eq. 579.

Annotations:—*Consd.* *Brownlie v. Russell* (1883), 8 App. Cas. 235; *Re Middlesborough, Redcar, & Saltburn, etc., Bldg. Soc.* (1889), 58 L. J. Ch. 771; *London Provident Bldg. Soc. v. Morgan*, [1893] 2 Q. B. 266; *Re West London & General Permanent Benefit Bldg. Soc.*, [1894] 2 Ch. 352. *Reid.* *Kemp v. Wright* (1894), 7 R. 631. *Mentd.* *Re Victoria Permanent Benefit Bldg. Investment & Freehold Land Soc.*, *Hill's Case*, *Jones' Case* (1870), L. R. 9 Eq. 605; *Re Blackburn & District Benefit Bldg. Soc.* (1883), 24 Ch. D. 421.

353. — Liability as debtor only — Not as contributory.]—A building society formed under 1836 Act, but not registered under 1874 Act, was ordered to be wound up. Under the rules of the society the advanced members were not made liable to contribute to losses, but the directors were at liberty to allow to an advanced member, upon discharging any mtge., a fair proportion to the best of their judgment of the surplus profits of

the society in respect of his advanced shares. At the date of the winding-up order D., an advanced member, was indebted to the society in respect of the advance made to him, which was secured upon a mtge. of leasehold property. D. died subsequently to the date of the winding-up order, & the exors. & trustees of his will were settled upon the list of contributories of the society. The mtge. given by D. was to secure payment of all share or subscription money, expenses, fines, forfeitures, & money whatsoever to be paid by the mtgor. pursuant to the rules of the society in respect of the shares so received by him in advance as aforesaid, or otherwise in respect of his being a member of the society:—*Held*: (1) an advanced shareholder was the debtor of the society in respect of the money which he was bound to pay back, & was not a shareholder liable as a contributory; (2) the exors. & trustees of D. were not liable to be put on the list of contributories.—*Re BRITANNIA PERMANENT BENEFIT BUILDING SOCIETY* (1891), 65 L. T. 196.

Annotations:—*Consd.* *London Provident Bldg. Soc. v. Morgan*, [1893] 2 Q. B. 266. *Distd.* *Kemp v. Wright*, [1894] 2 Ch. 462.

354. — For amount due on preference shares.]—A building society issued under its rules paid up preference shares at a guaranteed rate of interest, the holders not being liable to contribute to losses nor to participate in profits. The ordinary members were liable under the rules, whether on withdrawing their shares, or on repaying advances thereon, or on redeeming their securities, for a fair proportion of the losses, expenses, bad debts, & other charges of the society. The society was wound up & there was a deficiency of assets:—*Held*: the ordinary members were liable for the full amount due on the preference shares, including interest thereon since the date of the winding-up order, & those members who had received advances on their shares must satisfy that liability by payment.—*Re RELIANCE PERMANENT BENEFIT BUILDING SOCIETY* (1892), 61 L. J. Ch. 453; 66 L. T. 823; 8 T. L. R. 525; 36 Sol. Jo. 461.

355. — Ratably with investing members — Special contract in rules.]—The rules of an incorporated building society, which was being wound up by the ct., provided that periodic accounts should be taken of the assets & liabilities of the society, & that in the event of a deficiency the loss should be apportioned amongst the members generally, & that any member having made the full payment or repayment on his shares should remain in the society until he had made all such additional payments or repayments as were allotted to him:—*Held*: advanced as well as unadvanced members were liable to contribute to losses.—*Re ALBION MUTUAL PERMANENT BUILDING SOCIETY* (1888), 43 Ch. D. 410, n.

Annotation:—*Reid.* *Re West Riding Permanent Benefit Bldg. Soc.* (1890), 43 Ch. D. 407.

356. — — — — —.]—The rules of a building society provided (1) that advance members could redeem their securities on payment of the amount fixed by the tables of the society, together with the full amount which should then be due "for subscriptions, fines, & other payments," (2) that surplus profits "after providing for all liabilities" should be appropriated equitably & equally between the investing & borrowing members, & (3) that "in the event of the directors determining," at a special meeting to be held every three years, that there was "a deficiency of income by which the society might be prevented from meeting its anticipated expenditure & liabilities" the amount

Annotation :—**Consd.** *Re West London & General Permanent Benefit Bldg. Soc.*, [1894] 2 Ch. 352.

357. — Right to redeem in accordance with rules—Not bound to remain members & share losses.]—TOSH v. NORTH BRITISH BUILDING SOCIETY, No. 135, *ante*.

359. ———.]—Circumstances (*see* No. 344, *ante*) in which :—*Held* : the advanced members were entitled to redeem on paying the calls therein mentioned & the amounts due under their mtgs. & the rules & tables.—*Re* WEST LONDON & GENERAL PERMANENT BENEFIT BUILDING SOCIETY, [1894] 2 Ch. 352 ; 63 L. J. Ch. 506 ; 70 L. T. 796 ; 42 W. R. 535 ; 10 T. L. R. 280 ; 38 Sol. Jo. 273 ; 8 R. 764 ; *subsequent proceedings* (1898), 78 L. T. 393, C. A.

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Annotations:—*Reid. Re Britannia Permanent Benefit Bldg. Soc.* (1891), 65 L. T. 198. *Mentl. London Provident Bldg. Soc. v. Morgan*, [1893] 2 Q. B. 266; *Kemp v. Wright*, [1894] 2 Ch. 462.

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be entered to it, but judgment should be allowed to go by default, C. undertaking to hold such judgment at the disposal of the society & not to take any further action upon it." The object of above course was to make both C. & B. creditors of the society rather than shareholders. The writ was issued, & judgment went by default as arranged. C. afterwards filed a petition to wind up the society, but the county ct. judge refused to allow C. & B. to rank as creditors in the winding-up:—*Held*: in the circumstances the transaction was not *bonâ fide* but was *ultra vires*, as the directors had a fiduciary position with respect to the other shareholders, & the county ct. judge's decision was right.—*Re SHEFFIELD PERMANENT BUILDING SOCIETY, CROOKES' APPEAL, BRAILSFORD'S APPEAL* (1889), 5 T. L. R. 211, D. C.

363. Priority in repayment—Of widows & children of deceased members.]—Upon the construction of a scheme of arrangement entered into between the creditors & contributories of an unincorporated building society, in the course of its winding-up by the ct., it was declared that the surplus assets ought to be distributed according to the rights of the shareholders under the rules of the society. The question then arose whether the widows & children of deceased members were entitled to precedence, having regard to the provision in the rules that if more than one member should give notice to withdraw at one time they should be paid in rotation, according to the priority of notice, provided always that the widows & children of deceased members should always have the precedence. The rules also provided (clause 25) that, in case of a member dying, his shares & interest should belong to his exors. or administrators, or other the person or persons thereafter mentioned; that, when on the death of any member without leaving a will a sum of money not exceeding £50 should become payable, such sum should, in default of letters of administration being taken out to the deceased member, be paid to any person nominated by deceased in writing, such person being husband, wife, father, mother, child, brother or sister, nephew or niece, of such member, & in case there should be no such nomination, or the person so nominated should have died before the deceased member, or in case the member should have revoked such nomination, then such sum should be paid to the person who should appear to be entitled under Stat. Distribution to receive same, without taking out letters of administration:—*Held*: (1) the true construction of the rules was that, whenever there was a competition between persons who had given notice to withdraw their shares & the widows & children of deceased members whom the society was bound to recognise under clause 25, then the widows & children should always have precedence; (2) under the scheme, such widows & children were entitled to be paid in priority to the other shareholders of the society, such widows

& children ranking *inter se* according to the dates of the deaths of the deceased members through whom they claimed.—*Re WEST LONDON & GENERAL PERMANENT BENEFIT BUILDING SOCIETY* (1898), 78 L. T. 393; 14 T. L. R. 304; 42 Sol. Jo. 363, C. A.

Annotations:—*Feld. Re Counties Conservative Permanent Benefit Bldg. Soc., Davis v. Norton*, [1900] 2 Ch. 819. *Mentd. Re United Service Share Purchase Soc.* (1909), 78 L. J. Ch. 713.

364. — Of withdrawing members over other members—Of "realised" members.]—By the rules of a benefit building society "realised" members, who had by their subscription, with interest & bonuses, made up the full amount of their shares, were entitled to payment, or certificates for payment in rotation, of such amount, & "withdrawal" members, who had not made up the full amount of their shares, but had given notice to withdraw, were entitled to like payments or certificates for the amount of their subscriptions with interest. In the winding-up of the society:—*Held*: these two classes stood in the position of creditors entitled to be paid in priority to "investing" members, who had not made up their shares, & had given no notice of withdrawal.—*Re NORWICH & NORFOLK PROVIDENT BUILDING SOCIETY, Ex p. RACKHAM* (1876), 45 L. J. Ch. 785, C. A.

Annotations:—*Mentd. Re Blackburn & District Benefit Bldg. Soc.* (1883), 24 Ch. D. 421; *Walton v. Edge* (1884), 10 App. Cas. 33.

365. — Application of rules.]—By the rules of a building society it was provided that members of the society might withdraw their money, provided the funds permitted, by giving notice according to the printed form in the schedule. The society was wound up, & the funds were insufficient to pay the whole of the investing members in full:—*Held*: those members who had given the prescribed notice of withdrawal were entitled to be paid in priority to those members who had not given notice, & the winding-up of the society did not prevent the application of the rules, although at the time of winding-up there were no funds immediately available for payment.—*WALTON v. EDGE* (1884), 10 App. Cas. 33; 54 L. J. Ch. 362; 52 L. T. 666; 49 J. P. 468; 33 W. R. 417; 1 T. L. R. 96, H. L.; *affg. S. C. sub nom. Re BLACKBURN & DISTRICT BENEFIT BUILDING SOCIETY* (1883), 24 Ch. D. 421, C. A.

Annotations:—*Consd. Re Middlesbrough, Redcar, Saltburn-by-the-Sea, & Cleveland District Permanent Benefit Bldg. Soc.* (No. 2) (1885), 53 L. T. 203; *King v. Rawlings* (1890), 54 J. P. 613; *Re Sunderland 36th Universal Bldg. Soc.* (1890), 24 Q. B. D. 394. *Reid. Re Alliance Soc.* (1885), 28 Ch. D. 559; *Re Mutual Aid Permanent Benefit Bldg. Soc.* (1885), 29 Ch. D. 182; *Sibun v. Pearce* (1890), 44 Ch. D. 354; *Barnard v. Tomson*, [1894] 1 Ch. 374; *Botten v. City & Suburban Permanent Bldg. Soc.*, [1895] 2 Ch. 441; *Sixth West Kent Mutual Bldg. Soc. v. Shove*, [1899] 2 Ch. 64, n.; *Re Wrexham, Mold & Connah's Quay Ry.*, [1899] 1 Ch. 440; *Sinclair v. Brougham*, [1914] A. C. 398. *Mentd. Brooks v. Blackburn Benefit Bldg. Soc.* (1884), 9 App. Cas. 857; *Tosh v. North British Bldg. Soc.* (1886), 11 App. Cas. 489; *Walker v. General Mutual Bldg. Soc.* (1887), 36 Ch. D. 777; *Re Ambition Investment Bldg. Soc.*, [1896] 1 Ch. 89.

366. — — — — —.]—The rules of a building

PART XIII. SECT. 2, SUB-SECT. 3.

m. Priority in repayment — Debenture holders.]—Debenture-holders holding debentures which purported to create a charge upon the funds of the society (a rule of the society providing that the repayment of deposits or loans, with such interest as might be agreed upon, should be a first charge upon the funds of the society) are entitled to be paid in full, with interest at the rates mentioned in their debentures, in priority to all other claims.—

Re AUCKLAND PERMANENT CO-OPERATIVE BUILDING & INVESTMENT SOCIETY (1899), 17 N. Z. L. R. 634.—N. Z.

365 i. — Withdrawing members over other members—Application of rules.]—Where, under the rules withdrawing members became, at expiration of their notices, absolutely entitled to payment, & entitled in the liquidation to payment in priority to members who had not withdrawn before liquidation, & it was provided that no more than one-half of the

weekly receipts should be applied in payment to withdrawing members, payment was merely postponed to such members if it should be necessary in order to carry on the business of the society. They were to be paid in rotation, according to the priority of their notices, with interest to the time of payment at a rate specified in the rules.—*Re AUCKLAND PERMANENT CO-OPERATIVE BUILDING & INVESTMENT SOCIETY* (1899), 17 N. Z. L. R. 634.

society provided that any member desirous of withdrawing should, by giving a month's notice in writing, be entitled to receive back his subscription money in the manner therein mentioned; that members withdrawing, whose shares were fully paid up, should be entitled to 5 per cent. interest from the time such shares were so paid up, or from the time the previous dividend was paid, & that if more than one member should give notice to withdraw they should be paid in rotation according to the priority of their notices. The society was ordered to be wound up under Cos. Acts, & at the date of the winding-up the shareholders consisted of three classes, viz.: (1) members who gave early notices of withdrawal of their shares, & who claimed to be paid out of the assets in priority to those who gave later notices; (2) members who gave later notices & who claimed that all the withdrawing members should be paid *pari passu*; & (3) members who gave no notices. The question being, whether the assets should be distributed *pro rata* amongst all the members who gave notice of withdrawal before the winding-up commenced, or ought to be distributed amongst them in priority & rotation according to the successive dates of their respective notices:—*Held*: the members who gave notice of withdrawal prior to the commencement of the winding-up were entitled to be repaid the amount of their shares in priority to the other members, according to the respective dates of their notices.—*Re MIDDLESBROUGH, REDCAR, SALTBURN-BY-THE-SEA, & CLEVELAND DISTRICT PERMANENT BENEFIT BUILDING SOCIETY* (No. 2) (1885), 53 L. T. 203.

Annotation:—*Mentd.* *Re Reliance Permanent Benefit Bldg. Soc.* (1892), 61 L. J. Ch. 453.

367. — Of lenders over shareholders & members—Money borrowed under unlimited power of borrowing—Claim to special equitable charges.—By the rules of an unincorporated building society, the directors were authorised from time to time, as occasion might require, to borrow any sums of money at interest from any persons, the borrowed money to be a first charge upon the funds & property of the society. Under the rule the directors borrowed large sums for the proper purposes of the society, & deposited with the lenders, as security, title deeds of properties which had been mortgaged to the society by advanced members:—*Held*: the rule was valid, & the lenders were entitled in the winding-up to payment out of the assets, after satisfaction of the outside creditors, & in priority to the claims of all shareholders or members, but the lenders must give up their securities to the official liquidator, the claim to special equitable charges upon specific properties being inconsistent with the true meaning of the rule, which was that all the money borrowed under it was to have the benefit, equally & *pari passu*, of a first charge upon the general funds & property.—*MURRAY v. SCOTT, AGNEW v. MURRAY, BRIMELOW v. MURRAY* (1884), 9 App. Cas. 519; 53 L. J. Ch. 745; 51 L. T. 462; 33 W. R. 173, H. L.; *revsq.* S. C. *sub nom.* *Re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY* (1882), 23 Ch. D. 440, C. A.

Annotations:—*Consd.* *Cunliffe, Brooks v. Blackburn Benefit*

Bldg. Soc. (1884), 52 L. T. 225; *Small v. Smith* (1884), 10 App. Cas. 119; *Re Middlesbrough, Redcar, Saltburn-by-the-Sea, & Cleveland District Permanent Benefit Bldg. Soc.* (No. 2) (1885), 53 L. T. 203; *Re West London & General Permanent Benefit Bldg. Soc.*, [1894] 2 Ch. 352; *Sinclair v. Brougham*, [1914] A. C. 398. *Reid, Blackburn & District Benefit Bldg. Soc. v. Cunliffe, Brooks* (1885), 29 Ch. D. 902; *Re Mutual Aid Permanent Benefit Bldg. Soc.* (1885), 29 Ch. D. 182. *Mentd.* *Re Mutual Aid Permanent Benefit Bldg. Soc.* (1885), 30 Ch. D. 434; *Sheffield & South Yorkshire Permanent Bldg. Soc. v. Aislewood* (1889), 44 Ch. D. 412; *Amalgamated Soc. of Ry. Servants v. Osborne*, [1910] A. C. 87; *Re Birkbeck Permanent Benefit Bldg. Soc.*, [1912] 2 Ch. 183.

— Money raised by subscriptions & deposits on loan—From persons not members.]—

By r. 1 of a building society, formed under 1836 Act, it was declared that the society was established “for the purpose of raising, by monthly subscriptions & deposits on loans, a fund to make advances to members of the value of their shares,” to enable them to erect or purchase houses to be mortgaged to the society for the purpose of securing the payments prescribed by the rules of the society. A second rule provided that the directors should meet at certain times “for the purpose of conducting the business of the society.” A third rule provided that at the end of every five years a general account of the affairs of the society was to be prepared, showing the gross receipts & expenditure & liabilities, & if in taking the accounts there appeared to be a deficiency of income, by which the society might be prevented from meeting its anticipated expenditure & liabilities, the amount of such deficiency should be equally apportioned by the directors between the investing & borrowing members, & be paid forthwith by such monthly or quarterly instalments as the directors should determine:—*Held*: the lenders of money to the society were entitled in the winding-up of the society to priority over the members of the society.—*Re MUTUAL AID PERMANENT BENEFIT BUILDING SOCIETY* (1885), 30 Ch. D. 434; 55 L. J. Ch. 111; 53 L. T. 802; 34 W. R. 143, C. A.

Annotation:—*Consd.* *Re Birkbeck Permanent Benefit Bldg. Soc.*, [1912] 2 Ch. 183.

See, further, COMPANIES.

369. — Of shareholders over unadvanced members—Issue of deposit or paid up shares—Preferential payment authorised by rules.—By the rules of an unincorporated building society the board was authorised to issue deposit or paid up shares for £30 each at 5 per cent. interest with the right of withdrawing the whole or part of the deposit upon notice in preference to all other shares. That rule was struck out by the certifying barrister, but the directors printed & acted upon it by issuing shares accordingly. Some years afterwards the rule was amended, by altering £30 into £1, & the amendment was certified by the barrister, & those who had taken £30 shares had them exchanged for £1 shares, & other £1 shares were issued to new shareholders. The money paid by those shareholders was applied for the purposes of the society:—*Held*: such shareholders, whether they had become so before or after the amendment was certified, & whether they had given notice of withdrawal or not, were

n. — Matured shareholders over withdrawing members—Right to interest.]—Matured shareholders are entitled to payment in priority to shareholders who withdrew before liquidation (the rules of the society showing that matured shareholders were entitled to be paid in any event at the moment of maturity, whilst withdrawing shareholders might be postponed if half of

the weekly receipts were insufficient to meet the withdrawals, & other funds were not available), but they are not entitled to interest, the rules not mentioning interest in their case.—*Re AUCKLAND PERMANENT CO-OPERATIVE BUILDING & INVESTMENT SOCIETY* (1899), 17 N. Z. L. R. 634.—N.Z.

o. Ordinary creditors over

matured—Or withdrawing members.]—Ordinary creditors take in priority, both to shareholders whose shares have matured & also to shareholders who had given notices of withdrawal which had expired before liquidation of the society, but they are not entitled to interest.—*Re AUCKLAND PERMANENT CO-OPERATIVE BUILDING & INVESTMENT SOCIETY* (1899), 17 N. Z. L. R. 634.—N.Z.

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entitled to be paid in the winding-up in preference to the unadvanced members.—*MURRAY v. SCOTT, AGNEW v. MURRAY, BRIMELOW v. MURRAY* (1884), 9 App. Cas. 519; 53 L. J. Ch. 745; 51 L. T. 462; 33 W. R. 173, H. L.; *affg. S. C. sub nom. Re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY* (1882), 23 Ch. D. 440, C. A.

Annotations:—Consd. Re Middlesbrough, Redcar, Saltburn-by-the-Sea, & Cleveland District Permanent Benefit Bldg. Soc. (No. 2) (1885), 53 L. T. 203; *Sinclair v. Brougham*, [1914] A. C. 398. *Held. Re West London & General Permanent Benefit Bldg. Soc.*, [1894] 2 Ch. 352. *Mentd. Brooks v. Blackburn Benefit Bldg. Soc.* (1884), 9 App. Cas. 857; *Small v. Smith* (1884), 10 App. Cas. 119; *Blackburn & District Benefit Bldg. Soc. v. Cunliffe, Brooks* (1885), 29 Ch. D. 902; *Re Mutual Aid Permanent Bldg. Soc.* (1885), 30 Ch. D. 434; *Sheffield & South Yorkshire Permanent Bldg. Soc. v. Aizlewood* (1889), 44 Ch. D. 412; *Amalgamated Soc. of Ry. Servants v. Osborne*, [1910] A. C. 87; *Re Birkbeck Permanent Benefit Bldg. Soc.*, [1912] 2 Ch. 183.

370. Of depositors & unadvanced members—Ultra vires banking business—Distribution of assets pari passu.]—A building society formed in 1851 under 1836 Act, & empowered by its rules to borrow to an unlimited extent, started & developed a banking business. In 1911 the society was ordered to be wound up, & questions of priority arose between the outside creditors, the unadvanced shareholders, & the bank customers on current and deposit account, for convenience called the depositors. The assets were insufficient for payment of all claimants in full, but were more than sufficient for payment of the outside creditors, who were subsequently paid by arrangement, & the shareholders:—*Held*: (1) the depositors were not entitled to recover money paid by them on an *ultra vires* contract of loan on the footing of money had & received by the society to their use; (2) the assets remaining after payment of the outside creditors must be taken to represent in part money which the depositors could follow, as having been invalidly borrowed, & in part money which the society could follow, as having been wrongfully employed by its agents in the

banking business, & subject to a view to tracing his own money into any particular asset, & to the costs of the liquidation, ought to be distributed *pari passu* between the depositors & the unadvanced shareholders according to the amounts respectively credited to them in the books of the society at the commencement of the winding-up.—*SINCLAIR v. BROUGHAM*, [1914] A. C. 398; 83 L. J. Ch. 465; 111 L. T. 1; 30 T. L. R. 315; 58 Sol. Jo. 302, H. L.; *varying S. C. sub nom. Re BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY*, [1912] 2 Ch. 183, C. A.; *subsequent proceedings, sub nom. Re BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY*, [1915] 1 Ch. 91.

Annotations:—Mentd. Brougham v. Dwyer (1913), 108 L. T. 504; *Leslie v. Sheill*, [1914] 3 K. B. 607; *Roscoe (Bolton) v. Winder*, [1915] 1 Ch. 62; *Hammerton v. Dysart*, [1916] 1 A. C. 57; *John v. Dodwell*, [1918] A. C. 563; *Kensington & Knightsbridge Electric Lighting Co. v. Notting Hill Electric Lighting Co.* (1918), 16 L. G. R. 179; *Banque Belge pour l'Etranger v. Hambrouck* (1920), 37 T. L. R. 76.

371. Recovery of money overpaid—Shareholders paid in full by mistake of law—Liability to refund excess.]—In the winding-up of a building society the Ct. of Appeal affirmed the decision of the lower ct. that the A. & B. shareholders of the society were entitled to be paid in full out of the assets of the society in priority to a third class of creditors called depositors. The assets being amply sufficient for that purpose the liquidator, who was the official receiver, thereupon paid the claims of the B. shareholders in full before he received notice of an appeal by the depositors to the House of Lords. The House of Lords varied the judgment of the Ct. of Appeal by directing that the depositors were entitled to share ratably with the A. & B. shareholders in the assets, & that decision gave an all-round dividend of 16s. in the pound. On the application of the liquidator the B. shareholders were ordered to refund 4s. in the pound, being the amount they had received in excess of 16s. in the pound.—*Re BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY*, [1915] 1 Ch. 91; 84 L. J. Ch. 189; 112 L. T. 213; 31 T. L. R. 51; 59 Sol. Jo. 89; [1915] H. B. R. 31.

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See SHIPPING AND NAVIGATION.

BURDEN OF PROOF.

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NOTE.—The principal Acts regulating burials & cremation now in force in England are *Burial Ground Act, 1816 (c. 141), Cemeteries Clauses Act, 1847 (c. 65), Burial Acts, 1852 (c. 85), 1853 (c. 134), 1854 (c. 87), 1855 (c. 128), 1857 (c. 81), 1859 (c. 1), 1860 (c. 64), 1862 (c. 100), 1871 (c. 33), Public Health (Interments) Act, 1879 (c. 31), Burial Laws Amendment Act, 1880 (c. 41), Burial & Registration Acts (Doubts Removal) Act, 1881 (c. 2), Disused Burial Grounds Act, 1884 (c. 72), Burial of Drowned Persons Act, 1886 (c. 20), Burial Act, 1900 (c. 15), Cremation Act, 1902 (c. 8), & Burial Act, 1906 (c. 44), referred to respectively in this Title as 1816 Act, 1847 Act, 1852 Act, 1853 Act, 1854 Act, 1855 Act, 1857 Act, 1859 Act, 1860 Act, 1862 Act, 1871 Act, 1879 Act, 1880 Act, 1881 Act, 1884 Act, 1886 Act, 1900 Act, 1902 Act, & 1906 Act.*

Part I.—Rights and Duties of Executors and Others as to Burial.

SECT. 1.—DISPOSAL OF BODY.

SUB-SECT. 1.—RIGHT TO POSSESSION OF BODY.

1. *Whether property in corpse—Action in trover.]—Held:* an action of trover against deft. for the bodies of two children that grew together

would not lie, as no person had any property in corpses.—*v. HANDYSIDE (circa 1750), 2 East, P. C. 652.*

2. — *Death in workhouse.]—The master of S. workhouse, a surgeon & another person were indicted for conspiracy to prevent the burial of*

PART I. SECT. 1, SUB-SECT. 1.

1i. *Whether property in corpse—Action for recovery.]—A corpse may possess such attributes as to justify its preservation on scientific or other*

grounds, & if a person has by the lawful exercise of work or skill so dealt with such body in his lawful possession that it has acquired attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession

of it, & if deprived thereof may maintain an action for its recovery as against a person not entitled to have it delivered to him for the purpose of burial subject to any positive law forbidding its retention in the particular cir-

a person who died in the workhouse in order that the corpse might be dissected.—*R. v. YOUNG* (1784), 4 *Wentworth's Pleadings* 219.

3. — *Anatomy Act, 1832* (c. 75).]—Deft. was convicted on an indictment charging him with disposing of certain dead bodies for the purpose of dissection. Deft., the master of a workhouse, was a person having lawful possession of the bodies of deceased paupers, & under *Anatomy Act, 1832*, s. 7, it was lawful for him to permit such bodies to undergo anatomical examination, provided the relatives did not require them to be buried without such examination. For the purpose of preventing the relatives from making this requirement & leading them to suppose that the bodies were buried without dissection, deft. showed the bodies to the relatives in coffins & caused the appearance of a funeral to be gone through. This fraud prevented the relatives from making the requirement, & deft. for gain to himself disposed of the bodies for dissection:—*Held*: the statutory requirement not having in fact been made, deft. was justified in what he did by the sect., & the conviction was wrong.—*R. v. FEIST* (1858), *Dears. & B.* 590; 27 *L. J. M. C.* 164; 31 *L. T. O. S.* 266; 22 *J. P.* 322; 4 *Jur. N. S.* 541; 6 *W. R.* 546; 8 *Cox, C. C.* 18, *C. C. R.*

4. — *Death in prison—Executed convict.*]—To sell the dead body of a capital convict for dissection, where dissection is no part of the sentence, is a misdemeanour indictable at common law.—*R. v. CUNDICK* (1822), *Dow. & Ry. N. P.* 13; 1 *Dow. & Ry. M. C.* 356, *N. P.*

5. — *Gaoler no Hen.*]—A gaoler refused to deliver up the body of a person, who had died while a prisoner in execution in his custody, to the exors. of deceased, unless they would satisfy certain claims made against deceased by the gaoler. The ct. issued a *mandamus*, peremptory in the first instance, commanding that the body should be delivered up to the exors.—*R. v. FOX* (1841), 2 *Q. B.* 246; 114 *E. R.* 95; *sub nom. Re WAKEFIELD (BAILIFF)*, 1 *Gal. & Dav.* 566; *sub nom. Ex p. WAKEFIELD (LORD OF THE MANOR)*, 11 *L. J. Q. B.* 41; *sub nom. Re JEWISON*, 5 *Jur.* 989.
Annotation:—*Folld. Williams v. Williams* (1882), 20 *Ch. D.* 659.

6. — — — — —.]—An indictment was preferred against a gaoler, charging that a prisoner had died in the gaol; that the body remained in the gaol, in the possession of deft., & that he had refused to deliver the body up to the exors. of deceased when so requested by them as such exors.

The notion of a gaoler being authorised to detain a dead body on account of pecuniary claims is a mistake, & a gaoler doing so is guilty of a misconduct in his public character, for which he is

cumstances.—*DOODEWARD v. SPENCE* (1908), 6 *C. L. R.* 406.—*AUS.*

1 ii. — *Extent & limitations of.*]—The proposition, accepted in English law, that there can be no property in a corpse, does not rest upon a sound foundation, & is not sustainable at least as a general proposition. Inasmuch as there is a legal right of custody, control, & disposition, the law recognises property in a corpse, but property subject to a trust, & limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise.—*MINER v. CANADIAN PACIFIC RY. CO.* (1910), 15 *W. L. R.* 161.—*CAN.*

7 i. — *Unauthorised disinterment.*]—A person was convicted of abstracting a body from the vault of a mortuary chapel, & concealing it in the hope of extorting money.—

ADVOCATE, H. M. v. SOUTAR (1882), 5 *Couper*, 65.—*SCOT.*

a. — *Post-mortem examination—Authorisation requisite.*]—In an action of damages brought against a doctor by the widow & children of deceased, pursuers averred that defender had made an unauthorised post-mortem examination of the body of deceased:—*Held*: the action was competent, & was appropriate for jury trial, in so far as founded on the wrong done by the unauthorised post-mortem examination.—*HUGHES v. ROBERTSON*, [1913] *S. C.* 394; 59 *Sc. L. R.* 268.—*SCOT.*

8 i. — *Disposal by will—Rights of executors—After burial.*]—Where the exors. asked for permission to remove the corpse of deceased from the place where it had first been buried:—*Held*: as the corpse formed no part of the

liable to prosecution (*MAULE, J.*).—*R. v. SCOTT* (1842), 2 *Q. B.* 248, n.; 114 *E. R.* 97, n.
Annotation:—*Folld. Williams v. Williams* (1882), 20 *Ch. D.* 659.

7. — *Unauthorised disinterment.*]—The law of England recognises no property in a corpse, & the unlicensed removal of a corpse even from unconsecrated ground is a misdemeanour, whatever motive may have prompted the removal.—*R. v. SHARPE* (1857), *Dears. & B.* 160; 26 *L. J. M. C.* 47; 28 *L. T. O. S.* 295; 21 *J. P.* 86; 3 *Jur. N. S.* 192; 5 *W. R.* 318; 7 *Cox, C. C.* 214, *C. C. R.*
Annotations:—*Folld. Williams v. Williams* (1882), 20 *Ch. D.* 659. *Reid. R. v. Price* (1884), 12 *Q. B. D.* 247.

8. — *Disposal by will—Rights of executor.*]—Testator directed W. to burn his body, & directed his exors. to repay W. the expense of so doing. The body was buried in unconsecrated ground with the assent of the exors. Afterwards W., representing to the Under-Secretary of State that she intended to bury it in consecrated ground, obtained his license to remove it. She caused it to be burnt in Italy, & then brought an action against the exors. for the expenses:—*Held*: there was no property in a dead body, but the exors. had a right to the possession of the body.—*WILLIAMS v. WILLIAMS* (1882), 20 *Ch. D.* 659; 51 *L. J. Ch.* 385; 46 *L. T.* 275; 46 *J. P.* 726; 30 *W. R.* 438; 15 *Cox, C. C.* 39.
Annotations:—*Reid. R. v. Price* (1884), 12 *Q. B. D.* 247. *Mentd. Re Dixon*, [1892] *P.* 386.

SUB-SECT. 2.—WHERE INQUEST OR NOTICE OF DEATH NECESSARY.

To coroner.]—*See CORONERS.*

9. To registrar—*Births & Deaths Registration Act, 1836* (c. 86).]—P., an assistant to the sexton, left word with his sister that a child was to be buried with a doctor's certificate, & afterwards it was buried in P.'s absence as he directed. P. was told the child had lived forty-five minutes, but he did not give notice to the registrar within seven days thereafter:—*Held*: there was evidence of P. having committed the offence of unlawfully burying the child without giving notice to the registrar.
Qu.: whether *Births & Deaths Registration Act, 1836*, applied to stillborn children.—*PHIPPS v. WHITEHOUSE* (1864), 28 *J. P.* 533.

See, now, Births & Deaths Registration Act, 1874 (c. 88), & generally, *REGISTRATION OF BIRTHS, MARRIAGES, & DEATHS.*

SUB-SECT. 3.—MODE OF DISPOSAL.

By burning.]—*See Part XVIII., post.*

estate, the exors. had no right to its possession & the application should be refused.—*KLINGENBERG'S EXECUTOR v. LADEMAN* (1898), 5 *O. R.* 105.—*S. AF.*

PART I. SECT. 1, SUB-SECT. 3.

b. *General rule.*]—The property in a corpse is subject, on the one hand, to the obligations of proper care & decent burial, & the restraints upon its voluntary or involuntary disposal & use provided by law, or arising out of the fact that the thing in question is a corpse; & on the other hand, the nature & extent of the right or obligation of the person for the time being claiming property.—*MINER v. CANADIAN PACIFIC RY. CO.* (1910), 15 *W. L. R.* 161.—*CAN.*

c. *Mutilation & dissection—To prevent inquiry into cause of death.*]—

Sect. 1.—Disposal of body: Sub-sect. 4. Sect. 2: Sub-sects. 1 & 2.]

SUB-SECT. 4.—UPON WHOM DUTY LIES.

10. Householder—In whose house body lies.]—*Semble*: every householder in whose house a dead body lies is bound by the common law to inter the body decently.—*R. v. STEWART* (1840), 12 Ad. & El. 773; 4 Per. & Dav. 349; 10 L. J. M. C. 40; 113 E. R. 1007.

Annotations:—*Apld.* *Bradshaw v. Beard* (1862), 12 C. B. N. S. 344. *Reid.* *R. v. Price* (1884), 12 Q. B. D. 247. *Mentd.* *Margate Pier & Harbour Co. v. Margate Town Council* (1869), 20 L. T. 564; *Woolwich Overseers v. Robertson* (1881), 6 Q. B. D. 654; *Williams v. Williams* (1882), 20 Ch. D. 659; *R. v. White* (1883), 11 Q. B. D. 309; *Re Dixon*, [1892] P. 386; *Tofts v. Pearl Life Insce.* (1914), 112 L. T. 140.

11. — Custodian of lunatic—No committee.]—A lunatic, of whose person or estate there was no committee, died without leaving ready money to pay the expenses of his funeral. The heir-at-law, who was one of the next-of-kin, petitioned that a sufficient sum belonging to the lunatic should be paid out of ct. for such purpose:—*Held*: the persons with whom the lunatic had resided should be directed to proceed with the funeral, & the petition be ordered to stand over.—*Re TOWNSEND* (1852), 21 L. J. Ch. 747; 18 L. T. O. S. 231, L. J. J.

12. — Public or private nuisance.]—B. was indicted in two counts for omitting & neglecting to bury certain bodies whereby decomposition set in & “the air was greatly affected & corrupted & was rendered & became for several days offensive, unwholesome, injurious & dangerous to health to the great damage & common nuisance of such of the liege subjects of our lord the King as inhabited in the house . . . to the evil example of all others in the like case offending & against the peace,” etc. The two counts, as drawn, did not allege a nuisance to the public, but only a private nuisance:—*Held*: the counts were bad.—*R. v. BYERS* (1907), 71 J. P. 205.

13. Overseers of poor—Body not in poor house.]—The overseers of a parish are not bound to bury the body of a pauper lying in the parish, but not in a parochial house, although such pauper was a married woman whose husband is settled in the parish & receiving relief there.

Semble: where a body lies in the house of a parish or union the parish or union must provide for the interment.—*R. v. STEWART* (1840), 12 Ad. & El. 773; 4 Per. & Dav. 349; 10 L. J. M. C. 40; 113 E. R. 1007; *sub nom.* *R. v. St. GEORGE, HANOVER SQUARE OVERSEERS* (1840), Arn. & H. 83; 4 J. P. 792; 5 Jur. 363.

Annotations:—*Apld.* *Bradshaw v. Beard* (1862), 12 C. B. N. S. 344. *Reid.* *Woolwich Overseers v. Robertson* (1881), 6 Q. B. D. 654; *R. v. Price* (1884), 12 Q. B. D. 247; *Re Dixon*, [1892] P. 386. *Mentd.* *Margate Pier & Harbour Co. v. Margate Town Council* (1869), 20 L. T. 564; *Williams v. Williams* (1882), 20 Ch. D. 659; *R. v. White* (1883), 11 Q. B. D. 309; *Tofts v. Pearl Life Insce.* (1914), 112 L. T. 140.

See, further, Part XIII., post.

14. Parent without means—Parish officer—Liability for nuisance.]—A parent is bound to provide christian burial for the body of a deceased child if he has the means; but if he has not the means, though the body remains unburied & becomes a nuisance to the neighbourhood, he is not indictable for the nuisance, notwithstanding

Deft., not being a duly qualified medical practitioner, dissected & removed parts of the body of deceased to prevent due inquiry into the cause of death:—*Held*: a criminal misdemeanour, as tending to defeat the objects of a Coroner's inquest, & being *contra bonos mores*.—*R. v. RUSSELL* (1839), 1 Legge, 110.—**AUS.**

d. Public exhibition — Monstrous birth.]—Though a public exhibition of the corpse of a still-born two-headed child may be a misdemeanour as being indecent & injurious to public welfare, mere retention of it unburied is not necessarily unlawful.—*DOODEWARD v. SPENCE* (1908), 6 C. L. R. 406.—**AUS.**

he could have obtained money for the burial expenses by way of loan from the poor law authorities of the parish, for he is not bound to incur a debt.

Semble: the parish officer would be liable for a nuisance in such case.—*R. v. VANN* (1851), 2 Den. 325; T. & M. 632; 21 L. J. M. C. 39; 18 L. T. O. S. 174; 15 J. P. 802; 15 Jur. 1090; 5 Cox, C. C. 379, C. C. R.

Annotations:—*Reid.* *Clark v. London General Omnibus Co.*, [1906] 2 K. B. 648. *Mentd.* *Osborn v. Gillett* (1873), L. R. 8 Exch. 88; *R. v. Price* (1884), 12 Q. B. D. 247.

15. Executor.]—An exor. who has assets sufficient for that purpose, is liable, upon an implied promise, to pay for a funeral, suitable to the degree of his testator, furnished by the directions of a third person.

It is the duty of the exor. to dispose of testator in the usual manner, *viz.*, by burying him (*HULLOCK, B.*).—*ROGERS v. PRICE* (1829), 3 Y. & J. 28. *Annotations*:—*Reid.* *Lucy v. Walrond* (1837), 3 Bing. N. C. 841. *Mentd.* *Corner v. Shew* (1838), 3 M. & W. 350.

16. —.]—The term “exorship. expenses” in a will means expenses incident to the proper performance of the duty of an executor & includes testator's funeral expenses.

Even if the exor. never receives assets to the amount of the funeral expenses he is liable to pay, although he did not order the funeral. It is part of his official duty to bury the deceased, so that he is liable to pay the funeral expenses without an order (*JESSEL, M.R.*).—*SHARP v. LUSH* (1879), 10 Ch. D. 468; 48 L. J. Ch. 231; 27 W. R. 528.

Annotations:—*Mentd.* *Re Clemow. Yeo v. Clemow*, [1900] 2 Ch. 182; *Re King, Travers v. Kelly*, [1904] 1 Ch. 363; *Re Spencer Cooper, Poë v. Spencer Cooper*, [1908] 1 Ch. 130; *Re Townend, Knowles v. Jessop*, [1914] W. N. 145.

17. —.]—Testator directed W. to burn his body, & directed his exors. to repay W. the expense of so doing. The body was buried in unconsecrated ground with the assent of the exors. Afterwards W., representing to the Under-Secretary of State that she intended to bury it in consecrated ground, obtained his license to remove it. She caused it to be burnt in Italy, & then brought an action against the exors. for the expenses. The action was dismissed:—*Held*: the exors.' duty was to bury the body.—*WILLIAMS v. WILLIAMS* (1882), 20 Ch. D. 659; 51 L. J. Ch. 385; 46 L. T. 275; 46 J. P. 726; 30 W. R. 438; 15 Cox, C. C. 39.

Annotations:—*Mentd.* *R. v. Price* (1884), 12 Q. B. D. 247; *Re Dixon*, [1892] P. 386.

See, also, cases in Sect. 2, sub-sect. 2, post.

SECT. 2.—FUNERAL EXPENSES.

SUB-SECT. 1.—WHAT ARE.

18. In general.]—For strictness no funeral expenses are allowable against a creditor, except for the coffin, ringing the bell, parson, clerk, & bearers' fees, but not for pall or ornaments (*HOLT, C. J.*).—*SHELLY'S CASE* (1693), 1 Salk. 296; 91 E. R. 262.

Annotations:—*Consd.* *Edwards v. Edwards* (1834), 2 Cr. & M. 612. *Reid.* *Hancock v. Podmore* (1830), 1 B. & Ad. 260. *Mentd.* *Young v. Cawdrey* (1819), 8 Taunt. 734.

19. Tombstone—Question of fact for court—Assurance Companies Act, 1909 (c. 49), s. 36 (1).]—Whether the cost of a tombstone is a funeral ex-

PART I. SECT. 2, SUB-SECT 1.

19 i. Tombstone.]—A gravestone is a charge properly attending a funeral, not as necessary expense, but suitable & proper as a customary mark of respect.—*SMITH v. ROSE* (1877), 24 Gr. 438.—**CAN.**

19 ii. —.]—The cost of erecting a

pense within Assurance Cos. Act, 1909, s. 36 (1), is a question of fact for the judge who tries the action. In arriving at a conclusion he ought to consider the station & condition of life of deceased & the general circumstances of the case, & the expense incurred ought, in those circumstances, to be reasonable.—*GOLDSTEIN v. SALVATION ARMY JENCE SOCIETY*, [1917] 2 K. B. 291; 86 J. K. B. 793; 117 L. T. 63, D. C.

See, further, EXECUTORS & ADMINISTRATORS.

SUB-SECT. 2.—FUND OR PERSON LIABLE.

20. Deceased's estate—Personal estate.]—Testator made his wife extriix. & residuary legatee, desiring her to bury him decently. In his lifetime she borrowed £100 for the funeral expenses, & after his death gave a bond for it:—*Qu.*: whether the £100 was a charge on testator's personal estate.—*LANGLEY v. OATES* (1708), 2 Eq. Cas. Abr. 455; 22 E. R. 388, L. C.

21. — Order by stranger.]—Although a person, other than the exor., may have rendered himself liable to the undertaker, the estate is ultimately answerable for so much of the cost as an executor might reasonably pay, & no more.—*GREEN v. SALMON* (1838), 8 Ad. & El. 348; 3 Nev. & P. K. B. 388; 1 Will. Woll. & H. 460; 7 L. J. Q. B. 236; 2 Jur. 567; 112 E. R. 869.

See, also, Nos. 25, 28, *post*.

22. — Married woman—Separate estate—Administration of estate.]—A decree issued, reciting that deceased was at the time of her death living apart from her husband, & died possessed of the sum of £300, savings out of her separate income, & that such separate estate was indebted to S. in the sum of £66 for the funeral expenses & interment of deceased; & citing the husband to accept or refuse letters of administration of the estate, or show cause why they should not be granted to S. as a creditor:—*Held*: a person who *ex necessitate* becomes a creditor in respect of the funeral expenses of a married woman possessing separate estate, is not bound to proceed against the husband.—*In the Goods of SPITTY* (1852), 8 L. T. O. S. 351; 16 Jur. 92.

Annotation:—*Mentd.* Fairland v. Percy (1875), L. R. 3 P. & D. 217.

23. — Funds under power of appointment.]—A married woman, by her will, in exercise of a power of appointment over trust moneys, made several bequests, & "after payment of her just debts, funeral & testamentary expenses, & the expenses attending the execution of her will, appointed" the residue of the trust money among her nieces:—*Held*: the charge of funeral expenses was not contingent upon her surviving her husband, & her husband surviving was entitled to repayment, out of the trust moneys, of money paid by him in respect of such expenses.—*WILLETER v. DOBIE* (1856), 2 K. & J. 647; 4 W. R. 669; 69 E. R. 942.

Annotation:—*Consd.* *Re M'Myn, Lightbown v. M'Myn* (1886), 33 Ch. D. 575.

24. — Executor's right of retainer.]—A husband, exor. of his wife's will made

under a testamentary power of appointment, is entitled to retain out of her estate the expenses of her funeral, though such estate was insufficient for creditors, & her will did not contain any charge of debts & funeral expenses.—*Re M'MYN, LIGHTBOWN v. M'MYN* (1886), 33 Ch. D. 575; 55 L. J. Ch. 845; 55 L. T. 834; 35 W. R. 179.

Annotation:—*Mentd.* *Re Churchill, Manisty v. Churchill* (1888), 39 Ch. D. 174.

25. Administration to undertaker—Order by stranger—No known relations.]—F. died intestate, without any known relation, in Aug., 1849. In Mar., 1852, the usual decree issued against the Queen's Proctor at the instance of a specialty creditor, & on the return of the decree, & no appearance, the ct. was moved to decree the administration to the creditor. This motion was directed to stand over, on the ground that the creditor held sufficient security for his debt by mtge. on deceased's real property. A motion was then made for administration to H. as a creditor, on account of funeral expenses incurred by him as undertaker. But this motion was rejected, & a fresh decree directed to issue at the instance of H. This decree accordingly issued, and was returned:—*Held*: the person who gave the order for the funeral was responsible, & H. should apply to that person for payment.—*In the Goods of FOWLER* (1852), 16 Jur. 894.

Annotation:—*Reid.* *Newcombe v. Beloe* (1867), L. R. 1 P. D. 314.

26. — Order by legatee.]—Administration with the will annexed, granted to a person as a creditor for funeral expenses, who had undertaken the funeral of the deceased, at the request of the universal legatee named in the will, upon his giving justifying security. The ct. will not grant administration to an undertaker as a creditor for funeral expenses, unless it is informed of the circumstances in which the expenses were incurred, & by whose authority appct. undertook the funeral.—*NEWCOMBE v. BELOE* (1867), L. R. 1 P. & D. 314; 36 L. J. P. & M. 37; 16 L. T. 33; 31 J. P. 168.

Annotation:—*Mentd.* *Fairland v. Percy* (1875), L. R. 3 P. & D. 217.

27. — Administration to creditor—Burial by guardians of poor.]—An intestate died by his own hand, after murdering his wife & child, & all three persons were buried at the expense of the parish. A creditor having applied for administration, the guardians of the parish, supported by three other creditors, opposed, & the guardians asked for a grant to their nominee:—*Held*: the fact of the guardians having had the duty of burial cast upon them gave them no prior right to administration, & the creditor who had first applied to the ct. was entitled to the grant, subject to the usual conditions.—*In the Goods of WEARE* (1892), 66 L. T. 860; 56 J. P. 394.

Burial of poor persons, see Part XIII., *post*.

28. Executor—Adequate assets—Order by stranger.]—If exors. neglect to give orders for the funeral of testator, & have sufficient assets for that purpose, they are liable, upon an implied promise, to the person who furnishes the funeral in a manner

tombstone is not chargeable against the estate of deceased.—*Re EATON'S ESTATE* (1902), 23 N. L. R. 249.—S. AF.

PART I. SECT. 2, SUB-SECT. 2.

22 i. Deceased's estate—Married woman—Separate estate.]—The separate estate of a married woman is liable for her funeral expenses.—*Re GIBBONS* (1899), 31 O. R. 252.—CAN.

22 ii. — The wife may charge her separate estate with her funeral expenses, but, unless she does so, or unless such expenses are by statute made a charge upon her estate, the husband cannot retain out of her estate in his hands moneys which he has spent in discharge of a legal obligation which the common law imposes upon him.]—*Re MONTGOMERY, LUMBERS v. MONTGOMERY* (1911), 17 W. L. R. 77.—CAN.

22 iii. — The estate of a woman married out of community, not the husband, is liable for her funeral expenses.]—*GRIFFITHS v. WILLIAMSON* (1913), S. R. 89.—S. AF.

22 iv. — Spouses married in community.]—Funeral expenses of a spouse married in community of property must be borne by the half-share of the deceased spouse.—*Re BELL* (1897), 18 N. L. R. 178.—S. AF.

Sect. 2.—Funeral expenses : Sub-sects. 2 & 3.]

suitable to testator's degree & circumstances.—

TUGWELL v. HEYMAN (1812), 3 Camp. 298, N. P.

Annotations:—Folld. Rogers v. Price (1829), 3 Y. & J. 28.

Refd. Corner v. Shawe (1838), 6 Dowl. 584.

29. ——— ——— ———.]—ROGERS v. PRICE,
No. 15, ante.

30. ——— ——— ———.]—SHARP v. LUSH, No.
16, ante.

31. ——— Whether personally liable.]—An
exor., as such, is not liable for the funeral expenses
of testator.—**CORNER v. SHEW** (1838), 3 M. & W.
350; 6 Dowl. 584; 1 Horn. & H. 65; 7 L. J. Ex.
105; 150 E. R. 1179.

Annotations:—Mentd. Brown v. Maclean (1849), 12 L. T. O. S.
423; **Bignell v. Harpur** (1850), 19 L. J. Ex. 168; **Farhall**
v. Farhall (1871), 7 Ch. App. 123.

32. ——— Express promise.]—Although
an exor., as such, is liable only for the expenses of
a funeral suitable to the rank & station of deceased,
yet, where a funeral had been ordered by the
widow as his agent, & he had made an express
promise to the undertaker to pay the amount of his
account:—**Held**: the exor. was personally liable
for all the charges which were fair & reasonable of
the funeral which was performed, notwithstanding
that it might be in a more expensive style than
was suitable to the circumstances of deceased.—
BRICE v. WILSON (1834), 8 Ad. & El. 349, n.;
3 Nev. & M. K. B. 512; 3 L. J. K. B. 93; 112
E. R. 870.

Annotation:—Consd. Green v. Salmon (1838), 8 Ad. & El. 348.

33. Executor de son tort—Money ear-marked
—**Extent of liability.]—Where** a party receives a
debt due to the estate of a person deceased, for the
purpose of providing the funeral, he will not
thereby become chargeable as executor *de son tort*,
unless he receive a greater sum than is reasonable
for that purpose, regard being had to the estate &
condition of deceased, which is a question for the
jury.—**CAMDEN v. FLETCHER** (1838), 4 M. & W.
378; 1 Horn. & H. 361; 8 L. J. Ex. 17; 150 E. R.
1475.

34. Administrator—Specific funds—Money had
& received.]—Deft. having, as administrator, re-
ceived a sum of money, which, it was agreed by
the parties entitled to it, was to be applied in dis-
charge of the funeral expenses of testator's widow,
which had been paid by pltf., promised so to apply
it:—**Held**: pltf. was entitled to recover it, in an
action for money had & received.—**MEERT v.**
MOESSARD (1827), 1 Moo. & P. 8.

Annotation:—Distd. Barlow v. Browne (1846), 16 L. J. Ex. 62.

35. ——— Sanction before appointment—Order
by stranger.]—Deft., before taking out letters of
administration, sanctioned an expensive funeral
which a relation had ordered for deceased:—**Held**:
after taking out administration, deft. was liable
in the capacity of administrator for this expense.—
LUCY v. WALROND (1837), 3 Bing. N. C. 841; 5
Scott, 46; 132 E. R. 634; *sub nom.* **LACEY v.**
WALROND, 3 Hodg. 215; 6 L. J. C. P. 290.

Annotation:—Refd. Corner v. Shew (1838), 3 M. & W. 350.

36. Next of kin—Order at instance of other
next of kin—For profit.]—J. S. died intestate seised
& possessed of considerable real & personal estate.
G. S., the heir-at-law & one of the next of kin, took
out administration to deceased with the consent of
most of the remaining next of kin. The funeral
expenses amounted to £1,200, G. S. being en-
couraged in going to this expense by two of the
next of kin, for the purpose of deriving a profit

from it to themselves as tradesmen:—**Held**:
G. S. was bound to control the funeral expenses
& the other next of kin could not be charged for
the acts of the two.—**STACPOOLE v. STACPOOLE**
(1816), 4 Dow, 209; 3 E. R. 1140, H. L.

Annotations:—Mentd. A.-G. v. Solly (1829), 2 Sim. 518;
Knott v. Cottet (1852), 16 Jur. 752.

37. Heir at law—Voluntary payment—Whether
personal estate liable.]—The heir-at-law of an in-
testate paid the funeral expenses out of his own
moneys as a matter of bounty, but afterwards
claimed to be allowed such payment out of the
personal estate:—**Held**: he was not entitled to
be repaid.—**COLEBY v. COLEBY** (1866), L. R. 2 Eq.
803; 14 L. T. 697; 12 Jur. N. S. 496.

See, also, Nos. 20, 21, ante.

38. Husband—Order by third person.]—When
a wife dies, her husband is bound to provide her
with a funeral at a reasonable expense, & if he does
not do so, any person who voluntarily employs an
undertaker & pays him for performing such a
funeral, is entitled to recover the sum so expended,
from the husband, in an action for money paid.—
AMBROSE v. KERRISON (1851), 10 C. B. 776; 20
L. J. C. P. 135; 17 L. T. O. S. 41; 138 E. R.
307.

Annotation:—Folld. Bradshaw v. Beard (1862), 12 C. B. N. S.
344.

39. ——— Absent abroad—Order by stranger—
Wife's father.]—Where a husband goes abroad &
leaves his wife, who dies in his absence, a third
person who voluntarily pays the expenses of her
funeral, suitable to the rank & fortune of the
husband, though without the knowledge of the
husband, may recover from him the money so laid
out, especially if such third person be the father
of the wife.—**JENKINS v. TUCKER** (1788), 1 Hy. Bl.
90; 126 E. R. 55.

Annotations:—Folld. Ambrose v. Kerrison (1851), 10 C. B.
776; **Bradshaw v. Beard** (1862), 12 C. B. N. S. 344.
Mentd. Gutteridge v. Smith (1794), 2 Hy. Bl. 374; **Grindell**
v. Godmond (1836), 5 Ad. & El. 755.

40. ——— Wife living separate—Order by
stranger.]—A husband & wife were living separate,
the wife receiving an allowance from the husband,
which was regularly paid to the time of the wife's
death. The daughter of the wife by a former
marriage lived with her, & at her death ordered
her funeral, which, in consequence of the wife's
desire to be buried at a considerable distance, was
a very expensive one:—**Held**: the husband was
liable for reasonable funeral expenses, & it was for
the jury to say whether the expense of burial at a
distance was a reasonable expense.—**BINGHAM v.**
WALKER (1848), 11 L. T. O. S. 151.

41. ——— ———.]—Deft.'s wife many years
ago voluntarily left his house, & went to reside at
her brother's, about a mile distant, where she con-
tinued to live apart from her husband until her
death, when her brother, without any communica-
tion with the husband, buried her in a suitable
manner:—**Held**: the brother was entitled to sue
the husband for the expense of the funeral.—
BRADSHAW v. BEARD (1862), 12 C. B. N. S. 344;
31 L. J. C. P. 273; 6 L. T. 458; 8 Jur. N. S. 1228;
26 J. P. 630; 142 E. R. 1175.

Annotation:—Refd. Jones v. Newtown & Llanidloes Gdns.
(1920), 89 L. J. K. B. 1161.

42. Infant—Widow—Child or relative.]—An
infant widow is liable upon a contract by her for
her deceased husband's funeral expenses, as such
a contract may be considered as made for her
personal benefit.

31 l. Executor — Whether personally
liable.]—MENZIES v. RIDLEY (1851),
2 Gr. 544.—**CAN.**

31 ll

—.]—Although the

exor. defts. first gave orders for a third
class funeral for deceased, yet, as they
by their conduct induced pltf. to
furnish a second class funeral, they were

held liable to pay therefor, whether
they had assets or not.—**PAUL v.**
DONOHY (1866), 6 W. R. 27.—**IND.**

Semble : a child or more distant relation, being an infant, would not be liable upon a contract for the burial of a parent or relative.—CHAPPLE v. COOPER (1844), 13 M. & W. 252; 13 L. J. Ex. 286; 3 L. T. O. S. 340; 153 E. R. 105.

Annotations :—*Reid*. Bradshaw v. Beard (1862), 12 C. B. N. S. 344; Ryder v. Wombwell (1868), L. R. 3 Exch. 90.

43. Guardians of ward—Maintenance fund.]—Guardians cannot be allowed funeral expenses out of a fund given for the ward's maintenance.—*v. WOOD* (1832), 2 L. J. Ch. 41.

44. Householder—Before liability settled.]—*Re TOWNSEND*, No. 11, *ante*.

45. Tortfeasor—Fatal Accidents Act, 1846 (c. 93)—Action by father.]—To a declaration alleging that by reason of the negligence of deft.'s servant pltf.'s daughter & servant was killed, & claiming damages for the burial expenses paid by pltf., deft. pleaded, first, that the daughter & servant was killed on the spot by the act complained of, so that pltf. did not & could not sustain damage entitling him to sue; & secondly, that the act complained of was a felonious act on the part of the deft.'s servant; & that the servant had not before the action been tried, committed, or prosecuted in any way in respect of the act:—*Held* : (1) the second plea afforded no answer to the declaration; (2) the first plea afforded a good answer, on the ground that, apart from Fatal Accidents Act, 1846, no civil action is maintainable against a person who has by negligence caused the death of another.—*OSBORN v. GILLET* (1873), L. R. 8 Exch. 88; 42 L. J. Ex. 53; 28 L. T. 197; 21 W. R. 409.

Annotations :—*Apprvd.* Clark v. London General Omnibus Co., [1906] 2 K. B. 648. *Consd.* Berry v. Humm, [1915] 1 K. B. 627. *Reid*. Appleby v. Franklin (1886), 17 Q. B. D. 93; Jackson v. Watson, [1909] 2 K. B. 193; Smith v. Selwyn, [1914] 3 K. B. 98; Admiralty Comrs. v. S.S. Amerika, [1917] A. C. 38.

46. ———.]—In an action by a father for damages for loss occasioned by the death of his daughter through the negligence of defts.:—*Held* : he was entitled to recover as damages the expenses of his daughter's funeral.—*BEDWELL v. GOLDING & SONS* (1902), 18 T. L. R. 436.

Annotation :—*Consd.* Clark v. London General Omnibus Co., [1906] 2 K. B. 648.

47. ———.]—A father cannot recover, either at common law or under Fatal Accidents Act, 1846, the funeral expenses to which he has been put in burying an unmarried infant daughter whose death was caused by reason of defts.' negligence & who was residing with her father at the time of her death.—*CLARK v. LONDON GENERAL OMNIBUS CO., LTD.*, [1906] 2 K. B. 648; 75 L. J. K. B. 907; 95 L. T. 435; 22 T. L. R. 691; 50 Sol. Jo. 631, C. A.

Annotations :—*Reid*. Jackson v. Watson, [1909] 2 K. B. 193; Berry v. Humm, [1915] 1 K. B. 627; Admiralty Comrs. v. S.S. Amerika, [1917] A. C. 38.

Order given by stranger.]—See Nos. 21, 25, 28, 35, 38, 39, 40, *ante*.

SUB-SECT. 3.—AMOUNT ALLOWED.

48. To executor—Status of deceased.]—£600 allowed for funeral in respect of testator's quality, being buried in his own country.—*OFFLEY v. OFFLEY* (1691), Prec. Ch. 26; 24 E. R. 14.

49. — As against creditor—Status of deceased.]—As against a creditor an exor. shall be allowed

45 l. Tortfeasor—Negligence—Action by father.]—In an action by the father of a person whose death was occasioned by the negligence of defts., it was held that pltf. could not recover funeral expenses incurred, as damages.—

TORONTO RY. CO. v. MULVANEY (1907), 38 S. C. R. 327.—CAN.

PART I. SECT. 2, SUB-SECT. 3.

50 l. To executor—Testamentary directions.]—A testator provided for

no more for funeral expenses than is absolutely necessary, regard being had to the degree & condition of deceased. Deceased had been a captain in the army, & at the time of his death was on half pay:—*Held* : £79 was too large a sum, as against a creditor.

Semble : in such a case as against a creditor, £20 is a reasonable sum.—*HANCOCK v. PODMORE* (1830), 1 B. & Ad. 260; 8 L. J. O. S. K. B. 403; 109 E. R. 783.

Annotation :—*Expld.* Edwards v. Edwards (1834), 2 Cr. & M. 612.

50. ———.]—Deceased was a small tradesman:—*Held* : £10 was a reasonable allowance to the extrix. for funeral expenses, as against a creditor.—*REEVES v. WARD* (1835), 1 Hodg. 300; 2 Scott, 390; 5 L. J. C. P. 67.

51. — Insolvent estate—Necessaries.]—Though at law, where a person dies insolvent, his exor. will be allowed no more for his funeral than is necessary, yet if he is led into a greater expense on this account, by seeing large legacies left by the will, which induced him to think the estate was solvent, the ct. will not adhere to the rule laid down at law that he must not exceed £10.—*STAG v. PUNTER* (1744), 3 Atk. 119; 26 E. R. 872, L. C. *Annotations* :—*Consd.* Hancock v. Podmore (1830), 1 B. & Ad. 260. *Reid*. Edwards v. Edwards (1834), 2 Cr. & M. 612.

52. ——— Status of deceased.]—The ct. refused to allow £2,210 for the funeral expenses of a deceased nobleman whose personal estate was believed to be solvent at his death, but ultimately, from unforeseen circumstances, proved to be insolvent.—*BISSETT v. ANTROBUS* (1831), 4 Sim. 512; 58 E. R. 192.

53. ———.]—There is no fixed sum for funeral expenses, where the estate of testator is insolvent; but the exor. will be allowed reasonable expenses according to the circumstances of the particular case.

The exor. is entitled to be allowed reasonable expenses, & if he exceeds those he is to take the chance of the estate turning out insolvent (*PARKE, B.*).—*EDWARDS v. EDWARDS* (1834), 2 Cr. & M. 612; 4 Tyr. 438; 3 L. J. Ex. 204; 149 E. R. 905.

54. ———.]—The usual allowance for funeral expenses to be paid from an insolvent estate is £20.—*YARDLEY v. ARNOLD* (1842), Car. & M. 434, N. P.

Annotation :—*Mentd.* Jacobs v. Laybourn (1843), 1 Dow. & L. 352.

55. ———.]—A charge by exors. for unnecessary expenses of a funeral disallowed.—*BRIDGE v. BROWN* (1843), 2 Y. & C. Ch. Cas. 181; 63 E. R. 79.

Annotation :—*Mentd.* Goldstein v. Salvation Army Asso. Soc., [1917] 2 K. B. 291.

56. — Testamentary directions—Hindoo.]—A Hindoo testator made two of his sons his exors., & directed that, when they should perform a religious or other act, by way of funeral obsequies, they should give notice to their brothers, & they should all perform the act, otherwise whatever the exors. might think proper they should do, & should any one raise objections to it, they should be inadmissible:—*Held* : the will did not give the exors. an unlimited discretion in expending testator's fortune in religious ceremonies.—*MULLICK v. MULLICK* (1829), 1 Knapp, 245; 12 E. R. 312, P. O.

57. To personal representatives—Insolvent estate—Status of deceased.]—Even in an insolvent estate, the personal representative will be allowed

the erection "of a suitable ~~statue~~" over his grave, "not to exceed \$1,500," & also of monumental tablets over the graves of his deceased wives, & died worth \$200,000, & the exors. spent \$3,000 on a monument to him & his

Sect. 2.—Funeral expenses: Sub-sect. 3. Part II.
Sect. 1: Sub-sects. 1 & 2. Sect. 2. Part III.
Sect. 1: Sub-sect. 1, A. & B.]

a sum expended for funeral expenses, according to the situation of life in which deceased had lived.—*PITCHFORD v. HULME* (1825), 3 L. J. O. S. Ch. 223.

58. Circumstances of deceased — Sufficient assets.]—*TUGWELL v. HEYMAN*, No. 28, *ante*.

59. — — —.]—*ROGERS v. PRICE*, No. 15, *ante*.

60. — — — Extravagance.]—J. S. died intestate seised & possessed of considerable real & personal estate. G. S. the heir-at-law & one of the next of kin, with the consent of most of the remaining next of kin, took out administration. The funeral expenses amounted to £1,200. Deceased's per-

sonal estate, at the date of this death amounted to £31,473. In an action against G. S. for an account brought by the representative of one of the next of kin:—*Held*: £200 was a sufficient sum for the funeral.—*STACPOOLE v. STACPOOLE* (1816), 4 Dow, 209; 3 E. R. 1140, H. L.

Annotations:—Mentd. A.-G. v. Solly (1829), 2 Sim. 518; *Knott v. Cottee* (1852), 16 Jur. 752.

61. Reasonable expenses — Assurance Companies Act, 1909 (c. 49), s. 36 (1).]—*GOLDSTEIN v. SALVATION ARMY ASSURANCE SOCIETY*, No. 19, *ante*.

62. — — — Burial at a distance—Question for jury.]—*BINGHAM v. WALKER*, No. 40, *ante*.

See, also, Nos. 32, 33, 39, *ante*, & generally, EXECUTORS & ADMINISTRATORS.

Part II.—Churchyards.

SECT. 1.—PROPERTY IN CHURCHYARDS.

SUB-SECT. 1.—IN WHOM FREEHOLD VESTS.

63. Parson.]—The soil & freehold of the churchyard is in the parson only.—*FRANCES v. LEY* (1615), Cro. Jac. 366; 79 E. R. 314; *sub nom. DAY v. BEDDINGFIELD*, Noy, 104.

Annotations:—Consd. Spooner v. Brewster (1825), 10 Moore, C. P. 494. *Reid. Bryan v. Whistler* (1828), 8 B. & C. 288. *Mentd. R. v. London* (1743), 13 East, 420, n.; *Fletcher v. Sondes* (1826), 3 Bing. 501; *Winstanley v. North Manchester Overseers*, [1910] A. C. 7.

64. — — — By custom in churchwardens.]—The freehold of the churchyard is in the parson; but by custom it may belong to the churchwardens.—*ANON.* (1682), 2 Show. 184; 89 E. R. 879.

65. — — —.]—Although the freehold of the churchyard is in the parson the right to a tombstone vests in the person who erects it.—*SPOONER v. BREWSTER* (1825), 3 Bing. 136; 2 C. & P. 34; 10 Moore, C. P. 494; 3 L. J. O. S. C. P. 203; 130 E. R. 465.

Annotations:—Distd. Hitchcock v. Walford (1838), 2 Jur. 326; *M'Gough v. Lancaster Burial Board* (1888), 4 T. L. R. 679. *Reid. Ashby v. Harris* (1868), L. R. 3 C. P. 523; *Keot v. Smith* (1875), L. R. 4 A. & E. 398.

66. Vicar—Divided parish—New Parishes Act, 1856 (c. 104).]—In 1816, under a local Act, a new church was built in St. P., which was to be the parish church, the old church being thereby converted into a "parish chapel." In 1853, by an Order in Council, the original burial place for the parish, which surrounded the old church, & also an additional ground provided under an earlier local Act, were closed, & a cemetery was provided for the whole parish. In 1863, that part of the parish in which the old church stood was formed into a new district, & the "parish chapel" was declared to be the church of that district:—*Held*: New Parishes Act, 1856, s. 10, did not operate to vest the old churchyard in the incumbent of the new district church, but the freehold still remained in the vicar of the parish.—*CHAMPNEYS v. ARROWSMITH* (1867), L. R. 3 C. P. 107; 37 L. J. C. P. 22; 17 L. T. 261; 31 J. P. 803; 16 W. R. 277, Ex. Ch.

Annotation:—Reid. Stewart v. West Derby Burial Board (1886), 34 Ch. D. 314.

67. — — — 1816 Act—London Government Act, 1899 (c. 14).]—An Act of 1719 passed to authorise the rebuilding of the parish church of St. M. provided (*inter alia*) for the enlargement of the churchyard & for the erection of a vestry room for

the parish. Under that Act land was acquired & conveyed to trustees upon trust "for the parish & parishioners, & that same was to be made part of the site of the parish church now to be rebuilt, or to be laid out as part of the churchyard." The vestry room was erected upon part of such land. The site of the vestry room, together with vaults, constructed underneath it, was duly consecrated for burial; but the room itself was not consecrated. By an Act of 1826 passed to authorise certain street improvements, the Commissioners of Woods & Forests were empowered to remove the vestry room & to provide a new vestry room in its stead, which, by the terms of the Act, was to vest in the persons in whom the previous room would have been vested had the Act not been passed. The Commissioners removed the old vestry room accordingly, & erected a building comprising a new vestry room, together with other accommodation:—*Held*: (1) the earlier vestry room became vested in the vicar of the parish by virtue of 1816 Act, s. 4, & remained vested in the vicar notwithstanding Poor Relief Act, 1819 (c. 95), s. 17, vesting parish property in the churchwardens & overseers; (2) the fact that it was used for civil purposes by the vestry both before & after the establishment of an elective vestry for the parish under the Metropolis Management Act, 1855 (c. 120), did not affect the title to the room, which remained vested in the vicar & was not subject to London Government Act, 1899, transferring the property of metropolitan vestries & of the churchwardens & overseers of metropolitan parishes to the metropolitan borough councils.—*WESTMINSTER CORPN. v. ST. MARTIN-IN-THE-FIELDS (VICAR & CHURCHWARDENS)* (1906), 96 L. T. 491; 71 J. P. 82; 23 T. L. R. 112; 5 L. G. R. 500.

See, further, ECCLESIASTICAL LAW.

Trees & timber, *see* AGRICULTURE, Vol. II., pp. 71, 72.

SUB-SECT. 2.—REPAIR OF FENCES.

68. Adjoining owner's liability—Jurisdiction of court.]—The owner of land adjoining a churchyard & his predecessors had been in use to repair so much of the churchyard fence as adjoined his land, & the churchwardens sued in an ecclesiastical

wives:—*Held*: the exors. might be allowed \$3,000.—*ARCHER v. SEVERN* (1886), 13 O. R. 316; *affd.*, 14 A. R. 723.—*CAN.*

61 i. Circumstances of deceased — Reasonable expenses.]—A funeral expense, which is not unnecessary nor

unreasonable in amount, will be allowed.—*TREURNICH v. DE VILLIER'S EXECUTORS* (1904), 21 S. C. 354.—*S. AF.*

ct. in respect of the non-repair of the fence:—*Held*: prohibition lay, the matter being one to be tried at common law.—CLAYDON v. DUNCOMBE (CHURCHWARDENS) (1638), 2 Roll. Abr. 287, pl. 52.

69. Duty of churchwardens—Whether faculty requisite.]—A contractor when rebuilding a house abutting on a churchyard unlawfully pulled down the churchyard wall for the purpose of obtaining for the lower windows of the house light & air from the churchyard, & rebuilt the house a few inches from the site of the old wall, & outside the churchyard. The rector & churchwardens, in order to vindicate their right to rebuild the wall, placed an iron screen of the same height as the old wall immediately opposite to the windows of the new house. On an application by the rector & churchwardens for a faculty to rebuild the wall:—*Held*: where a churchyard wall has been wilfully pulled down, or fallen down, it is the duty of the churchwardens to rebuild it, & if they do so without alteration no faculty is necessary, unless their right to rebuild it is in dispute.—ST. STEPHEN, WALBROOK (RECTOR & CHURCHWARDENS) &

GROCERS CO. v. SUN FIRE OFFICE TRUSTEES (1883), Trist. 103.

See, generally, BOUNDARIES, FENCES, & PARTY-WALLS.

SECT. 2.—CONSECRATION.

70. Additional ground — Separated from churchyard—Consecration of Churchyards Act, 1867 (c. 133).]—Land may adjoin & may be added to an existing churchyard within Consecration of Churchyards Act, 1867, although it is separated therefrom by a highway.

A plot of ground separated from a churchyard by a highway about 20 ft. wide:—*Held*: to be "adjoining to an existing churchyard" within the Act.—*Re* BATEMAN (BARONESS) & PARKER'S CONTRACT, [1899] 1 Ch. 599; 68 L. J. Ch. 330; 80 L. T. 469; 63 J. P. 345; 47 W. R. 516; 43 Sol. Jo. 314.

Annotation:—*Mentd.* Cave v. Horsell (1912), 106 L. T. 147.

See, further, Part VIII., Sect. 4, sub-sect. 7, post.

Part III.—Burial in Churches and Churchyards.

SECT. 1.—RIGHT OF BURIAL.

SUB-SECT. 1.—PERSONS HAVING RIGHT.

A. Parishioners.

71. Without leave.]—All parishioners have a right to be buried in the churchyard without leave of the incumbent.—MAIDMAN v. MALPAS (1794), 1 Hag. Con. 205; 161 E. R. 526.

Annotations:—*Reid.* Keet v. Smith (1875), L. R. 4 A. & E. 398. *Mentd.* Wilson v. M'Math (1819), 3 B. & Ald. 244, n.; Sanders v. Head (1843), 3 Curt. 565; Fell v. Law (1848), 6 Notes of Cases 209; R. v. Chichester (1859), 2 E. & E. 209; Ritchings v. Cordingley (1868), L. R. 3 A. & E. 113; Winchester v. Wix (1868), 21 L. T. 439; Nevill v. Bridger (1874), L. R. 9 Exch. 214; R. v. Oxford (1879), 4 Q. B. 1. 245; Julius v. Oxford (1880), 5 App. Cas. 214; McGough v. Lancaster Burial Board (1888), 21 Q. B. D. 323, C. A.; Batten v. Gedye (1889), 41 Ch. D. 507; St. Michael Bassishaw v. Parishioners, [1893] P. 233; Lee v. Hawtrey, [1898] P. 63.

72. At common law.]—Burial in the parish churchyard is a common law right inherent in the parishioners.—R. v. COLERIDGE (1819), 2 B. & Ald. 806; 1 Chit. 588; 3 Phillim. 337, n.; 106 E. R. 559.

Annotations:—*Appld.* R. v. St. Aubyn, *Ex p.* Blackmore (1830), 8 L. J. O. S. K. B. 384. *Reid.* *Ex p.* Titchmarsh (1845), 9 Jur. 159; Brown v. Montreal (1874), L. R. 6 P. C. 157. *Mentd.* Winstanley v. North Manchester Overseers [1910] A. C. 7.

73. Unbaptised parishioner.]—An information is grantable against a parson for opposing the burial of an unbaptised parishioner in the churchyard.—R. v. TAYLOR (1721), 1 Burn's Ecclesiastical Law, 9th ed. 258.

Annotation:—*Reid.* Andrews v. Cawthorne (1745), Willes, 537, n.

74. New district—Divided parish.]—The burial of the dead is an ecclesiastical purpose within New

Parishes Act, 1856 (c. 104), s. 14, & where a district, which has a burial ground, becomes by the operation of this sect. a separate & distinct parish for ecclesiastical purposes, the inhabitants of such new parish cease to have any right of burial in the burial ground of the old parish out of which the district was taken.—HUGHES v. LLOYD (1888), 22 Q. B. D. 157; 58 L. J. Q. B. 122; 60 L. T. 675; 53 J. P. 310; 37 W. R. 380; 5 T. L. R. 145, D. C.

Annotations:—*Reid.* Jones, Lewis & Evans v. Roberts (1888), 5 T. L. R. 146. *Mentd.* R. v. Harding (1889), 6 T. L. R. 53.

Convenient warning to vicar.]—*See* No. 106, *post*.

See, also, Sect. 5, post.

B. Non-Parishioners.

75. Consent of churchwardens.]—In a case of office promoted against C. for erecting tombs in the churchyard of the parish of K., one of them being the tomb of W., who was not a parishioner, the churchwardens were blamed in the argument, for allowing strangers to be buried there.

This is a permission, undoubtedly, which should be sparingly granted, since there can be no absolute claim of that kind; but I think there is enough shown to prove that the churchwardens in this parish are authorised to give such leave, since there is a table of fees produced, in which there is one "for the burial of strangers" (SIR W. SCOTT).—BARDIN v. CALCOTT (1789), 1 Hag. Con. 14; 161 E. R. 459.

Annotations:—*Reid.* Kellett v. St. John's, Burscough Bridge (1916), 32 T. L. R. 571. *Mentd.* McGough v. Lancaster Burial Board (1888), 36 W. R. 822.

76. —.]—Upon a process against the churchwardens of H. for suffering strangers to be buried in their churchyard, & their appearing &

PART III. SECT. 1, SUB-SECT. 1.—A.

71 i. Without leave of rector.]—A., with leave from the sexton, but not from the rector, buried a parishioner in a graveyard vested in the Representative Church Body: the grave was the proper one, according to custom, in which to bury deceased:—*Held*: the rector is the person alone entitled to point out graves, & give permission to inter in such graveyard, & burial in the same without permission

is a trespass.—CHURCH REPRESENTATIVE BODY v. M'LOUGHLIN, [1896] 31 I. L. T. 43.—IR.

72 i. At common law.]—At common law a parishioner cannot acquire an exclusive right of burial in the parish graveyard, save by faculty or prescription supposing a faculty, annexing the right to an ancient message, & in absence of such can only acquire an exclusive right to burial under Public Health (Ir.) Act, 1878, s. 170.—

HICKEY v. SULLIVAN (1894), 28 I. L. T. —IR.

PART III. SECT. 1, SUB-SECT. 1.—

e. Nonconformist graveyard — Ex-member of congregation.]—A person who has ceased to be a member of the congregation of a Presbyterian church has no right of burial in the graveyard attached to such church, merely because his ancestors have been interred in such graveyard.—DEACONS' BOARD v. ASTON, [1898] 33 I. L. T. 46.—IR.

1.— *of burial: Sub-sect. 1, B.;*

confessing the charge, they were admonished by the ecclesiastical judge not to suffer the same for the future.—**HARROW-ON-THE-HILL CHURCHWARDENS' CASE** (undated), 1 Burn's Ecclesiastical Law, 9th ed. 258.

77. — Discretionary—Convenience of parishioners.]—A practice had prevailed during the incumbency of several vicars, that upon the burial of any stranger in the parish of H. certain fees should be paid, of which the vicar took one moiety & the churchwardens the other for the use of the poor. The fees were paid to the sexton, who paid over the moieties to the respective parties. A new vicar refused to accede to this arrangement, he buried several strangers, & procured the sexton, to whom the fees were paid, to pay over the entire fees to himself:—*Held*: the churchwardens might recover one moiety as had & received to their use.

I do not apprehend that the churchwardens would be liable to censure either by the civil or ecclesiastical law in joining with the vicar in permitting strangers to be buried in the churchyard & receiving fees for that permission, provided no inconvenience were sustained by the parish. If it could be shown that other parishioners sustained actual inconvenience, it might be different (**GIBBS, C.J.**).—**LITTLEWOOD v. WILLIAMS** (1815), 6 Taunt. 277; 1 Marsh. 589; 128 E. R. 1041.

Annotations:—*Reid. Re Haigh with Aspull*, [1919] P. 143. *Mentd. St. Martin Orgars* (1890), Trist. 145.

78. — Injunction against vicar.]—**A.-G. v. STRONG** (1868), Seton on Decrees, 7th ed. 550.

Annotation:—*Reid. A.-G. & Spalding Union R. D. C. v. Garner* (1907), 97 L. T. 486.

79. Parishioner of new parish—Whether rights in old parish—Parish divided.]—**HUGHES v. LLOYD**, No. 74, *ante*.

SUB-SECT. 2.—LIMITATION OF RIGHT.

80. Particular place—Near to ancestors.]—A custom to bury as near as possible to ancestors is bad.—**FRYER v. JOHNSON** (1755), 2 Wils. 28; 95 E. R. 667.

Annotation:—*Reid. R. v. Westmeath County JJ.* (1866), 15 W. R. 59.

81. — Or vault.]—The ct. will not grant a *mandamus* to compel a rector to bury the corpse of a parishioner in a vault, or in any particular part of a churchyard.—*Ex p. BLACKMORE* (1830), 1 B. & Ad. 122; 109 E. R. 732; *sub nom. R. v. St. AUBYN, Ex p. BLACKMORE*, 8 L. J. O. S. K. B. 384.

Annotations:—*Folld. Nevill v. Bridger* (1874), L. R. 9 Exch. 214. *Reid. Ex p. Titchmarsh* (1845), 9 Jur. 159; *Winstanley v. North Manchester Overseers*, [1910] A. C. 7.

82. Unusual mode—Iron coffin—Jurisdiction.]—The mode of burying the dead is a matter of ecclesiastical cognisance.

On a question whether a parishioner had a right to be buried in the parish churchyard in an iron coffin, which was a new & unusual mode:—*Held*: a *mandamus* should be refused.—**R. v. COLERIDGE** (1819), 2 B. & Ald. 806; 1 Chit. 588; 3 Phillim. 337, n.; 106 E. R. 559.

Annotations:—*Consd. R. v. St. Aubyn, Ex p. Blackmore* (1830), 8 L. J. O. S. K. B. 384; *Brown v. Montreal* (1874), L. R. 6 P. C. 157. *Reid. Ex p. Titchmarsh* (1845), 9 Jur. 159; *Winstanley v. North Manchester Overseers*, [1910] A. C. 7.

83. — Increased fee.]—The use of iron in the structure of coffins is not unlawful, but they are not to be admitted into churchyards on the same terms of pecuniary payment as coffins of ordinary wood.—**GILBERT v. BUZZARD** (1821), 2 Hag. Con. 333; 3 Phillim. 335; 161 E. R. 761.

Annotations:—*Consd. R. v. Price*

Reid. Re Dixon, [1892] P. 386.

(1840), 10 L. J. M. C. 40; *Titchmarsh*

3 Curt. 703; *St. Stephen, Walbrook & v. Chapman*

Fire Office (1883), Trist. 103; *Haig*; *Grocers Co. v*

Mary, Islington, Burial Fees (1891), Trist. 149; *Re*

[1894] P. 284; *Re Haigh with Aspull*, [1910] P. 143.

B. D.

2.—BURIAL IN CHURCHES.

84. By prescription.]—Pltf., seised of the manor of R., claimed against P., clerk of the parish of H., that whereas he, pltf., was so seised & he & his ancestors had been in the habit from time, etc., of burying their dead without fee or payment within the church of H., yet P. knowing these facts had maliciously prevented pltf. from making a grave there wherein to bury his father then deceased, who was a resident within the parish:—*Held*: pltf. was entitled to judgment.—**HARVEY v. PERCIVALL** (1606), Coke's Entries, fo. 8.

Annotation:—*Reid. Dawney v. Dee* (1620), Cro. Jac. 605.

85. — Ancient messuage—Burial in chancel.]—A right of burial in the chancel may be prescribed for as belonging to an ancient messuage.—**WARING v. GRIFFITHS** (1758), 1 Burr. 440; 2 Keny. 183; 97 E. R. 392.

86. By license of parson.]—The soil & freehold of the church is in the parson only, & he alone can license burials in the church.—**DAY v. BEDDINGFIELD** (1815), Noy, 104; 74 E. R. 1070; *sub nom. FRANCES v. LEY*, Cro. Jac. 366.

Annotations:—*Consd. Bryan v. Whistler* (1828), 8 B. & C. 288. *Reid. R. v. London* (1743), 13 East, 420, n.; *Winstanley v. North Manchester Overseers*, [1910] A. C. 7. *Mentd. Spooner v. Brewster* (1825), 10 Moore, C. P. 494; *Fletcher v. Sondes* (1826), 3 Bing. 501.

87. Cremation urn — Faculty — Jurisdiction.]—The vicar & churchwardens of a parish church, in the diocese of L., built under Church Building Act, 1818 (c. 45), & closed for burials by virtue of an Order in Council under 1853 Act, concurred in an application by the widow of a parishioner whose dead body had been cremated praying the Consistory Ct. of London to authorise by faculty the formation of a niche in the wall of the church inside the church, & above the level of the floor, & the permanently placing therein of a sealed urn containing the cremated ashes of such dead body. Deceased during his life had expressed a wish that in the event of his death his remains might be cremated, & a certificate was brought in to the effect that the vestry of the parish was in favour of the remains being interred beneath the church:—*Held*: (1) the burial of the cremated ashes of a dead body in the church had not been prohibited by Church Building Act, 1818, Public Health Acts, 1848 (c. 63), & 1875 (c. 55), or by the Order in Council closing the church under 1853 Act; the provisions in those Acts as to burial not applying to the burial of the remains of a corpse after it had been reduced to ashes, & the ct. had jurisdiction in its discretion to grant the faculty as prayed, but must decline to do so having regard to the inconvenience which might ensue in case of alterations in the church, etc., if the urn was deposited in the church wall according to the proposal of the applicant; (2) the ct. having ascertained from the Home Office that no objection on sanitary grounds was entertained by the Home Secretary to the interment of the urn containing the remains below the floor of the church, was prepared, at the request of appct. to decree the issue of a faculty for the urn & its contents being interred below the church. *Semble*: cremated remains cannot lawfully be interred in or under a parish church except under the authority of a faculty

from the Ordinary.—*Re KERR*, [1894] P. 284; 10 T. L. R. 522.

Annotation :—*Reid. Re Haigh with Aspull*, [1919] P. 143.

3.—EXCLUSIVE RIGHT.

SUB-SECT. 1.—IN CHURCHYARDS.

Right of succession.—*GILBERT v. BUZ* (1821), 2 Hag. Con. 333; 3 Phillim. 335; 161 E. R. 761.

Annotations :—*Reid. Haig v. Barlow, Re St. Mary, Islington, Burial Fees* (1891), Trist. 149. *Mentd. R. v. Stewart* (1840), 12 Ad. & El. 773; *Titchmarsh v. Chapman* (1843), 3 Curt. 703; *St. Stephen, Walbrook & Grocers Co. v. Sun Fire Office* (1883), Trist. 103; *R. v. Price* (1884), 12 Q. B. D. 247; *Re Dixon*, [1892] P. 386; *Re Kerr*, [1894] P. 284; *Re Haigh with Aspull*, [1919] P. 143.

89. Non-parishioner—Of family of parishioner—Closed churchyard.—By an Order in Council a churchyard was closed except as to burials in reserved grave spaces allotted to members of the families of parishioners:—*Held*: a faculty for the reservation of a space in the churchyard for exclusive burial could be granted to a living non-parishioner, member of the family of a parishioner.—*Re SARGENT* (1890), 15 P. D. 168.

Annotation :—*Reid. De Romana v. Roberts*, [1906] P. 332.

90. — Faculty — Restrictions.—With the concurrence of the incumbent of a parish church a non-parishioner petitioned the ordinary to sanction by a confirmatory faculty the exclusive grant of the reservation for the sole use of herself, her exors., administrators & assigns, of a portion of ground in the parish churchyard as a place of burial. The grant of the faculty was opposed by one of the churchwardens of the parish on the ground that the granting of it would be detrimental to the rights of the parishioners to be buried in the churchyard in preference to non-parishioners. At the hearing of the suit it appeared that petitioner had paid to the incumbent a considerable extra burial fee for the grant of the reservation according to the custom of the parish; that the population of the parish only amounted to forty-six persons; that on the average the number of burials of parishioners was one *per annum*, & that there was room for about seventy interments in the churchyard, an addition to which had been consecrated some years back with a view of non-parishioners being buried there. The ct. granted the faculty as prayed, but made an order on the incumbent that he should make no further grants of reservations of grave spaces to non-parishioners during his tenure of the living: *Semble*: the incumbent of a parish church may make grants of the reservation of grave spaces to non-parishioners on their paying to him, or in some cases to him & the churchwardens, special burial fees, but to complete their title to the grant a faculty from the ordinary is necessary.—*DE ROMANA v. ROBERTS*, [1906] P. 332. *Annotation* :—*Reid. Kellett v. St. John's, Burscough Bridge* (1916), 32 T. L. R. 571.

91. — Transfer of right.—In May, 1896, the husband of petitioner purchased from the then vicar & churchwardens of H. in the diocese of London two plots of ground in the churchyard at the request of his wife as a burial place, & as they were non-parishioners they were charged, as was usual, double fees. The receipt was signed by the parish clerk on behalf of the vicar & churchwardens. In Dec., 1900, petitioner ceased to live with her husband, who admitted her right to the

two plots of ground in H. churchyard as her property, & indorsed on the back of the receipt a transfer of all his interest to his wife. Subsequently petitioner presented a petition for a faculty to confirm the grant of the two plots:—*Held*: (1) the vicar had a right with the consent of the churchwardens to grant the two sites to petitioner's husband for burials, & the husband was entitled to have that grant confirmed by faculty; (2) he having transferred his right to the graves to his wife by the memorandum on the back of the receipt, she was entitled to apply to have the transfer confirmed by faculty.—*HENDON CHURCHYARD CASE* (1910), 27 T. L. R. 1.

SUB-SECT. 2.—VAULTS IN CHURCHES AND CHURCHYARDS.

92. General rule.—*ST. BOTOLPH WITHOUT, ALDGATE (VICAR & ONE OF THE CHURCHWARDENS) v. ST. BOTOLPH WITHOUT, ALDGATE (PARISHIONERS), SEWERS COMRS. OF CITY OF LONDON & ST. BOTOLPH WITHOUT, ALDGATE (VICAR & PARISHIONERS) v. ST. BOTOLPH WITHOUT, ALDGATE (PARISHIONERS)*, [1892] P. 161; *subsequent proceedings*, [1892] P. 173.

Annotations :—*Consd. Re Plumstead Burial Ground*, [1895] P. 225. *Reid. St. Andrew's, Hove v. Mawn* (1894), [1895] P. 228, n.; *St. Nicholas, Leicester v. Langton*, [1899] P. 19; *Re Bideford, Ex p. Bideford*, [1900] P. 314. *Mentd. St. Helen's, Bishopsgate with St. Mary, Outwich v. Parishioners*, [1892] P. 259.

93. In church—Whether faculty required.—A vicar was found guilty of having allowed certain vaults to be built in the parish church & appropriated as burial places without faculty, & was admonished to refrain from doing so in future, & condemned in costs.—*MUSGRAVE v. RUSSELL* (1777), Rothery's Ecc. App. No. 175, p. 87.

94. — Inconvenience to parishioners.—A faculty for the appropriation of a vault in a church "to the use of a family, so long as they continue parishioners & inhabitants of the parish," will be granted, if it may be done without probable inconvenience to the parish.—*MAGNAY v. ST. MICHAEL, PATERNOSTER ROYAL AND ST. MARTIN VINTRY (RECTOR, ETC.)* (1827), 1 Hag. Ecc. 48; 162 E. R. 502.

Annotations :—*Consd. Matthews v. Jeffery* (1880), 43 L. T. 796. *Reid. Kellett v. St. John's, Burscough Bridge* (1916), 32 T. L. R. 571.

95. ——The lay rector is not entitled as of right to make a vault in the chancel without leave of the ordinary, nor is he entitled to a faculty for such purpose without laying before the ordinary such particulars as will afford the vicar & parishioners an opportunity of judging of it, & satisfy the ordinary that such vault will not interrupt the parishioners in the use & enjoyment of the chancel; nor has the vicar an absolute veto, though he may show cause against the grant of a faculty. *Semble*: the consent of the lay rector must precede the leave of the ordinary for the construction of a vault in the chancel.—*RICH v. BUSHNELL* (1827), 4 Hag. Ecc. 164; 162 E. R. 1407. *Annotations* :—*Consd. Rugg v. Kingsmill* (1867), 31 J. P. 644; *Neville v. Bridger* (1874), 30 L. T. 690. *Apld. Nickalls v. Briscoe*, [1892] P. 269. *Reid. Griffin v. Dighton* (1863), 2 New Rep. 270; *Kellett v. St. John's, Burscough Bridge* (1916), 32 T. L. R. 571. *Mentd. Moody v. Randolph* (1874), 38 J. P. 324.

96. — Procedure.—The grant of a faculty for the appropriation of a vault in a church or chapel is entirely within the discretion of the

hands:—*Held*: that a grant of the exclusive right of burial ought to be presumed.—*JENNINGS v. MCCARTHY* (1908), 42 I. L. T. 217.—*IR.*

M M

PART III. SECT. 3, SUB-SECT. 1.

1. Presumption of right—For relatives—Lay property.—Where a person exercised for over forty years the ex-

clusive right of burying his relatives in a particular plot in a graveyard which, at the time of the dissolution of the Irish monasteries, had passed into lay

Sect. 3.—Exclusive right: Sub-sect. 2. Sect. 4: Sub-sects. 1 & 2. Sects. 5 & 6: Sub-sect. 1.]

ordinary. The ecclesiastical law requires, before such faculty is decreed, that all persons interested in opposing the grant should be heard before the ordinary. The vicar or perpetual curate of a church, though entitled to officiate in & have free access to the chancel, has no right to fees for the erection of monumental tablets, or for the construction of vaults in the chancel. A faculty for that purpose may be legally granted without his consent; but he has a *locus standi*, by reason of his position as incumbent, to oppose the grant of such a faculty.

A faculty for the appropriation of a family vault under the chancel of a district church, having been applied for by the lay proprietor of the great tithes, & the owner of the land immediately adjacent to & in the vicinity of the church, was objected to by the vicar of the parish, because the access to it being only from the exterior, & no churchyard or burial ground attached, there was no consecrated ground outside the church on which any part of the burial service could be performed. Such faculty having been granted:—*Held*: though the granting of such a faculty was entirely within the discretion of the ordinary, such discretion ought to be exercised so as to prevent the possibility of a misuse by the grantee, &, in the circumstances, the grant ought only to issue on the condition that the grantee appropriated & consented to the consecration of a sufficient piece of ground near the opening of the vault, to be so consecrated for the sole & special purpose of burials in the vault, & such faculty decreed accordingly.—*RUGG v. KINGSMILL* (1868), L. R. 2 P. C. 59; 5 Moo. P. C. C. N. S. 79; 37 L. J. Eccl. 13; 18 L. T. 94; 32 J. P. 356; 16 E. R. 445, P. C.

Annotations:—*Consd.* Winchester v. Rugg (1868), L. R. 2 A. & E. 217. *Refd.* Kellett v. St. John's, Burscough Bridge (1916), 32 T. L. R. 571.

97. — Grant by parol.]—Where a rector granted to A. by parol leave to make a vault in the parish church, & to bury a certain corpse there, & that he should have the exclusive use of the vault, & afterwards, without the leave of A., opened the vault, & buried another person there:—*Held*: no action could be maintained against him for so doing, for if the rector had power to grant the exclusive use of a vault, he could not do it by parol. *Semble*: a rector cannot grant a vault in the church, but only leave to bury there in each particular instance.—*BRYAN v. WHISTLER* (1828), 8 B. & C. 288; 2 Man. & Ry. K. B. 318; 6 L. J. O. S. K. B. 302; 108 E. R. 1050.

Annotations:—*Expld.* Kerrison v. Smith (1897), 66 L. J. Q. B. 762. *Consd.* North Manchester Overseers v. Winstanley, [1908] 1 K. B. 835. *Refd.* Wood v. Leadbitter (1845), 13 M. & W. 838; Ashby v. Harris (1868), L. R. 3 C. P. 523. *Mentd.* Taplin v. Florence (1851), 10 C. B. 744.

98. — Church being rebuilt.]—A faculty for a vault in a church cannot be granted for a church rebuilding, where re-consecration is necessary, till it takes place. Consent will not create a jurisdiction depending entirely *ratione loci*.—*TURNER v. HANWELL* (RECTOR, ETC.) (1842), 1 Notes of Cases 368.

Annotations:—*Consd.* Ensham v. Ensham (1857), 29 L. T. O. S. 402; Battiscombe v. Eve (1863), 7 L. T. 697. *Refd.* Parker v. Leach (1866), L. R. 1 P. C. 312.

99. In churchyard—Grant of faculty—Inconvenience to parishioners.]—Where a faculty is sought for erecting a vault & is not opposed the ct. will scruple to grant it, unless it has satisfactory information to show that it may issue without probable inconvenience to the parish.—*ROSHER v. NORTHFLEET* (VICAR, ETC.) (1825), 3 Add. 14; 162 E. R. 386.

Annotation:—*Mentd.* Kellett v. St. John's, Burscough Bridge (1916), 32 T. L. R. 571.

100. — Non-resident.]—A consistory ct. has jurisdiction to grant a faculty for the exclusive use of a family vault in a churchyard without residential restriction.—*KEILETT v. ST. JOHN'S, BURSCOUGH BRIDGE* (1916), 32 T. L. R. 571.

101. — Mandamus.]—The ct. will not grant a *mandamus* to compel a rector to bury the corpse of a parishioner in a vault, or in any particular part of a churchyard.

The ct. declined to grant a *mandamus* to compel a rector to bury deceased son of a parishioner in a vault, where the rector had declined to allow the vault to be opened until a fee of £2 12s. 6d. was paid, but had intimated that he would allow the corpse to be buried in the churchyard without the payment of any such fee.—*Ex p. BLACKMORE* (1830), 1 B. & Ad. 122; 109 E. R. 732; S. C. *sub nom.* R. v. ST. AUBYN, *Ex p. BLACKMORE*, 8 L. J. O. S. K. B. 384.

Annotations:—*Foll.* Nevill v. Bridger (1874), L. R. 9 Exch. 214. *Refd.* *Ex p.* Titchmarsh (1845), 9 Jur. 159; Winstanley v. North Manchester Overseers, [1910] A. C. 7. *Mentd.* R. v. Westmeath County JJ. (1866), 15 W. R. 59.

102. Right to charge special fee.]—*Ex p. BLACKMORE*, No. 101, *ante*.

103. ——A vicar of a parish, being freeholder of the church & churchyard, may make a special contract for the payment of a fee, other than the customary burial fee, if any, for the burial of a non-parishioner in a particular vault in the parish church.—*NEVILL v. BRIDGER* (1874), L. R. 9 Exch. 214; 43 L. J. Ex. 147; 30 L. T. 690; 22 W. R. 740.

Annotations:—*Refd.* Winstanley v. North Manchester Overseers, [1910] A. C. 7; *Re* Haigh with Aspull, [1919] P. 143.

SECT. 4.—BURIAL SERVICE.

SUB-SECT. 1.—READING OF—WARNING TO MINISTER.

104. Whole service must be read.]—Summary proceeding, under Church Discipline Act, 1840 (c. 86), against a clerk in Holy Orders, for omitting certain words in the office of burial. Upon a report of the comrs., the party proceeded against consented that sentence should be pronounced by the bishop of the diocese.

A clerk, in the performance of the burial service over the corpse of a person who had died in a state of intoxication, is not at liberty to omit the words expressing a hope that the deceased "resteth in our Lord Jesus Christ."—*Re TODD* (1844), 3 Notes of Cases, Supp. 51.

105. By unauthorised person.]—It is illegal for any one, unless he be lawfully authorised, to read or assist in reading a burial service in consecrated ground over a dead body.

It is clearly illegal to collect an assemblage of persons in a churchyard for the purpose of forcibly burying the corpse of an unbaptised person or to read a service over such corpse. By the ecclesiastical law no person, unless he be duly authorised, can be permitted to perform service on consecrated ground (DR. LUSHINGTON).—*JOHNSON v. FRIEND & BALLARD* (1860), 6 Jur. N. S. 280.

Annotation:—*Refd.* Wood v. Headingley-cum-Burley Burial Board, [1892] 1 Q. B. 713.

106. "Convenient warning"—Proof of.]—Articles against a clerk in Holy Orders, for refusing to bury the corpse of an infant, daughter of dissenters, of the class called Independents, baptised according to the form generally observed amongst that class, namely, with water, in the name of the Holy

Trinity. The party proceeded against was dismissed, on the ground of a deficiency of proof that convenient warning was given to the minister of the intention to bring the corpse, before it was brought to the churchyard.—**TITCHMARSH v. CHAPMAN** (1844), 1 Rob. Eccl. 175; 3 Notes of Cases 370; 4 L. T. O. S. 195; 8 Jur. 1077; 163 E. R. 1003; *subsequent proceedings, sub nom. Exp. TITCHMARSH* (1845), 9 Jur. 159; *sub nom. R. v. BASSINGBOURNE (VICAR)* (1845), 9 J. P. Jo. 83.

Annotations:—**Refd.** Barnes v. Shore (1846), 1 Rob. Eccl. 382; Cooper v. Dodd (1850), 7 Notes of Cases 514. **Mentd.** Brown v. Montreal (1874), L. R. 6 P. C. 157.

107. — Form of.]—TITCHMARSH v. CHAPMAN, No. 106, *ante*.

108. — .]—**COOPER v. DODD** (1850), 2 Rob. Eccl. 270; 7 Notes of Cases 514; 14 Jur. 724; 163 E. R. 1314.

See, further, Sect. 1, sub-sect. 1, *ante*, Sect. 5, Part VIII., Sect. 4, sub-sect. 9, *post*.

SUB-SECT. 2.—DISTURBANCE OF.

109. Prevention by private person—Action for assault.]—To an action of assault & battery, a plea that pltf. disturbed a congregation while the minister was performing the rites of burial, & that deft., though neither constable, churchwarden, or other officer, *molliter manus imposuit* to prevent such disturbance, is a good justification.—**GLEVER v. HYNDE** (1673), 1 Mod. Rep. 168; 86 E. R. 806; *sub nom. LEVER v. HIDE*, 1 Freem. K. B. 131.

Annotation:—**Refd.** Burton v. Henson (1842), 10 M. & W. 105.

110. Indictment—Form of.]—R. v. CHEERE (1825), 4 B. & C. 902; 7 Dow. & Ry. K. B. 461; 3 Dow. & Ry. M. C. 463; 4 L. J. O. S. K. B. 79; 107 E. R. 1294.

Disturbances in churches & churchyards.]—See ECCLESIASTICAL LAW.

SECT. 5.—EXCLUSION FROM CHRISTIAN BURIAL.

111. General rule.]—Every person dying in this country & not within certain ecclesiastical prohibitions is entitled to christian burial.—**R. v. STEWART** (1840), 12 Ad. & El. 773; 4 Per. & Dav. 349; 10 L. J. M. C. 40; 113 E. R. 1007; *sub nom. R. v. ST. GEORGE, HANOVER SQUARE OVERSEERS*, Arn. & H. 83; 4 J. P. 792; 5 Jur. 363.

Annotations:—**Consd.** Bradshaw v. Beard (1862), 12 C. B. N. S. 344; Margate Pier & Harbour v. Margate Town Council (1869), 20 L. T. 564; Williams v. Williams (1882), 20 Ch. D. 659; R. v. Price (1884), 12 Q. B. D. 247; Tofts v. Pearl Life Insce. Co. (1914), 112 L. T. 140. **Refd.** Woolwich Overseers v. Robertson (1881), 6 Q. B. D. 654; Re Dixon, [1892] P. 386. **Mentd.** R. v. White (1883), 11 Q. B. D. 309; Ex p. Sibley (1883), 31 W. R. 811.

112. Unbaptised person—Jurisdiction.]—As to a parson refusing to read the service over a deceased parishioner, because he was never baptised, the ct. would not interpose, that being a matter cognisable in the Ecclesiastical Ct.—**R. v. TAYLOR** (1721), 1 Burn's Ecclesiastical Law, 9th ed. 258.

Annotation:—**Refd.** Andrews v. Cawthorne (1745), Willis, 537, n.

See, also, No. 105, *ante*.

113. Baptised person—Child of dissenter.]—A minister of the Established Church cannot refuse to bury the baptised child of a dissenter.—**KEMP v. WICKES** (1809), 3 Phillim. 264; 161 E. R. 1320.

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g. Member of censured society—Not excommunicated.]—Circumstances in which:—**Held**: deceased, a member of a literary society which had incurred ecclesiastical censures, never having

been excommunicated *nominatim*, & never having been adjudged or proved to be an *un pœcheur public* within the Quebec ritual, was not at the time of his death under any such valid ecclesiastical sentence or censure as would according to the Quebec ritual, or any

law binding upon Roman Catholics in Canada, justify the denial of ecclesiastical sepulture to his remains.—**BROWN v. MONTREAL, CURÉ, ETC.** (1874), L. R. 6 P. C. 157; 44 L. J. P. C. 1; 31 L. T. 555; 20 L. C. J. 228, P. C.—CAN.

Annotations:—**Consd.** Escott v. Mastin (1842), 4 Moo. P. C. C. 104; Titchmarsh v. Chapman (1844), 3 Curt. 840. **Mentd.** Martin v. Mackonochie, Flamank v. Simpson (1868), L. R. 2 A. & E. 116; Read v. Lincoln (1889), 14 P. D. 88.

114. — Baptised by dissenting layman—Suspension of clergyman.]—A child baptised with water in the name of the Trinity, by a layman, a Wesleyan Methodist, not authorised to administer the rite of baptism:—**Held**: not to be “unbaptised” within the rubric for the burial of the dead in the Common Prayer Book, as incorporated into Uniformity Act, 1662 (c. 4).

A clergyman of the Church of England having refused to perform the office of interment, after due notice of the death of a parishioner so baptised, suspended from the ministry for three months.—**ESCOTT v. MASTIN** (1842), 4 Moo. P. C. C. 104; Brod. & F. 4; 1 Notes of Cases 552; 6 Jur. 765; 13 E. R. 241, P. C.

Annotations:—**Refd.** Cooper v. Dodd (1850), 2 Rob. Eccl. 270. **Refd.** Sanders v. Head (1843), 3 Curt. 565. **Mentd.** Titchmarsh v. Chapman (1844), 3 Curt. 840; Gorham v. Exeter (1850), 2 Rob. Eccl. 1; Martin v. Mackonochie, Flamank v. Simpson (1868), L. R. 2 A. & E. 116; Jenkins v. Cook (1875), L. R. 4 A. & E. 463; Re Perry Almshouses, [1898] 1 Ch. 391.

115. — Baptised by dissenting minister—Suspension of clergyman.]—A clerk in Holy Orders of the Church of England suspended for three months, for refusing to bury the corpse of an infant, baptised by a minister of the class called Primitive Methodists.—**NURSE v. HENSLÖWE** (1844), 3 Notes of Cases 272; 4 L. T. O. S. 195.

See, also, No. 106, *ante*.

116. Intoxicated person.]—Re TODD, No. 104, *ante*.

117. Person found drowned—Suspension of clergyman.]—A clergyman refused to bury the body of a parishioner, on the coroner's order for burial, the jury having returned a verdict of “found drowned,” assigning as his reason that such person had died in a state of intoxication, or was *felo de se*:—**Held**: the mere opinion of the clergyman as to the cause of death did not justify his refusal to bury.

In the circumstances the ct. has no discretion or alternative, but is bound to pronounce a sentence of suspension for three months (Sir H. JENNER FUST).—**COOPER v. DODD** (1850), 2 Rob. Eccl. 270; 7 Notes of Cases 514; 14 Jur. 724; 163 E. R. 1314.

118. Non-parishioner—Private vault.]—A clergyman will be punished for refusing to perform divine service over the body of a member of a family which is deposited in a private family vault, even though the member, being a married woman, has ceased to be a parishioner.—**NEVILL v. BAKER** (1862), cited in 1 Phillimore Ecclesiastical Law, 2nd ed. at p. 655.

See, further, Sect. 1, Sect. 4, sub-sect. 1, *ante*.

SECT. 6.—MONUMENTS IN CHURCHES AND CHURCHYARDS.

SUB-SECT. 1.—IN CHURCHES.

119. Right to erect—By whose authority—Ordinary—Appeal.]—An appeal lies about setting up ornaments in the church.

Though ornaments cannot be set up without the consent of the ordinary, it must be exercised

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according to a prudent & legal discretion, which the Superior has a right to look into, & correct, & an appeal to the Ct. of Arches will lie (*per CUR.*)—*CART v. MARSH* (1737), 2 Stra. 1080; 93 E. R. 1044.
Annotation:—*Reid. Bulwer v. Hase* (1803), 3 East, 217.

120. ——— Rector—Appeal.]—Where a rector was cited in the episcopal consistorial ct. to show cause why the ordinary should not grant to a parishioner a faculty for stopping up a window in a church against which it was proposed to erect a monument, to the granting of which the rector dissented, notwithstanding which the ct. below were proceeding to grant the faculty with the consent of the ordinary:—*Held*: to be no ground for a prohibition, but mere matter of appeal if the rector's reasons for dissenting were improperly overruled.—*BULWER v. HASE* (1803), 3 East, 217; 102 E. R. 580.

Annotation:—*Mentd. R. v. Tristram* (1899), 43 Sol. Jo. 280.

121. ——— Parson.]—The ordinary may order a monument to be taken down, if it is inconveniently placed in a church, but if he does not interpose, the parson's authority to erect it is sufficient.—*HOPPER v. DAVIS* (1754), 1 Lee, 640; 161 E. R. 234.

Annotations:—*Consd. Fagg v. Lee* (1873), L. R. 4 A. & E. 135. *Mentd. Lee v. Fagg* (1874), L. R. 6 P. C. 38.

122. ——— Whether in churchwardens by custom.]—A custom for the churchwardens of a parish to set up monuments, etc. in a church, without the consent either of the rector or the ordinary is illegal.—*BECKWITH v. HARDING* (1818), 1 B. & Ald. 508; 106 E. R. 187.

Annotation:—*Mentd. Winstanley v. North Manchester Overseers*, [1910] A. C. 7.

123. ——— Whether in lay rector.]—The lay rector is not entitled as of right to affix tablets in the chancel without leave of the ordinary, nor is he entitled to a faculty for such purposes without laying before the ordinary such particulars as will afford the vicar & parishioners an opportunity of judging of it, & satisfy the ordinary that such tablets will not interrupt the parishioners in the use & enjoyment of the chancel; nor has the vicar an absolute veto, though he may show cause against the grant of a faculty. *Semble*: the consent of the lay rector must precede the leave of the ordinary for the erection of tablets in the chancel.—*RICH v. BUSHNELL* (1827), 4 Hag. Ecc. 164; 162 E. R. 1407.

Annotations:—*Consd. Rugg v. Kingsmill* (1867), 31 J. P. 644. *Reid. Griffin v. Dighton* (1863), 2 New Rep. 270; *Moody v. Randolph* (1874), 38 J. P. 324. *Mentd. Neville v. Bridger* (1874), 30 L. T. 690; *Nickalls v. Briscoe*, [1892] P. 269; *Kellett v. St. John's, Burscough Bridge* (1916), 32 T. L. R. 571.

124. ——— Whether faculty required—Action by rector.]—Proceedings promoted by the rector of the parish against a person for erecting a monument in the church without a faculty, sustained.—*MAIDMAN v. MALPAS* (1794), 1 Hag. Con. 205; 161 E. R. 526.

Annotations:—*Reid. Ritchings v. Cordingley* (1868), L. R. 3 A. & E. 113; *Keet v. Smith* (1875), L. R. 4 A. & E. 398; *McGough v. Lancaster Burial Board* (1888), 21 Q. B. D. 323; *Batten v. Gedy* (1889), 41 Ch. D. 507; *St. Michael, Bassishaw v. Parishioners*, [1893] P. 233. *Mentd. Wilson v. M'Math* (1819), 3 B. & Ald. 244, n.; *Sanders v. Head* (1843), 3 Curt. 565; *Fell v. Law* (1848), 1 Rob. Eccl. 726; *R. v. Chichester* (1859), 2 E. & E. 209; *Winchester v. Wix* (1868), 21 L. T. 439; *Nevill v. Bridger* (1874), L. R. 9 Exch. 214; *R. v. Oxford* (1879), 4 Q. B. D. 525; *Julius v. Oxford* (1880), 5 App. Cas. 214; *Lee v. Hawtrey*, [1898] P. 63.

125. ——— Action by ordinary.]—An allegation responsive to articles in a cause of office promoted by the ordinary of a royal peculiar, calling upon deff. to answer to having set up a

monument in a church in his jurisdiction without a faculty & to show cause why he should not be decreed to remove same. Pleading that the monument was erected by leave of the minister & churchwardens, & that it was ornamental to the church instead of injuring it or disfiguring it, admitted to proof.—*SEAGER v. BOWLE* (1823), 1 Add. 541; 162 E. R. 191.

Annotation:—*Consd. Walter v. Montague* (1836), 1 Curt. 253.

126. Right to remove—Whether in parson.]—A parson cannot take a gravestone, coat of armour, tomb, etc., though they are annexed to his freehold; nor can he take things which are hung up in the church for the honour of deceased.—*CORVEN'S CASE* (1612), 12 Co. Rep. 105; 77 E. R. 1380; *sub nom. GARVEN & PYM'S CASE*, Godb. 199; *sub nom. PYM v. GORWYN*, Moore, K. B. 878.

Annotations:—*Consd. MacGough v. Lancaster Burial Board* (1888), 52 J. P. 740. *Reid. Frances v. Ley* (1615), Cro. Jac. 366. *Mentd. May v. Gilbert* (1613), 2 Bulst. 150; *Buxton v. Bateman* (1662), 1 Sid. 88; *Spooner v. Brewster* (1825), 3 Bing. 136; *Churton v. Frewen* (1866), L. R. 2 Eq. 634; *Philipps v. Halliday*, [1891] A. C. 228; *Claverley v. Claverley*, [1909] P. 195.

127. ——— Private aisle—Action by heir.]—If a parson takes from an aisle built by a gentleman or nobleman the ensigns of honour of the latter, such as a gravestone, coat-armour or the like which does not belong to the parson, the heir may well have an action of trespass. It is otherwise where same is repaired at the common charge of the parish.—*MAY v. GILBERT* (1613), 2 Bulst. 150; 80 E. R. 1025.

Annotations:—*Mentd. Chester's Case* (1698), 5 Mod. Rep. 433; *Jacob v. Dallow* (1698), 12 Mod. Rep. 233; *Stocks v. Booth* (1786), 1 Term Rep. 428; *Byerley v. Windus* (1826), 7 Dow. & Ry. K. B. 564.

See, also, No. 143, post.

128. ——— By order of ordinary.]—*HOPPER v. DAVIS*, No. 121, *ante*.

129. ——— Erection without authority—Sanction of ordinary.]—Monuments & ornaments, which have been illegally or irregularly placed in a parish church by the incumbent, cannot be lawfully removed, save under the sanction of the ordinary.—*RITCHINGS v. CORDINGLEY* (1868), L. R. 3 A. & E. 113; *sub nom. RICHINGS v. CORDINGLEY*, 19 L. T. 26; 32 J. P. 611.

Annotations:—*Reid. Batten v. Gedy* (1889), 41 Ch. D. 507. *Mentd. Evans v. Dodson* (1874), Trist. 26; *St. Mary-at-Hill with St. Andrew Hubbard v. Parishioners*, [1892] P. 394; *St. Michael, Bassishaw v. Parishioners*, [1893] P. 233; *Wolfe v. Surrey County Council, Reeve v. Same*, [1905] 1 K. B. 439; *Fowke v. Berington*, [1914] 2 Ch. 308.

130. Injury to—Action by heir.]—The heir shall have an action for injuring the tomb of his ancestor.—*FRANCES v. LEY* (1615), Cro. Jac. 366; 79 E. R. 314; *sub nom. DAY v. BEDDINGFIELD*, Noy, 104.

Annotations:—*Reid. Spooner v. Brewster* (1825), 10 Moore, C. P. 494. *Mentd. R. v. London* (1743), 13 East, 420, n.; *Fletcher v. Sondes* (1826), 3 Bing. 501; *Bryan v. Whistler* (1828), 8 B. & C. 288; *Winstanley v. North Manchester Overseers*, [1910] A. C. 7.

131. ——— Action by churchwardens.]—A churchwarden by the common law may maintain an action upon the case for defacing of a monument in the church.—*BISHOP & TURNER'S CASE* (1619), Godb. 279; 78 E. R. 163.

See, further, ECCLESIASTICAL LAW.

SUB-SECT. 2.—IN CHURCHYARDS.

132. Right to erect—By whose authority—Ordinary.]—Proceedings against a person for erecting tombs in the churchyard without due authority, sustained.

The ordinary is to judge of the convenience of allowing tombs or monuments to be erected, & if

done without his consent, he has sufficient authority to decree a removal (Sir W. SCOTT).—**BARDIN v. CALCOTT** (1789), 1 Hag. Con. 14; 161 E. R. 459.

Annotations:—**Reid**. **McGough v. Lancaster Burial Board** (1888), 36 W. R. 822; **Kellett v. St. John's, Burscough Bridge** (1916), 32 T. L. R. 571.

133. Property in.]—Trespass may be maintained for taking away a tombstone from a churchyard, & obliterating an inscription made upon it, at the suit of the party by whom it is erected, although the freehold of the churchyard is in the parson, as the right to a tombstone vests in the person who erects it, or in the heirs of the deceased, in whose memory it is set up.—**SPOONER v. BREWSTER** (1825), 3 Bing. 136; 2 C. & P. 34; 10 Moore, C. P. 494; 3 L. J. O. S. C. P. 203; 130 E. R. 465.

Annotations:—**Distd.** **Hitchcock v. Walford** (1838), 2 Jur. 326; **McGough v. Lancaster Burial Board** (1888), 4 T. L. R. 679. **Reid**. **Ashby v. Harris** (1868), L. R. 3 C. P. 523. **Mentd.** **Keet v. Smith** (1875), L. R. 4 A. & E. 398.

134. — Action by heir.]—*Qu.*: whether the rector of a parish be liable in trespass for taking & converting to his own use a tombstone, erected in the time of his predecessor by pltf., inasmuch as the freehold of the churchyard is in him, & whether pltf., though the heir-at-law of his father, had such a property in the tombstone as would entitle him to maintain the action, he not having been proved to have paid for its erection.—**HITCHCOCK v. WALFORD** (1838), 2 J. P. 310; 2 Jur. 326.

135. Right to repair—Leave of churchwardens.]—**BARDIN v. CALCOTT** (1789), 1 Hag. Con. 14; 161 E. R. 459.

Annotations:—**Mentd.** **McGough v. Lancaster Burial Board** (1888), 36 W. R. 822; **Kellett v. St. John's, Burscough Bridge** (1916), 32 T. L. R. 571.

136. Removal of—By faculty to incumbent.]—The incumbent of a parish church objected to the retention on a newly erected tombstone in the parish churchyard of an inscription which had been placed there without his consent or the sanction of a faculty, & the material portion of which consisted of the following words:—"Of your charity pray for the repose of the souls of the beloved son, of . . . & . . ., died . . ., also of . . . son of the above . . . died . . . On whose souls sweet Jesus have mercy"; & subsequently applied to the ordinary for a faculty for the removal of the tombstone out of the churchyard. The parishioner who had caused the tombstone to be erected appeared as resp. in the suit, & further, himself instituted a suit praying for a confirmatory faculty confirming the erection of the tombstone & its retention in the churchyard with the above inscription on it. The two suits were heard together, & at the hearing it appeared that the deceased persons named on the tombstone were members of a Roman Catholic family, & that the inscription had been composed as being the usual inscription placed on tombstones erected to the memory of Roman Catholics:—**Held**: (1) the *onus* of satisfying the ct. that the inscription was in all respects unobjectionable lay upon petitioner for the confirmatory faculty, & had not been discharged; (2) the evidence supported the presumption that the inscription was intended to be an appropriate one in memory of Roman Catholics, & in regard to prayers for the dead in conformity with the doctrine of purgatory as recognised & enjoined by the Roman Catholic Church, & the ct., whilst declining on these grounds & the further grounds that the churchwardens & those parishioners who were members of the Church of England entertained conscientious objections to the retention of the inscription, to decree a confirmatory faculty, must decree a faculty to issue to the incumbent authorising him to remove the tombstone.

Inscriptions proposed to be placed on the tombstones in a parish churchyard are in the first instance subject to the control of the incumbent of the parish, but any decision come to by him may be reviewed by the ordinary on proper application being made to the Ecclesiastical Ct. of the diocese.—**PEARSON v. STEAD, STEAD v. PEARSON**, [1903] P. 66; 18 T. L. R. 331.

137. Levelling tombstones — Faculty — Expense.]—Where no substantial inconvenience was shown by one individual, who opposed the faculty, & the plan had been adopted at a vestry on the unanimous report of a committee:—**Held**: the ct. would grant a faculty to level a churchyard & lay flat upright head & foot stones, with a clause that no expense should fall on individuals.—**SHARPE v. HANSARD** (1830), 3 Hag. Ecc. 335; 162 E. R. 1177. *Annotation*:—**Mentd.** **Kellett v. St. John's, Burscough Bridge** (1916), 32 T. L. R. 571.

138. Inscription — Control by incumbent.]—Prayers for the dead are not prohibited by the Church of England, & the following inscription:—"Pray for the soul of J. W. It is a holy & wholesome thought to pray for the dead (2 Mac. xii. 46)":—**Held**: unobjectionable.

To the incumbent belongs the superintendence of the church & churchyard, & it is his duty to take care that no inscription should be placed there which could be made the means of disseminating doctrines inconsistent with those of the established religion (Sir H. JENNER).—**BREEKS v. WOOLFREY** (1838), 1 Curt. 880; 163 E. R. 304.

Annotations:—**Consd.** **Keet v. Smith** (1875), L. R. 4 A. & E. 398; **Egerton v. All of Odd Rode**, [1894] P. 15; **Pearson v. Stead, Stead v. Pearson**, [1903] P. 66. **Reid**. **Bourne v. Keane**, [1919] A. C. 815. **Mentd.** **Hereford v. T—n** (1853), 2 Rob. Eccl. 595; **Martin v. Mackonochie, Flamank v. Simpson** (1868), L. R. 2 A. & E. 116; **Sheppard v. Bennett** (1870), 18 W. R. 650.

139. — Right of rejection.]—The daughter of H. K., a Wesleyan minister, was buried in the churchyard of the parish where her father resided. The incumbent of the parish refused to allow a stone with an inscription describing deceased as daughter of "the Rev." H. K., "Wesleyan minister," to be erected over the grave:—**Held**: the presence of the words "The Rev." before "H. K., Wesleyan minister," in the inscription, which was otherwise unobjectionable, was not a sufficient justification for the incumbent refusing to allow the tombstone to be erected within the churchyard, as the word "reverend" was not a title of honour or dignity, & a person prefixing the word to his name did not thereby claim to be a person in Holy Orders.—**KEET v. SMITH** (1876), 1 P. D. 73; 45 L. J. P. C. 10; 33 L. T. 794; 40 J. P. 196; 24 W. R. 375, P. C.

Annotation:—**Mentd.** **St. Nicholas, Leicester v. Langton**, [1899] P. 19.

140. — Appeal to ordinary.]—**PEARSON v. STEAD, STEAD v. PEARSON**, No. 136, *ante*.

SECT. 7.—WINDOWS, COATS OF ARMS, ETC., AS MEMORIALS.

141. Window — Sanction of ordinary—Inscription.]—An application was made to the consistory ct. of Chester to authorise by faculty the erection in a parish church in the diocese of a stained glass memorial window, having placed below it an inscription in Latin, the translation of a portion of which was as follows: "Of your charity pray for the soul of H. F., deceased, & for the soul of J. H. C., deceased":—**Held**: the ordinary ought not in his discretion to sanction the introduction into the church of any inscription of which the

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above words would form part, & so much of the application as prayed that a faculty might be granted for placing such words beneath the proposed window must be rejected.—*EGERTON v. ALL OF ODD RODE*, [1894] P. 15.

Annotation:—Reid. Pearson v. Stead, Stead v. Pearson, [1903] P. 66.

142. ——— Subject—Appeal.]—A faculty was granted for the insertion in the centre compartment of the east window of a parish church of a representation in stained glass of the Crucifixion of Our Saviour, with the figure of the Virgin Mary in one side compartment of the window & of St. John in the other side compartment, the representation being of an historical nature & one to which, having regard to the services in the church & other circumstances, there would be no likelihood that superstitious reverence would be paid.

The vicar & churchwardens of a parish church in the diocese of Carlisle, with the unanimous consent of the vestry of the parish, applied to the ordinary for a faculty authorising them to insert in the central compartment of the east window of the church, a window of three lower compartments divided by stone mullions, an historical representation of the Crucifixion of Our Saviour with the arms of the figure on the cross carried from the centre compartment into the compartments on either side, & in one of these side compartments a figure of the Virgin Mary, & in the other side compartment the figure of St. John, the window to have in it the following inscription: "To the glory of God & in memory of the men of this parish & church who gave their lives for King & Country in the Great War, 1914." Evidence was given to show that if the faculty was granted there would be no likelihood of superstitious reverence being paid to the window or to the representation proposed to be inserted therein. The ordinary dismissed the application, holding the representation to be, apart from its questionable legality, unsuitable & inappropriate for a war memorial. The promovents appealed to the Chancery Ct. of York. The official principal of the Chancery Ct. of York, being of opinion that no question arose as to the legality of the representation in stained glass of the Crucifixion with the accompanying figures & inscription, & that the ordinary had in refusing the application exercised a wrong discretion, allowed the appeal, & retaining the cause decreed the issue of the faculty applied for.—*Re ST. PAUL'S, CARLISLE*, [1919] P. 134.

143. Arms & helmet—Right to remove—Action of trespass.]—Lady G., at the funeral of her husband, left his arms & helmet in the church. The parson destroyed them, & she brought an action of trespass:—*Held*: this action was maintainable.—*WYCHE'S (LADY) CASE* (1469), Y. B. 9 Edw. IV., fo. 14, pl. 8; *sub nom. GRAY'S (LADY) CASE*, cited in Moore, K. B. at p. 878.

Annotations:—Consd. Corven's Case (1612), 12 Co. Rep. 105. *Reid. Frances v. Ley* (1615), Cro. Jac. 366; *Spooner v. Brewster* (1825), 3 Bing. 136.

See, also, Nos. 126, 127, ante.

See, further, ECCLESIASTICAL LAW.

SECT. 8.—USE OF CHURCHYARDS FOR SECULAR PURPOSES.

144. Consecrated ground — Jurisdiction of Ecclesiastical Court—Prohibition—Charity school.]—A parish was cited in the Bishop of London's Ct.,

to show cause why a license should not be granted to S., to erect a charity school on part of the churchyard. Upon the motion of the rector & parishioners a prohibition was granted, for the Ecclesiastical Ct. had nothing to do with this, & could not compel them without their consent.—*ST. GEORGE'S, HANOVER SQUARE (RECTOR, ETC.) v. STEUART* (1740), 2 Stra. 1126; 93 E. R. 1077.

Annotations:—Distd. Russell v. St. Botolph, Bishopsgate (1859), 5 Jur. N. S. 300. *Consd. St. Nicholas, Leicester v. Langton*, [1899] P. 19; *Re Bideford, Ex p. Bideford*, [1900] P. 314. *Distd. L. C. C. v. Dundas*, [1904] P. 1. *Reid. Campbell v. Paddington* (1852), 2 Rob. Eccl. 558; *R. v. Twiss* (1869), L. R. 4 Q. B. 407; *Re Plumstead Burial Ground*, [1895] P. 225.

145. ——— Workhouse.]—*Ex p. BEDFORD* (1865), 29 J. P. Jo. 260.

146. ——— No interments—Public elementary school.]—The ecclesiastical cts. have jurisdiction in their discretion to grant faculties authorising the erection on consecrated ground of the buildings of public elementary schools not provided by the local education authority, in cases where it is proved that in the buildings so to be erected religious instruction will be given according to the principles of the Church of England, & that interments have never taken place in the ground upon which it is proposed that the school buildings shall be erected.—*CORKE v. RAINGER & HIGGS*, [1912] P. 69; 28 T. L. R. 130.

Annotation:—Reid. Sutton v. Bowden, [1913] 1 Ch. 518.

147. ——— Vestry room.]—Faculty to build a vestry room on consecrated ground, in which no bodies had been interred, granted.—*CAMPBELL v. PADDINGTON (PARISHIONERS)* (1852), 2 Rob. Eccl. 558; 19 L. T. O. S. 276; 16 Jur. 646; 163 E. R. 1413.

Annotations:—Consd. St. Nicholas, Leicester v. Langton, [1899] P. 19; *Re Bideford, Ex p. Bideford*, [1900] P. 314; *Sutton v. Bowden*, [1913] 1 Ch. 518. *Reid. R. v. Twiss* (1869), L. R. 4 Q. B. 407; *Re Plumstead Burial Ground*, [1895] P. 225; *L. C. C. v. Dundas*, [1904] P. 1.

148. ——— Street improvement.]—A faculty for altering the boundaries of a churchyard, & diverting part of the consecrated ground to secular purposes, refused.—*ST. JOHN'S, WALBROOK (RECTOR & CHURCHWARDENS) v. ST. JOHN'S, WALBROOK (PARISHIONERS)* (1852), 2 Rob. Eccl. 515; 19 L. T. O. S. 276; 16 Jur. 645; 163 E. R. 1398.

Annotations:—Consd. Re Plumstead Burial Ground, [1895] P. 225; *St. Nicholas, Leicester v. Langton*, [1899] P. 19; *Re Bideford, Ex p. Bideford*, [1900] P. 314. *Reid. R. v. Twiss* (1869), L. R. 4 Q. B. 407. *Mentd. Keet v. Smith* (1875), L. R. 4 A. & E. 398.

149. ———.]—The churchwardens of the parish of R., with the sanction & approval of the vicar of the parish, the rural dean of the district, & the bishop of the diocese, but without any legal authority, permitted a portion of the churchyard of R. to be separated from the remainder, & to be taken into & to form part of a public road:—*Held*: it was not in the power of any ecclesiastical ct. whatever to allow any portion of consecrated ground to be devoted to secular uses, or to grant a faculty to confirm such an appropriation.

Where a party has been proved to have interfered illegally with the soil of the churchyard, or the erections upon it, it has invariably formed part of the judgment that he shall restore to its former state what he has so interfered with.—*HARPER v. FORBES & SISSON* (1859), 5 Jur. N. S. 275.

Annotations:—Consd. Re Plumstead Burial Ground, [1895] P. 225; *St. Andrews, Hove v. Mawn*, [1895] P. 228, n.; *Re Bideford, Ex p. Bideford*, [1900] P. 314. *Reid. R. v. Twiss* (1869), 33 J. P. 516; *St. Nicholas, Leicester v. Langton*, [1899] P. 19.

See, also, Part XI., Sect. 3, sub-sect. 2, post.

150. Unconsecrated ground—Parish hall.]—

Faculty granted authorising the erection of a parish hall at the west end of a parish church on a piece of unconsecrated ground forming part of the churchyard.—*Re HOLY TRINITY, HOXTON* (1909), 25 T. L. R. 570.

SECT. 9.—ALIENATION OF CONSECRATED GROUND.

151. Vesting on death of trustee—1816 Act—London Government Act, 1899 (c. 14).]—An Act of 1719 provided for the rebuilding of the parish church of St. M., & also for the building of a vestry room. The new vestry room was erected upon ground which was added to the churchyard, & such additional ground, including the site of the vestry room, was consecrated as a place for burials. Under 7 Geo. 4, c. 77, this vestry room was pulled down & another built in its stead. The basement was composed of vaults & was used for burials, having been duly consecrated for that purpose in 1831. The new vestry room was vested in the same person or persons as the previous vestry room had been vested in. Under Metropolis Local Management Act, 1855 (c. 120), an elective vestry for the parish of St. M. was constituted & incorporated, before that Act the

vestry, as a vestry, having no corporate existence. In 1891 the vestry, having erected a more commodious meeting place, by resolution gave up possession of the old vestry room to the vicar & churchwardens, who had been made a corp., & who were at that time using, as they still did, a considerable portion of the premises in question for services & meetings. Under London Government Act, 1899, the secular powers & property of the vestry of St. M. were, speaking generally, transferred to the mayor, etc., of the city of W. In 1903 the mayor, etc., of the city of W. instituted an action against the vicar & churchwardens of the parish of St. M. for a declaration that the old vestry hall & the site thereof belonged to the corp.:—*Held*: (1) by virtue of 1816 Act, s. 4, the then vestry room became vested in the vicar of the parish of St. M., & it was not divested by Poor Relief Act, 1819 (c. 12); (2) the vestry room in question likewise became vested in the vicar, & the property in such vestry room did not become transferred to the corp. of W. under the London Government Act, 1899.—*WESTMINSTER CORPN. v. ST. MARTIN-IN-THE-FIELDS (VICAR & CHURCHWARDENS)* (1906), 96 L. T. 491; 71 J. P. 82; 23 T. L. R. 112; 5 L. G. R. 500.

Part IV. Burial in Consecrated Ground without Service of the Church of England.

152. Service by unauthorised person.]—JOHNSON v. FRIEND & BALLARD, No. 105, *ante*.

153. — Permission by burial board.]—Apart from 1880 Act, a person commits an ecclesiastical offence if not being in orders, or not being authorised in that behalf by the incumbent of the parish, he conducts a religious service at a burial in the consecrated portion of a cemetery which is the burial ground of such parish; & it is an illegal act on the part of a burial board knowingly to permit such unqualified or unauthorised person so to act.—*WOOD v. HEADINGLEY-CUM-BURLEY BURIAL BOARD*, [1892] 1 Q. B. 713; 66 L. T. 90; 56 J. P. 326; 40 W. R. 390; 8 T. L. R. 217; 36 Sol. Jo. 201, D. C.

Annotations:—*Mentd.* Williams v. Briton Ferry Burial Board, [1905] 2 K. B. 565; Sutton v. Bowden, [1913] 1 Ch. 518.

154. Notice of burial—Defective notice—Waiver—Expense of delayed funeral—Churchyard.]—A notice given by H. under 1880 Act, s. 1, of burial without the church service contained his name but no address. The vicar at first objected to

bury the child, because the churchyard was full, but afterwards room was found. H. attended with his friends on the day named in the notice, but had to postpone the funeral to a future day. H. sued the vicar for the expenses of the abortive funeral on the first day:—*Held*: the notice of burial was bad, & the defect was not waived by what the vicar had done thereafter.—*HOARE v. RAM* (1881), 45 J. P. 729.

155. — By burial board—To incumbent—Cemetery.]—There is no obligation upon a burial board to cause the notice required by 1880 Act, s. 1, to be given to an incumbent before such board permits a burial to take place in the consecrated portion of their cemetery without the performance of the burial service according to the rites of the Church of England.—*WOOD v. HEADINGLEY-CUM-BURLEY BURIAL BOARD*, [1892] 1 Q. B. 713; 66 L. T. 90; 56 J. P. 326; 40 W. R. 390; 8 T. L. R. 217; 36 Sol. Jo. 201, D. C.

Annotations:—*Mentd.* Williams v. Briton Ferry Burial Board, [1905] 2 K. B. 565; Sutton v. Bowden, [1913] 1 Ch. 518.

Part V.—Fees on Burial in Churchyard or Cemetery.

SECT. 1.—AT COMMON LAW—CUSTOM.

156. No fee payable—Except by custom.]—At common law no fee is payable for burials, unless there is a custom to the contrary.—*BURDEAUX v. LANCASTER* (1698), Holt, K. B. 317; 1 Salk. 332; 12 Mod. Rep. 171; 90 E. R. 1075.

Annotations:—*Consd.* Andrews v. Cawthorne (1745), Willes, 536; Patten v. Castleman (1753), 1 Lee. 387. *Mentd.* Naylor v. Scot (1729), 1 Barn. K. B. 159; Richards v. Dovey (1747), Willes, 622; Spry v. Marylebone (1839), 2 Curt. 5; Kirton v. Dear (1869), 18 W. C. 144.

157. S. P. EXETER'S (DEAN & CHAPTER) CASE (1707), 1 Salk. 334; 91 E. R. 294.

Annotations:—*Consd.* Andrews v. Cawthorne (1745), Willes, 536. *Refd.* Spry v. Gallop (1847), 16 M. & W. 716; Neville v. Bridger (1874), 30 L. T. 690; Winstanley v. North Manchester Overseers, [1910] A. C. 7. *Mentd.* Richards v. Dovey (1747), Willes, 622; Spry v. Marylebone (1839), 2 Curt. 5; Haig v. Barlow, Re St. Mary, Islington, Burial Fees (1891), Trist. 149.

158. — Breaking ground—In church.]—*GREGORY v. LUTTRELL* (1718), 2 Wood, 114.

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159.

Or churchyard.]

FRANKLYN v. ST. CROSS (MASTER & BRETHERN) (1721), 2 Wood, 185.

Annotations:—Mentd. Prevost v. Benett (1816), 2 Price, 272; Leathes v. Newitt (1817), 4 Price, 355; Batchellor v. Smallcombe (1818), 3 Madd. 12; Busk v. Lewis (1821), Jac. 363; Lewis v. Young (1824), M'Cle. 113.

160. ———.]—No burial fee is due at common law, but it may be due by custom in any particular parish.

Where any fee is due, it must be by the custom of the particular parish or place, which custom, if controverted, is triable & determinable only in the King's temporal cts. by the King's temporal judges (**ABNEY, J.**).—**ANDREWS v. CAWTHORNE** (1745), Willes, 536; 125 E. R. 1308.

Annotations:—Consd. Ayrton v. Abbott (1849), 14 Q. B. 1. **Refd.** Spry v. Gallop (1847), 16 L. J. Ex. 218; *Ex p.* St. Martin's, Birmingham (1870), 40 L. J. Ch. 69; Nevill v. Bridger (1874), L. R. 9 Exch. 214.

161. What fees are customary—Death in parish —Burial elsewhere.]—A custom of a parish, that fees should be paid there in respect of a passenger dying there, though buried elsewhere:—**Held:** unreasonable.—**TOPSALL v. FERRERS** (1617), Hob. 175; 80 E. R. 322.

Annotations:—Consd. Haspurt v. Wills (1670), 1 Mod. Rep. 47; Vaughan v. South Metropolitan Cemetery Co. (1860), 1 J. & H. 256. **Refd.** Burdeaux v. Lancaster (1698), 12 Mod. Rep. 171; Patten v. Castleman (1753), 1 Lee. 387; Spry v. Marylebone (1839), 2 Curt. 5. **Mentd.** Richards v. Dovey (1747), Willes, 622; Kirton v. Dear (1869), 18 W. R. 144.

162. ——— Where licence required—Burial in cathedral.]—No fee is due for burial of common right, but where a licence is necessary, the person giving it may stand on his own price, & if there be such a custom it is triable at common law. If the custom be not denied, the spiritual ct. shall proceed, for there is no other remedy, but if the custom be denied, a prohibition shall go.—**EXETER'S (DEAN & CHAPTER) CASE** (1707), 1 Salk. 334; 91 E. R. 294.

Annotations:—Consd. Andrews v. Cawthorne (1745), Willes, 536; Spry v. Gallop (1847), 16 M. & W. 716. **Refd.** Neville v. Bridger (1874), 30 L. T. 690; Winstanley v. North Manchester Overseers, [1910] A. C. 7. **Mentd.** Richards v. Dovey (1747), Willes, 622; Spry v. Marylebone (1839), 2 Curt. 5; Haig v. Barlow, *Re St. Mary, Islington, Burial Fees* (1891), Trist. 149.

163. ——— Burial of pauper—Poor rate.]—Burial fees for the interment of paupers cannot be claimed as payable by custom out of the poor rate.—**SPRY v. ST. MARYLEBONE (DIRECTORS & GUARDIANS)** (1839), 2 Curt. 5; 3 J. P. 66; 163 E. R. 318.

Annotations:—Refd. Spry v. Gallop (1847), 16 M. & W. 716. **Mentd.** *Re Haigh with Aspull*, [1919] P. 143.

See, also, No. 173, *post*.

164. To whom payable — By agreement.]—**LITTLEWOOD v. WILLIAMS**, No. 77, *ante*.

165. Jurisdiction of spiritual court—Prohibition.]—No prohibition lies *respectu jurisdictionis*, in a suit for burial fee, but *respectu triationis* it does after an issue offered there upon the prescription.—**ANDREWS v. SYMSON** (1675), 3 Keb. 527; 84 E. R. 859.

166. ———.]—Custom to pay for burials, triable at law.—**ANDERSON v. WALKER** (1691), 3 Salk. 86; 2 Lut. 1030; 91 E. R. 708.

Annotation:—Mentd. Richards v. Dovey (1747), Willes, 622.

167. ———.]—**EXETER'S (DEAN & CHAPTER) CASE**, No. 162, *ante*.

168. ———.]—**ANDREWS v. CAWTHORNE**, No. 160, *ante*.

169. ———.]—The Ecclesiastical Ct. has jurisdiction in suits for customary burial fees.—**SPRY v. ST. MARYLEBONE (DIRECTORS &**

GUARDIANS) (1839), 2 Curt. 5; 3 J. P. 66; 163 E. R. 318.

Annotations:—Refd. Spry v. Gallop (1847), 16 M. & W. 716. **Mentd.** *Re Haigh with Aspull*, [1919] P. 143.

170. ———.]—**SPRY v. GALLOP**, No. 173, *post*.

SECT. 2.—BY STATUTE.

171. When applicable—Sanction of vestrymen necessary—New church & cemetery.]—By a local Act a new church & cemetery were directed to be built, & made in the parish of St. M., & the vestrymen of the parish were thereby authorised to settle a table of fees for burials in such new church & cemetery, which were not to be fixed at a lower amount than the fees which had been customarily paid for burials in the old church & burial ground. The vestrymen had not settled any such table of fees:—**Held:** the ct. could not enforce the payment of fees for burials in the new church & cemetery, same not having been fixed by the vestrymen.—**SPRY v. ST. MARYLEBONE (DIRECTORS & GUARDIANS)** (1839), 2 Curt. 5; 3 J. P. 66; 163 E. R. 318.

Annotations:—Refd. Spry v. Gallop (1847), 16 M. & W. 716. **Mentd.** *Re Haigh with Aspull*, [1919] P. 143.

172. Persons entitled—Chapel & additional cemetery provided—Fees reserved to lay rector—Surplice fees.]—Before the passing of a local Act, the incumbent or minister of the parish of St. M., which was a lay rectory, by himself or his curates, performed the duty on all burials in the parish, & received the surplice fees thereon, as part of the profits of the living. By that Act the vestry of the parish were empowered to provide an additional cemetery for the parish, & erect a chapel thereon, & by s. 41, the lay rector was empowered to appoint a burying minister, to officiate in burying the dead in the cemetery, a reader to perform divine service, & preach in the chapel, & if it should seem right to the vestry, another minister to be preacher in the chapel, such reader & preacher to receive for their salaries such sums as the vestry should appoint. By s. 89, nothing therein contained was to lessen or alter the title of the lay rector, or the person for the time being entitled to the rectory & advowson, to the ecclesiastical dues, oblations, & obventions belonging thereto. By a subsequent Act, for effectuating the building of four district churches within the parish, it was enacted that the parish should remain & be one entire & undivided parish for all ecclesiastical & civil purposes, & pltf. was subsequently appointed rector of the parish. By a later Act, whereby the four districts were made district rectories for certain purposes, the district rectors were empowered to solemnise marriages & baptisms, & take all fees for same, but nothing therein contained was to alter or affect the law respecting burials or burial fees within the parish. In 1824, W. was presented by the Crown, in whose hands the lay rectory then was, to the chapel built under the first Act, & thenceforth performed all the burials there, & received the burial fees, which he paid over to pltf., the rector, until 1839, when deft., by direction of the vestry, received & retained them:—**Held:** pltf. was entitled to recover the amount of such fees in an action for money had & received.—**SPRY v. EMPEROR** (1840), 6 M. & W. 639; 10 L. J. Ex. 50; 151 E. R. 568.

Annotations:—Distd. Spry v. Gallop (1847), 16 M. & W. 716. **Mentd.** Parker v. Bristol & Exeter Ry. (1851), 6 Exch. 702; Taylor v. Met. Ry. (1906), 95 L. T. 149.

173. Burial of paupers.]—Upon a special case stated as to the right of pltf., as rector of the parish of St. M., & minister of the

new church of that parish, to recover certain fees alleged to be due from the burial of certain paupers in the new burial ground of the parish, it appeared that, in 1733, the then minister or rector of the parish, & the parochial authorities, referred to a third person the settlement of the minister's fees, & a table of fees was prepared by the referee. From that time down to 1838, a fee of 1s. 6d. was paid by the parish officers to the minister or rector of the parish for the burial of a pauper in any of the cemeteries of the parish. By a local Act, the vestrymen of St. M. were empowered to purchase land for erecting a new church & new chapels, & making a new burial ground. By s. 35, H., the then rector, & his successors, were declared to be ministers of the new church, & the patron of the living was empowered to appoint successively ministers of the new church who were to enjoy such oblations, mortuaries, glebes, tithes, profits, & other ecclesiastical dues, as the present minister ought to have. Power was also given to the patron to appoint a minister to officiate in burying the dead in the new burial ground, but no person was appointed in pursuance thereof. By s. 49 the vestrymen were empowered to settle the rates & fees for burial in the new burial ground, & to alter & amend same. By s. 50, they were prohibited from reducing the burial fees below the amount then payable for burials in the parish. By s. 71, they were empowered to borrow £150,000 on credit of the rates & burial fees, & to assign any portion of such rates or fees to the persons advancing the money. In pursuance of the Act, the vestry, in 1835, settled a table of fees, of which an item was: "Paupers from the workhouse 2s. 6d."; & from that time 1s. 6d. had been paid to the rector, & 1s. to the clerk & sexton, on such burials. The burial service had not been performed by the rector or any of his curates, but by the reader of one of the new chapels:—*Held*: (1) no fee was shown to be due to pltf., either by custom or by virtue of the Act of Parliament; (2) if such fee were due, it must be recovered in the Ecclesiastical Ct.—*SPRY v. GALLOP* (1847), 16 M. & W. 716; *Cripps' Church Cas.* 28; 16 L. J. Ex. 218; 12 J. P. 233; 153 E. R. 1378.

Annotations:—*Consd.* Haig v. Barlow, *Re* St. Mary Islington Burial Fees (1891), *Trist.* 149. *Mentd.* Roberts v. Aulton (1857), 2 H. & N. 432; *Re* Haigh with Aspull, [1919] P. 143.

174. — Divided parish.]—Under Church Building Act, 1819 (c. 134), & by an Order in Council, a district, with a district church, was parted off from the parish of St. M., but the Order in Council directed that, during the incumbency of the then rector of St. M., two-thirds of the fees to be received for (*inter alia*) burials at the district church should "belong & be paid" to the rector, & one-third to the district minister:—*Held*: where the minister had actually received the entire fees, the rector might recover from him the two-thirds in an action for money had & received, but the Act & Order in Council did not oblige the minister to receive the fees or any part of them, & the rector could not maintain *assumpsit* against him on a supposed duty to take the fees & pay the rector his two-thirds.—*KING v. ALSTON* (1848), 12 Q. B. 971; 18 L. J. Q. B. 59; 12 L. T. O. S. 241; 13 Jur. 297; 116 E. R. 1134.

Annotation:—*Distd.* Aulton v. Roberts (1857), 26 L. J. Ex. 380.

175. — Burials in cemetery.]—In 1823, a piece of ground in the parish of St. M., L., was purchased by subscription of the inhabitants, & conveyed to the comrs. for building new churches, who erected a chapel on part of it & inclosed the

remainder for a burial ground. In 1827, the chapel & burial ground were consecrated. In 1828 an Order in Council was made & published, whereby, after reciting Church Building Act, 1818 (c. 45), ss. 16, 22, & also reciting that the comrs. had made a representation to the Crown respecting the increase of population & insufficient church accommodation in the parish, & that it appeared to the comrs. expedient that an ecclesiastical district should be assigned to the new chapel under Church Building Act, 1819 (c. 134), & that the consent of the bishop had been obtained, his Majesty ordered that the proposed division should be made & effected according to the above Acts. The boundaries of the district were duly enrolled. No Order in Council was made respecting the performance of the offices of the church in the chapel, or the appropriation of the fees payable in respect thereof, nor did the comrs. make any order as to whether the fees for burials, etc., were to be reserved to the incumbent of the parish, or assigned to the curate of the chapel, or whether burials, etc., should be performed in such chapel. In 1848, the L. corpn. established a cemetery within the borough, under a local Act, by which the burial service over deceased persons removed for interment in the cemetery was to be performed by, & the fees paid to, the incumbent, who might have been required to perform the service, & would have been entitled to the fees, if the interment had taken place in his parish or ecclesiastical district:—*Held*: the Order in Council was made under Church Building Act, 1818, s. 21, & not under Church Building Act, 1819, s. 16, & upon enrolment of the boundaries, the chapelry became a separate district parish for all ecclesiastical purposes, & after the death of the then incumbent of the original parish, the curate of the district parish was entitled to the fees for burial, both in his parish & in respect of deceased persons removed therefrom for interment in the cemetery.—*EDGEELL v. BURNABY* (1853), 8 Exch. 788; 23 L. J. Ex. 65; 21 L. T. O. S. 144; 17 J. P. 520; 155 E. R. 1571.

Annotation:—*Mentd.* Roberts v. Aulton (1857), 2 H. & N. 432.

176. — Surplus fees.]—*Held*: under a local Act which made the parish of W. a district parish from that of St. D., the rector for the time being of the parish of W. was entitled to receive from the churchwardens the yearly sum of £100 out of the burial fees of the parish, but was not entitled to the surplus burial fees beyond the amount of £100, such fees being applicable by the churchwardens to parochial purposes.—*KING v. LIQUORISH* (1852), 18 L. T. O. S. 302; 16 J. P. Jo. 101.

177. — District chapelry.]—In 1810, a chapel was purchased for the purpose of being consecrated as a chapel of ease in the parish of A. The chapel was consecrated under a deed, dated Aug. 25, 1810, by which the parish clerk & sexton were to be entitled to the fees for (*inter alia*) burials in the chapel & cemetery thereof, as if they had taken place in the mother church. By an Order in Council, of Aug. 2, 1853, the chapel was created a district chapelry under Church Building Act, 1819 (c. 134), s. 16. Pltf., who was clerk & sexton of the parish of A., having brought an action for money had & received, against deft., the clerk & sexton of the chapel, for the fees received by him for burials in the chapel:—*Held*: (1) the action for money had & received would lie for these fees; (2) this being a "district chapelry," was not within Church Building Act, 1819, s. 10,

Sect. 2.—By statute. Sects. 3, 4 & 5. Parts VI. & VII. Sects. 1 & 2.]

& pltf., as clerk & sexton of the parish, was entitled to the fees arising at the chapel.—*ROBERTS v. AULTON* (1857), 2 H. & N. 432; 29 L. T. O. S. 280; 21 J. P. 629; 157 E. R. 178; *sub nom. AULTON v. ROBERTS*, 26 L. J. Ex. 380.

Annotations:—Consd. Hampstead Parish Clerk's Fee Case, Re Langmead (1876), Trist. 54. *Mentd. Ormerod v. Blackburn Burial Board* (1873), 21 W. R. 539; *White v. Norwood Burial Board* (1885), 54 L. T. 81.

See, also, No. 196, post.

178. — Burials by cemetery company.]—

By a private Act of Parliament establishing a cemetery co. it was enacted that upon the interment of every person within the cemetery the co. should pay to the incumbent for the time being of the church or chapel of the parish, or other ecclesiastical division of the parish, from which such person should be removed for the purpose of interment, certain fees. The district chapelry of J. was carved out of the larger district parish of M. after the passing of the Act, & never had any burial ground of its own:—*Held*: the incumbent of J., & not of M., was entitled to the fees payable by the cemetery co. for the interment of persons removed from the district of J., & this, notwithstanding the district of J. had been constituted since the passing of the cemetery co.'s Act.—*VAUGHAN v. SOUTH METROPOLITAN CEMETERY CO.* (1860), 1 John. & H. 256; 30 L. J. Ch. 265; 3 L. T. 727; 25 J. P. 212; 7 Jur. N. S. 159; 9 W. R. 228; 70 E. R. 743.

Annotation:—Folld. Bowyer v. Stantial (1878), 3 Ex. D. 315.

179.

—A cemetery co. were incorporated by a local Act, & by one sect. it was enacted that "upon the interment of every person within the consecrated part of the cemetery who shall appear by the books of the co. to have been removed for the purpose of interment from" certain parishes including C., "the co. shall pay unto the incumbent for the time being of the church or chapel of the parish, or other ecclesiastical district or division of the parish, from which such person shall be so removed" certain fees. By another sect. "every such incumbent shall pay to the churchwardens or chapelwardens for the time being of his church or chapel" out of the fees received by him certain amounts, "to be respectively paid & applied by them in the same manner & amongst the same persons, including the incumbents of such churches & chapels, & in the same proportions as the fees on interments, which the churchwardens & chapelwardens are entitled to receive in their respective parishes, districts, or divisions of parishes, are & ought by law & custom to be paid & applied." Pltf. was the rector of C., & defts. were respectively the incumbents of three ecclesiastical districts originally comprised within the limits of C.; none of them were in existence at the time of passing the local Act. For some years previous to the establishment of the cemetery the churchyard of C. was used as a place of interment of persons dying within the parish, & the rector of C. for the time being was entitled to all fees arising or accruing in respect of such interments. Pltf., as rector of C., claimed to recover against defts. respectively the fees for the interment of persons removed from the ecclesiastical districts of which they respectively were incumbents:—*Held*: defts. were entitled to the fees claimed by pltf.—*BOWYER v. STANTIAL* (1878), 3 Ex. D. 315; *sub nom. BOWYER v. SOUTH METROPOLITAN CEMETERY CO.*, 38 L. T. 271; 42 J. P. 389, C. A.

Where elective burial board.]—

Part VIII., Sect. 4, sub-sect. 10, A, *post*.

180. Amount recoverable—Whether power to increase fees.]—One sect. of a local Act directed that fees in the schedule thereto, & no other, should be taken in the parish of L. Another sect. empowered the Church Building Comrs., with the consent of the vestry of L. & the bishop of C., to make & fix, & to make alterations in, the table of fees for the parish of L. A third sect. referred to two cemeteries in L., & enacted that such fees only should be demanded & exacted for burials at the cemeteries as were specified & enumerated in the schedule to the Act, as the fees payable at the parish church or parochial chapel. The fees for the parish & the parochial churchyards were afterwards increased by the Church Building Comrs., with the consent of the vestry & bishop, & such increased fees were demanded & received at the cemeteries for burials therein, & subsequently paid by the vestry to the rector:—*Held*: there was no power to increase the fees for burials in the cemeteries, & the auditor had to the extent of the increase properly disallowed & surcharged the rector with those fees.—*R. v. CAMPBELL* (1856), 26 L. T. O. S. 239; 20 J. P. 71.

SECT. 3.—SPECIAL FEES.

181. Iron coffin.]—*GILBERT v. BUZZARD*, No. 83, *ante*.

182. Particular vault — In churchyard — Parishioner.]—*Ex p. BLACKMORE*, No. 101, *ante*.

183. — In church — Non-parishioner.]—*NEVILL v. BRIDGER*, No. 103, *ante*.

184. Kerb tablets—Special fees for—Not recoverable by rector & sexton—Unless supported by custom or resolution of vestry after notice & sanctioned by ordinary.]—*MILLER & WHEATLAND v. GILLAM* (1920), 55 L. Jo. 331; 150 L. T. Jo. 152; 64 Sol. Jo. 758.

SECT. 4.—MORTUARIES OR CORSE-PRESENTS.

185. Nature of—Jurisdiction of justices.]—A mortuary is not an "oblation" or "obvention" within 7 & 8 Will. 3, c. 6, & is not recoverable before two justices of the peace.—*AYRTON v. ABBOTT* (1849), 14 Q. B. 1; 4 New Mag. Cas. 5; 18 L. J. Q. B. 314; 14 L. T. O. S. 249; 13 J. P. 810; 14 Jur. 36; 117 E. R. 1.

Annotation:—Mentd. R. v. Kidd (1866), 16 L. T. 203.

186. Evidence of.]—An impropriator's predecessor's book admitted as evidence of a mortuary due.—*ANON.* (1719), Bunb. 46; 145 E. R. 590.

Annotations:—Mentd. Roe d. Brune v. Rawlings (1806), 7 East, 279; *Short v. Lee* (1821), 2 Jac. & W. 464.

187. Place of payment—Jurisdiction of spiritual court — Prohibition.]—On a suggestion that by 21 Hen. 8, c. 6, no mortuary should be paid but in such places where it ought to be paid before the making of the Act, prohibition was granted in a suit for a mortuary in the spiritual ct.—*WHITE'S CASE* (1589), Cro. Eliz. 151; 78 E. R. 409.

188. Custom admitted—Jurisdiction of spiritual court—Person entitled—Vicar or impropriator.]—On motion for a prohibition because the vicar sued in the spiritual ct. for a mortuary on the suggestion that it was not due by custom to the vicar, but to the impropriator:—*Held*: prohibition must be refused, because the spiritual ct.

held pleas of mortuaries notwithstanding 21 Hen. 8, c. 6, for that Act only dealt with those which were not due by custom, & in this case it was admitted that the mortuary was due by custom, but the ct. differed as to the person to whom it should be paid.—*MARKE v. GILBERT* (1665), 1 Sid. 263; 1 Kel. 919; 82 E. R. 1095.

189. Custom denied—Jurisdiction of spiritual court—Prohibition.]—Upon a suit in the spiritual ct. for a mortuary by custom, if deft. pleads “no such custom,” & the ct. refuses the plea, a prohibition shall go.—*HINDE v. CHESTER* (Bp.) (1631), Cro. Car. 237; 79 E. R. 808.

Annotation:—*Distd. Johnson v. Ryson* (1700), 12 Mod. Rep. 416.

190. ———.]—Suit for a mortuary prohibited, where by custom none was due. *STOKES v. TROLLOP* (1681), 1 Freem. K. B. 300; 89 E. R. 218.

191. ———.]—On a libel for a mortuary, if deft. suggests no custom, the ct. will grant a prohibition.—*PROUD v. PIPER* (1689), 3 Mod. Rep. 268; 87 E. R. 177; *sub nom. BROAD v. PIPER*, Carth. 97; Comb. 166.

192. ———.]—**Pleading in spiritual court.]**—A prohibition is not to be granted to the spiritual ct. to stay a suit for a mortuary, upon a suggestion that there is no custom for its payment, for that fact ought to be pleaded in the spiritual ct.—*JOHNSON v. OLDHAM* (1700), 1 Ld. Raym. 609; 91 E. R. 1307; *sub nom. JOHNSON v. RYSON*, 12 Mod. Rep. 416.

193. ———.]—*Held:* on a suggestion that there was no custom for the payment of mortuaries, a prohibition should issue to a spiritual ct. in a suit there, & pltf. should declare an attachment upon the prohibition to try if there was

such custom or not.—*JOHNSON v. WRIGHTSON* (1701), 2 Lut. 1066; 125 E. R. 593.

194. ———.]—**Suit in equity.]**—One cannot sue in equity for a mortuary.—*TORRENT v. BURLEY* (1726), 2 Stra. 715; 93 E. R. 803.

195. Proof of liability.]—*MANBY v. CURTIS* (1816), 2 Price, 284; 146 E. R. 98.

Annotations:—*Refd. Manby v. Lodge* (1821), 9 Price, 231. *Mentd. Salkeld v. Johnstone* (1842), 11 L. J. Ch. 201.

SECT. 5.—NEW PARISH.

196. Who entitled to fees—Sexton of parish—Not sexton of new district chapelry.]—*HAMMOND v. M'ALLISTER* (1874), *Times*, Nov. 14th.

See, also, No. 177, *ante*.

197. Sanction of ordinary—Statutory & other fees.]—The ordinary has jurisdiction in the case of a new parish to settle & approve the propriety of burial fees, although they may not be fees included in those which he has statutory power to fix.

On an application by the vicar & churchwardens of a new parish in the diocese of L. within New Parishes Act, 1843 (c. 37), s. 15, the Chancellor of that diocese fixed for the parish a table of fees containing all such fees as he was empowered & required to fix in pursuance of the above sect., & also confirmed the propriety of whatever fees contained in the table of fees were not included in fees which he was required to fix under the sect., & he ordered that a portion of the burial fees to be received in pursuance of the table of fees fixed by him should be allocated to form a fund for the maintenance & extension of the parish churchyard.—*Re HAIGH WITH ASPULL NEW PARISH*, [1919] P. 143; 35 T. L. R. 340.

Part VI.—Validity of Bequests for Burial Grounds, Tombs, and Monuments.

See CHARITIES.

Part VII.—Provision of Land for Burial Grounds.

SECT. 1.—GIFTS FOR CHURCHES ACTS, 1803 (c. 108) AND 1811 (c. 115).

Validity of bequests under.]—*See CHARITIES.*

198. 1811 Act—Grant by lord of manor—Village green—Customary rights.]—The Ecclesiastical Comrs., as lords of the manor of B. in the parish of M., granted to the vicar of M. under 1811 Act, s. 2, part of the waste of the manor for a burial ground. To a bill filed on behalf of the parishioners setting up a customary right to this part of the waste as a village green, & seeking to set aside the grant, a demurrer was overruled.—*FORBES v. ECCLESIASTICAL COMRS. FOR ENGLAND* (1872), L. R. 15 Eq. 51; 42 L. J. Ch. 97; 27 L. T. 511; 21 W. R. 169.

Gifts for churches.]—*See CHARITIES; ECCLESIASTICAL LAW.*

SECT. 2.—CHURCH BUILDING ACTS, 1818 (c. 45) TO 1884 (c. 65).

199. Validity of rate—Other purposes included—Whether “church” includes “churchyard.”]—

Where the churchwardens of a parish made a single rate for providing necessary additional burial ground for the parish, which could only be done, if at all, under the powers given by Church Building Acts, & also for draining & spouting a chapel in the parish, as at common law:—*Held:* the rate could not be enforced. *Qu.*: whether there is any power to make a rate for enlarging or for purchasing a burial ground.

Where the statutes referred to in this argument speak of “existing churches,” those words may include churchyards as well as the building itself (*ERLE, J.*).—*R. v. ABNEY* (1854), 3 E. & B. 779; 23 L. J. M. C. 154; 23 L. T. O. S. 206; 18 Jur. 1052; 2 C. L. R. 1488; 118 E. R. 1333; *sub nom. WHITWICK v. STENSON*, 18 J. P. 711.

Annotation:—*Refd. Farnell v. Smith* (1855), 15 C. B. 572.

200. Making of rate—Sufficiency of notice.]—A rate may be made, under 1818 Act, ss. 59, 60, for the purpose of paying the principal & interest of money borrowed in the manner provided by that Act, at a meeting of which the notice required by Church Building Act, 1819 (c. 134), s. 25,

Sect. 2.—Church Building Acts, 1818 (c. 45) to 1884 (c. 65). Part VIII. Sects. 1, 2, 3 & 4: Sub-1, A.]

has not been given, the latter statute not repealing the former, but merely providing a further mode of raising the necessary funds.—*FARNELL v. SMITH* (1855), 15 C. B. 572; 25 L. T. O. S. 68; 19 J. P. 87; 3 W. R. 184; 139 E. R. 548.

201. — Poll refused—Jurisdiction of spiritual court—Prohibition.]—At a vestry held for the parish of P., a resolution was passed, authorising the churchwardens to purchase on behalf of the parish a piece of land for an additional burial ground. A poll was demanded & refused. Upon the authority of this resolution, the Church Building Comrs., acting under Church Building Act, 1822 (c. 72), s. 26, authorised the parish to purchase the land & to levy rates to defray the expenses, which the parish did. Pltf. declined to pay the rate, & a suit for subtraction of church rates was commenced against him in the Ecclesiastical Ct., which he defended on the ground that a poll having been demanded & refused, the desire of the parish to enlarge their burial ground had not, as required by the above Act, been legally expressed. The Ecclesiastical Ct. having decided

in favour of the churchwardens by rejecting this defence:—*Held*: (1) a prohibition to the Ecclesiastical Ct. ought to issue, as the above sect. did not, by giving to the parish in these cases the powers conferred by Church Building Act, 1819 (c. 134), s. 25, impliedly take away the common law right to a poll, for, whatever might be the effect of that sect. in cases where it was applicable, it only applied to the power of a vestry in raising rates, & not to such a proceeding as this; (2) as the Ecclesiastical Ct. had rejected a defence which, if true, was a complete & substantial answer to the libel, & as pltf. was bound in the temporal ct. to establish the truth of this defence, the prohibition ought to be that no further proceedings be taken in the Ecclesiastical Ct., & not merely until that ct. should alter its decision on the point of law.—*WHITE v. STEELE* (1862), 12 C. B. N. S. 383; 31 L. J. C. P. 265; 6 L. T. 686; 8 Jur. N. S. 1177; 142 E. R. 1191; *subsequent proceedings*, 13 C. B. N. S. 231.

Annotations:—*Distd. Ripplin v. Bastin* (1869), L. R. 2 A. & E. 386. *Mentd. R. v. Row* (1863), 33 L. J. M. C. 53; *London Corpn. v. Cox* (1867), L. R. 2 H. L. 239.

See, now, Compulsory Church Rate Abolition Act, 1868 (c. 109).

See, further, ECCLESIASTICAL LAW.

Part VIII.—Provision of Burial Grounds under Burial Acts.

SECT. 1.—DEFINITIONS.

202. "Parish"—Separate overseers—Separate maintenance of poor.]—1852 Act, authorising the formation of a burial board in a "parish," is applicable to a parish not having separate overseers, nor separately maintaining its poor. The interpretation clause, s. 52, extends the meaning of the word to places, not parishes, having separate overseers & separately maintaining their own poor, but does not exclude parishes which, for any reason, do not fulfil those conditions.—*R. v. SUDBURY BURIAL BOARD* (1858), E. B. & E. 264; 27 L. J. Q. B. 232; 31 L. T. O. S. 161; 22 J. P. 706; 4 Jur. N. S. 948; 6 W. R. 551; 120 E. R. 506.

Annotation:—*Reid. R. v. Walcot Overseers* (1862), 2 B. & S. 555.

SECT. 2.—OPENING NEW BURIAL GROUNDS OR ADDITIONS.

203. Prohibition by Order in Council—Approval of Secretary of State—Addition to cemetery.]—The burial board of P., where by Order in Council no new burial ground was to be opened without the previous approval of one of the Secretaries of State, contracted in 1889 with the consent of the vestry for the purchase of a piece of land for the purpose of adding to their existing cemetery. The purchase was not to be completed till June, 1896. In the meantime no interest was to run, & the vendor was to be at liberty to remove the clay & make bricks on the land. In 1895 the property & liabilities of the board were transferred to the corp'n. Shortly before the time for completion the corp'n. applied to the Home Secretary for his approval of the land as a burial ground, which he refused to give. The corp'n. then declined to complete, & the vendor sued for specific performance or damages:—*Held*: (1) 1853 Act, s. 6, applied to an addition to an existing burial ground; (2) the sect. did not prohibit the contracting to purchase land with the consent of the vestry for the purpose of a burial ground without the approval

of a Secretary of State, & the contract was binding & the vendor entitled to damages for the breach of it, he not insisting on specific performance.—*WARD v. PORTSMOUTH CORPN.*, [1898] 2 Ch. 191; 67 L. J. Ch. 489; 78 L. T. 771; 62 J. P. 820; 46 W. R. 610; 14 T. L. R. 472, C. A.

Annotation:—*Consd. Re Bosworth & Gravesend Corp'n.*, [1905] 2 K. B. 426.

204. — — —.]—1853 Act, ss. 1, 6, apply to an addition to an existing burial ground as well as to an altogether new burial ground.

Where a piece of land was set apart for the purposes of interment, & part of it was used for those purposes, in contravention of an Order in Council made under 1853 Act, s. 1:—*Held*: the definition of a "burial ground" in Open Spaces Act, 1887 (c. 32), s. 4, which was by that Act rendered applicable to 1884 Act, included land which had been "set apart for the purposes of interment," even though it was so set apart in contravention of the Order in Council, & could never have been lawfully used for the purposes of interment, & s. 3 of the last-mentioned Act prohibited the use of any part of the land so set apart for building purposes.—*Re BOSWORTH & GRAVESEND CORPN.*, [1905] 2 K. B. 426; 74 L. J. K. B. 810; 93 L. T. 226; 69 J. P. 337; 54 W. R. 39; 21 T. L. R. 608; 3 L. G. R. 849, C. A.

See, further, Part XI., post.

SECT. 3.—VESTRIES AND MEETINGS IN NATURE OF VESTRY.

205. Voting at meeting—Demand of poll—"Division."]—A local Act, for regulating the affairs & the mode of conducting the business of a parish, containing upwards of 10,000 ratepayers entitled to vote at the vestry meetings, directed that at such meetings all questions should in the first instance be determined by a show of hands, which determination should be conclusive unless a "division" was demanded. It also enacted, that in all cases of "division" the votes should be taken

in the manner prescribed by 58 Geo. 3, c. 69. At a vestry meeting duly convened, after a show of hands had been taken upon a question before the meeting, a division was demanded, & thereupon a poll of the whole parish was taken:—*Held*: having regard to the number of persons entitled to vote, & the plurality of votes given to the ratepayers by 58 Geo. 3, c. 69, a "division" must be construed as equivalent to a poll of the parish, & not be confined to the ratepayers actually present at the meeting. The best mode of putting resolutions & amendments pointed out.—*ELT v. ST. MARY'S, ISLINGTON, BURIAL BOARD* (1854), Kay, 449; 18 J. P. 229; 69 E. R. 190.

206. What vestry has power—Election under local Act.]—By a local Act for making the township of S. a distinct parish, it was enacted that a new church & burial place adjoining should be the parish church & churchyard of the parish, & a vestry was constituted "for the preserving better order in the parish," & for other enumerated purposes relating to the church. On *mandamus* to convene a meeting of this vestry for determining whether a burial ground should be provided, under 1853 Act:—*Held*: this vestry was "a vestry elected under the provisions of a local Act" within 1852 Act, s. 52.—*R. v. PETERS* (1856), 6 E. & B. 225; 119 E. R. 848; *sub nom. Re SUNDERLAND VESTRY*, 25 L. J. Q. B. 271; 20 J. P. 581; 2 Jur. N. S. 424; 4 W. R. 480.

Annotation:—*Distd. R. v. Gladstone* (1857), 7 E. & B. 575.

207. — General vestry.]—Under a local Act for the administration of the poor laws in the parish of L. a select vestry was to be elected to carry out the Act & to be the board of guardians of the poor, with the duties & privileges of such guardians in general. A select vestry was elected, & performed the duties imposed by the Act, the vestry of the parish at large retaining all its functions in the general management of the parish:—*Held*: the select vestry was not "a vestry elected under a local Act for the government of the parish" within 1852 Act, s. 52, & the right to appoint a burial board under ss. 10, 11, was in the general vestry.—*R. v. GLADSTONE* (1857), 7 E. & B. 575; 5 W. R. 530; 119 E. R. 1359; *sub nom. Re LIVERPOOL BURIAL BOARD, Ex p. URQUHART*, 26 L. J. Q. B. 213; 29 L. T. O. S. 90; 21 J. P. 726; 3 Jur. N. S. 441.

SECT. 4.—ELECTIVE BURIAL BOARDS IN URBAN DISTRICTS.

SUB-SECT. 1.—ESTABLISHMENT AND ELECTION OF BURIAL BOARDS.

A. Areas for which Boards appointed.

208. Part of parish—Existing board—For other parts.]—The parish of T. included the township of T. W., which township, under 1855 Act, was entitled to have a separate burial board:—*Held*: the rest of the parish was, by implication, entitled to appoint a burial board for itself, exclusive of the township.—*VINER v. TONBRIDGE OVERSEERS* (1859), 2 E. & E. 9; 28 L. J. M. C. 251; 33 L. T. O. S. 202; 23 J. P. 773; 5 Jur. N. S. 1293; 7 W. R. 553; 121 E. R. 4.

Annotations:—*Reid. R. v. Walcot, St. Swithin, Overseers* (1862), 2 B. & S. 571; *R. v. Tonbridge Overseers* (1884), 13 Q. B. D. 339.

209. — — — For whole parish.]—Under 1857 Act, s. 5, a district parish formed for ecclesiastical purposes may form a burial board for its own district, notwithstanding a burial board has already been formed for the entire common law parish.—*R. v. WALCOT, ST. SWITHIN, OVERSEERS*

(1862), 2 B. & S. 571; 31 L. J. M. C. 221; 6 L. T. 325; 26 J. P. 548; 10 W. R. 602; 121 E. R. 1185. *Annotation*:—*Reid. R. v. Tonbridge Overseers* (1884), 13 Q. B. D. 339.

210. — — —]—The existence of a legally constituted burial board for the whole of a parish, does not prevent the vestry of an ecclesiastical district formed out of such parish under Church Building Act, 1831 (c. 38), & which does not separately maintain its own poor, from legally appointing a burial board for such district under 1855 Act, s. 12.—*R. v. TONBRIDGE OVERSEERS* (1884), 13 Q. B. D. 339; 53 L. J. Q. B. 488; 51 L. T. 179; 48 J. P. 740; 33 W. R. 24, C. A.; *resvg.* (1883), 11 Q. B. D. 134, D. C.

Annotation:—*Mentd. Re Plymouth Corpn. & Walter* (1918), 119 L. T. 626.

211. Whole parish—Although divided.]—The fact that a common law parish has been divided, under Church Building Act, 1818 (c. 45), into district parishes for ecclesiastical purposes, does not disentitle the ratepayers of such common law parish from meeting in vestry & resolving upon having a burial ground, & nominating a burial board for such common law parish.

The common law parish of W. was in 1840, by an Order in Council, divided into three district parishes for ecclesiastical purposes, pursuant to Church Building Act, 1818, the old burial ground remaining common to the new districts. At a vestry of the common law parish, held pursuant to 1852 Act, s. 10, & 1853 Act, s. 7, it was resolved that a burial ground should be provided for such parish, & a burial board was then appointed:—*Held*: the proceedings were lawful, & the board was well constituted for the entire common law parish.—*R. v. WALCOT OVERSEERS* (1862), 2 B. & S. 555; 31 L. J. M. C. 217; 6 L. T. 320; 26 J. P. 500; 10 W. R. 599; 121 E. R. 1179.

212. United parishes—Single burial board.]—The parish of A. & the hamlet of C. constituted for all ecclesiastical purposes one parish; each place separately maintained its own poor, appointed its own overseers, surveyors of highways, etc., but the ratepayers of each were accustomed to meet in one vestry & transact all business usually transacted at a parish vestry, excepting the above matters. By an Order in Council the burial ground for the parish & hamlet was ordered to be closed, whereupon a vestry of the two places met, & resolved that a burial ground should be provided for the parish, & a burial board was afterwards appointed, the Secretary of State having certified his approval. Money was afterwards borrowed to provide a burial ground, which was charged upon the parish of A. The burial board having required a sum of money for paying the interest upon the money borrowed, & for a sinking fund, they made an order upon the overseers of C. for the payment of a certain sum as their proportion:—*Held*: A. & C. were united parishes within 1855 Act, s. 11, & the united board was well formed, & C. was bound to pay the amount required.—*R. v. COLESHILL OVERSEERS* (1864), 4 B. & S. 667; 34 L. J. Q. B. 96; 29 J. P. 311; 122 E. R. 609, Ex. Ch.; *affg.* (1862), 2 B. & S. 825. *Annotation*:—*Reid. R. v. Walcot Overseers* (1862), 2 B. & S. 555.

213. Alteration of area—By county council.]—*R. v. DURHAM COUNTY COUNCIL* (1897), Local Government Chronicle, 1897, 70; Macmorran's Local Government Act, 4th ed., 198.

214. — — —]—*R. v. KEIGHLEY OVERSEERS* (1897), Local Government Chronicle 1897, 47; Macmorran's Local Government Act, 4th ed., 198. *Annotation*:—*Reid. Bootle Grdns. v. Whitehaven Grdns.* [1903] 2 Ch. 142.

Sect. 4.—Elective burial boards in urban districts:
Sub-sect. 1, B. & C.; sub-sects. 2, 3, 4, 5, 6 & 7.]

B. Membership.

215. Vacancy—How filled.]—A vacancy in a burial board having occurred, & the vestry not having filled it up within one month, as required by 1855 Act, s. 4, nor the burial board having done so:—*Held*: the vestry was not divested of the power still to appoint.—*R. v. SOUTH WREALD OVERSEERS* (1864), 5 B. & S. 391; 4 New Rep. 323; 33 L. J. M. C. 193; 10 L. T. 498; 28 J. P. 708; 10 Jur. N. S. 1099; 12 W. R. 873; 122 E. R. 876.

216. Member declining to act—Quo warranto.]—J. presided at a vestry meeting for electing a burial board under 1852 Act, s. 12, & declared himself elected, along with others. The clerk of the vestry duly announced such election to the clerk of the burial board, & the vestry meeting's minutes were duly confirmed, but J. never attended or acted at any meeting of the burial board, nor claimed a right to do so:—*Held*: as J. had not used the office, an information of *quo warranto* was not applicable.—*R. v. JONES* (1873), 28 L. T. 270; 37 J. P. 453.

Annotation:—*Reid. R. v. Tidy*, [1892] 2 Q. B. 179.

C. Sanction of Establishment.

217. By Secretary of State.]—The parish of M. was divided into fourteen townships, each maintaining its own poor & raising its own poor rate, though it had four churchwardens for the whole parish, & had an ancient church & burial ground. In June, 1858, a vestry of the entire parish resolved upon having a new burial ground, & a burial board was appointed. £3,000 having been borrowed for the purposes of the new burial ground, it became necessary to call for £303 6s. 5d. out of the poor rates, to pay the interest, etc., & £55 8s. 7d. was apportioned upon the township, one of the fourteen, of V. The overseers of that township having refused to pay, a *mandamus* issued to compel payment, to which they made a return that the approval of the Secretary of State had not been obtained to the formation of the burial board, as required by 1857 Act, s. 9, & that the board was not legally formed:—*Held*: the return was a good answer to the *mandamus*.—*R. v. WRIGHT* (1861), 5 L. T. 345; 26 J. P. 23; 8 Jur. N. S. 260; 10 W. R. 86.

See, now, 1900 Act, s. 4; Local Government Act, 1894 (c. 73), s. 62 (2).

SUB-SECT. 2.—JOINT BURIAL BOARDS.

218. Parishes without separate overseers—Joining with hamlet.]—Three parishes, not having separate overseers, & not separately maintaining their own poor, concurred with a hamlet in providing a common burial ground. On application for a *mandamus* to the burial board for those parishes to raise the purchase-money of the burial ground:—*Held*: these parishes were not, by 1852 Act, s. 52, precluded from availing themselves of the powers given by 1852 & 1853 Acts.—*R. v. SUDBURY BURIAL BOARD* (1858), E. B. & E. 264; 27 L. J. Q. B. 232; 31 L. T. O. S. 161; 22 J. P. 706; 4 Jur. N. S. 948; 6 W. R. 551; 120 E. R. 506.
Annotation:—*Conrad. R. v. Walcot Overseers* (1862), 2 B. & S. 555.

SUB-SECT. 3.—PROCEEDINGS AND POWERS OF BURIAL BOARDS.

219. To raise money—Purposes not stated—Consent of vestry or Secretary of State.]—A burial

board cannot raise money for the purposes of the board under Burial Acts without the consent of the vestry or Home Secretary, & where a certificate is signed directing the overseers to pay the board any sum from the rates for defraying the expenses of the board, the certificate must set out the items in respect of which the money is wanted.—*R. v. KILHAM, YORKSHIRE, BURIAL BOARD* (1885), 1 T. L. R. 678, C. A.

See, further, Sect. 4, *post*.

220. To contract—Extras ordered verbally—By surveyor.]—Pltf. contracted to do certain repairs to the chapels & premises of defts. for £38. The contract was accepted by defts., & the seal of the board was affixed to it. During the work the surveyor of defts. verbally ordered pltf. to do many extra small repairs which were not included in the contract. Pltf. sought to recover £13, the cost of these extras, from defts., who denied their liability on the ground that they had not been contracted for under the seal of the board:—*Held*: the board was not liable, as they were bound to contract for such work as pltf. had executed strictly in accordance with 1852 Act, s. 31.—*STEVENS v. HOUNSLOW BURIAL BOARD* (1889), 61 L. T. 839; 54 J. P. 309; 38 W. R. 236, D. C.

See, generally, CORPORATIONS.

221. Minute books—Inspection by solicitor—Acting for third party—Mandamus.]—A ratepayer made an application to an urban district council, being the burial board, for his solrs. to inspect & take copies of the minutes. The solrs. were acting for a co., which for another matter wished to obtain inspection of the books. The board refused to allow the solrs. to inspect, on the ground that the ratepayer alone was the person to whom they were bound to produce the books, & that the application was not made *bonâ fide*, but for another purpose, that was indirectly obtaining inspection on behalf of the co. for which the solrs. were also acting:—*Held*: the ct. would not, in the exercise of their discretion, make absolute a rule for a writ of *mandamus*, as the application was not made *bonâ fide* for the purpose of the ratepayer, but for another purpose.—*R. v. WIMBLEDON URBAN DISTRICT COUNCIL, Ex p. HATTON* (1897), 77 L. T. 599; 62 J. P. 84; 14 T. L. R. 146, D. C.

SUB-SECT. 4.—FINANCES OF BURIAL BOARDS.

222. Borrowing powers—Consent of vestry.]—A burial board, appointed under 1852 Act, laid before the vestry of the parish a proposal that the board should be authorised to borrow any sums of money not exceeding £20,000, for their purposes. This proposal was not put to the vote by a show of hands, but was met by an amendment that the matter should be referred back to the board to be reconsidered, & a show of hands being taken upon this amendment, it was carried by a majority. A division was then demanded, whereupon the chairman said that there should be a poll upon the original proposal & the amendment together, & that the votes must be affirmatively for one or the other, & not negatively as to either, & that no further amendment could afterwards be received. A majority of affirmative votes were given for the original resolution:—*Held*: the proceeding was too informal to authorise the burial board to borrow the money.—*ELT v. ST. MARY'S, ISLINGTON, BURIAL BOARD* (1854), Kay, 449; 18 J. P. 229; 69 E. R. 190.

223. Surplus income—Derived from poor rate—Liability to income tax.]—A burial board was

constituted under 1852 Act, & in pursuance of the Act a burial ground was provided with money charged upon the poor rate of the parish, & the surplus over expenditure of the income derived from the fees charged by the board was regularly applied in aid of the poor rate:—*Held*: the board were liable to be assessed to income tax in respect of such surplus, inasmuch as the provision requiring it to be applied in aid of the poor rate did not prevent it from being a "profit" within Income Tax Act, 1842 (c. 35), s. 60.—*PADDINGTON BURIAL BOARD v. INLAND REVENUE COMRS.* (1884), 13 Q. B. D. 9; 53 L. J. Q. B. 224; 50 L. T. 211; 48 J. P. 311; 32 W. R. 551; 2 Tax Cas. 46, D. C.
Annotation:—*Fidd.* Portobello Town Council v. Sulley (1890), 55 J. P. 9.

See, further, INCOME TAX.

224. — Payment for re-interment—Aid of poor rate.—*SCADDING v. ST. PANCRAS BURIAL BOARD* (1889), 5 T. L. R. 561, C. A.

225. Fees payable to vestry—"Parochial purpose"—1852 Act, s. 36.]—The repair of a parish church is a "parochial purpose" within the above sect., & fees received by a burial board under s. 34 are applicable to that purpose.—*R. v. ST. MARYLEBONE VESTRY*, [1895] 1 Q. B. 771; 64 L. J. Q. B. 622; 72 L. T. 11; 11 T. L. R. 120; 14 R. 172, C. A.

See, now, 1900 Act.

See, further, Part XIX., post.

SUB-SECT. 5.—ACQUISITION OF LAND.

226. Purchase-price—By annual payments.—A burial board duly constituted under 1852 & 1853 Acts, agreed to purchase parish lands on the terms of paying an annual sum, the principal to be secured either on the land or as a charge on the church rate or poor rate. On petition to carry out this agreement:—*Held*: the money must be paid into ct. in a gross sum, the dividends to be paid to the vendors until invested in land, & the costs to be paid by the burial board. *Semble*: the ct. would not sanction a perpetual charge.—*Re BARROW* (1855), 3 W. R. 635.

227. Charity lands—Application to court—Sanction of Charity Commissioners.—The ct. refused to entertain an application by a burial board for the purchase of a piece of land for the purposes of their cemetery, where the sanction of the Charity Comrs. to the application had not first been obtained, although the matter was of a pressing nature.

In such an application it is not necessary to show that the comrs. approve the proposal, but only that the application to the ct. is made with their permission.—*Re WATFORD BURIAL BOARD, Ex p. WATFORD BURIAL BOARD* (1856), 27 L. T. O. S. 316; 20 J. P. 741; 2 Jur. N. S. 1045.

228. — Approval by vestry.—A burial board made their report to the vestry approving a site for a burial ground, & representing that it could be obtained without any cost to the parish, it being charity land belonging to the parish. A resolution of the vestry was passed approving of the site, as required by 1852 Act, s. 29. The approval of the Poor Law Board, the Charity Comrs., & the Secretary of State was also obtained. It was afterwards ascertained that the land belonged to a charity not for the benefit of the parish generally, but of a particular class of householders, & another vestry meeting was held, at which, upon a poll being taken, the former resolution of the vestry was reversed. The burial board thereupon presented their petition to obtain the

authority of the ct. to take the proposed site, the board offering to pay for the site such sum as the ct. should think proper:—*Held*: there had been no due "approval of the vestry" within s. 29, & the petition must be dismissed, but without costs.—*Re EGHAM BURIAL BOARD* (1857), 30 L. T. O. S. 163; 21 J. P. 563; 3 Jur. N. S. 956.

SUB-SECT. 6.—CONTROL OF BURIAL GROUNDS.

229. Inscription on memorial—Jurisdiction of consistory court.—A burial board may object to the inscription on a memorial, but any person so hindered by the board may appeal to the consistory ct.—*CARLISLE'S (DEAN) CASE* (1866), *Times*, Dec. 21st.

230. Planting & ornamenting grave—Grant of exclusive right—Subsequent regulations.—A burial board granted to R. "the right & privilege of constructing a private grave" in their cemetery, & "the exclusive right of burial & interment therein," "to hold to her in perpetuity, for the purpose of burial & of erecting or placing therein a monument or stone," with a proviso that, if such monument or stone with the appurtenances should not be kept in repair, according to such regulations as should be made by the board for the management of the cemetery, the grant should be void. R. constructed a grave, & placed a headstone & a kerb round it, & planted the space with shrubs & flowers:—*Held*: it was not competent to the board by a regulation subsequently made by them for the management of the cemetery to deprive R. of the right of planting & ornamenting the grave.—*ASHBY v. HARRIS* (1868), L. R. 3 C. P. 523; 37 L. J. M. C. 164; 18 L. T. 719; 32 J. P. 567; 16 W. R. 869.

Annotation:—*Dttd. & Distd.* McGough v. Lancaster Burial Board (1888), 21 Q. B. D. 323.

231. ——Defts., a burial board, had provided a burial ground under 1852 Act. For the purpose of burying a deceased daughter, pltf. purchased from defts., & they conveyed to him, "the exclusive right of burial" in a grave space in their burial ground in perpetuity, & they also granted him the right to erect a gravestone on the grave. He afterwards placed upon the grave a wreath &, to protect it, a glass shade covered with a wire frame. It was the general rule of defts. never to allow the placing of such glass shades on the graves in their burial ground, & defts. removed the glass shade & wire frame without the consent of pltf.:—*Held*: (1) pltf. had only acquired such rights as, under 1852 Act, s. 33, defts. were empowered to sell, & such rights did not include a right to place the glass shade & wire covering on the grave; (2) in the exercise of the control vested in them by s. 38, defts. were entitled to remove same.—*MCGOUGH v. LANCASTER BURIAL BOARD* (1888), 21 Q. B. D. 323; 57 L. J. Q. B. 568; 52 J. P. 740; 36 W. R. 822; 4 T. L. R. 679, C. A.; *affg.* S. C. *sub nom.* LANCASTER BURIAL BOARD v. M'GOUGH (1887), 36 W. R. 159, D. C.

Liability for nuisance—Poisonous tree.—*See AGRICULTURE*, Vol. II., p. 65; No. 412.

See, generally, NUISANCE.

SUB-SECT. 7.—CONSECRATED AND UNCONSECRATED PORTIONS OF BURIAL GROUND.

232. What is sufficient division—Sufficiency for consecration.—*Held*: a division 12 inches high was sufficient, & the burial ground was in a fit state for consecration.—*R. v. TIVERTON BURIAL BOARD*

Sect. 4.—Elective burial boards in urban districts: B.; sub-sect. 10, A.]

(1858), 31 L. T. O. S. 233; 22 J. P. 529; 6 W. R. 662.

233. Application for consecration—Resignation of board—Mandamus.]—R. v. ATTLEBOROUGH BURIAL BOARD (1887), *Times*, Feb. 11th.

234. — Conditional on clergy foregoing fees—Mandamus.]—R. v. NORTH KELSEY BURIAL BOARD (1892), *Times*, March 22nd.

235. — Additional ground—Mandamus.]—In 1894 certain land was purchased as an addition to the old burial ground of B. The new portion had been divided, & the Home Secretary had given his sanction for interments in the additional ground. The burial board refused to apply to the bishop of the diocese to consecrate a portion of the additional ground under 1857 Act, s. 12, on the ground that that sect. only applied to new burial grounds, & not to additions to an old burial ground:—*Held*: the *mandamus* must go.—*R. v. BASINGSTOKE BURIAL BOARD* (1896), 41 Sol. Jo. 30; 60 J. P. Jo. 708.

236. — Plot included in error—Effect of consecration.]—A burial authority, which had acquired land for a new cemetery, petitioned the Secretary of State, under 1853 Act, s. 7, for his sanction to the division of the ground into four approximately equal parts, of which one part, called plot A, was to be consecrated; the sanction was duly given. Subsequently a petition was presented on behalf of the burial board to the bishop of the diocese, praying for the consecration of plots A & C; the latter was apparently inserted in error. Both plots were duly consecrated, all the legal requirements & formalities as to the consecration being complied with:—*Held*: plot C, having once been consecrated with the proper legal formalities, remained consecrated ground, notwithstanding the want of the sanction of the Secretary of State to its consecration.—*WILLIAMS v. BRITON FERRY BURIAL BOARD*, [1905] 2 K. B. 565; 74 L. J. K. B. 840; 92 L. T. 696; 69 J. P. 313; 54 W. R. 187; 3 L. G. R. 859, D. C.

Annotation:—Reid. Sutton v. Bowden, [1913] 1 Ch. 518.

237. Conduct of service in.]—1852 Act, s. 32, preserves to the sexton of a parish the right of performing, in the burial ground established under that Act, his duties as sexton in respect of the burial of parishioners & inhabitants of the parish, & the burial board are not entitled to refuse to allow him to perform those duties on the ground that they choose to have them performed by their own servants; & the sexton can justify an entry on the ground, notwithstanding the board's refusal to admit him, in order to perform his duties in circumstances in which he would have been entitled to perform similar duties in the old parish burying ground.

It is the intention of the above Act, that the burials of parishioners in the consecrated part of the new burial ground established under that Act, shall be conducted with the same ceremonies & in the same manner as they would have been in the old parish burying ground, & the effect of ss. 30, 32, taken together, is to make the chapel erected in the consecrated part of the new burial ground a substitute for the parish church for the purposes of such burials; & the sexton is entitled to toll the bell in the chapel at such burial, the tolling of the bell being part of the burial rite of the Church of England.

The sexton may delegate the performance of his duties to a deputy.—*ST. MARGARET'S, ROCHESTER BURIAL BOARD v. THOMPSON* (1871), L. R. 6 C. P.

445; 40 L. J. C. P. 213; 24 L. T. 673; 36 J. P. 6; 19 W. R. 892.

SUB-SECT. 8.—CHAPELS.

238. In consecrated portion—Rights of sexton of parish.]—ST. MARGARET'S, ROCHESTER BURIAL BOARD v. THOMPSON, No. 237, *ante*.

SUB-SECT. 9.—PERFORMANCE OF SERVICES.

A. By Incumbent.

239. Who entitled—Whether incumbent of district without burial ground—Or where interment by purchase only—Divided district.]—An incumbent of a church or ecclesiastical district, to sustain his right to perform the burial service & receive the fees for interment in a cemetery established under Burial Acts, must show that the inhabitants of the parish or district from which the person dying came had a right to be interred in the churchyard or burial ground of the parish or district, & that he would have had a right to the fees had the person dying been interred therein. But an incumbent of a parish or district having neither a churchyard nor burial ground belonging to the church, or having only a burial ground in which the right to interment could only be obtained by purchase, is not entitled to perform the burial service in a cemetery over the body of a late inhabitant of his district or to claim any fees for the interment, though the burials in the ground in which interments might be purchased are diminished.

In a divided district neither the vicar of the parish nor the incumbents of the churches can claim the fees paid for the burials in a cemetery formed within the district, as none of them collectively or individually fill the character of incumbent within Burial Acts.—*HORNBY v. TOXTETH PARK BURIAL BOARD* (1862), 31 Beav. 52; 31 L. J. Ch. 643; 6 L. T. 146; 8 Jur. N. S. 531; 10 W. R. 550; 54 E. R. 1056.

Annotation:—Reid. Stewart v. West Derby Burial Board (1886), 34 Ch. D. 314.

240. Divided district.]—In 1851 the church of St. T. was built & consecrated. In 1852, an Order in Council under Church Building Act, 1819 (c. 134), s. 16, authorised services to be performed in the new church, assigned a district to it out of the ancient parish of W., in which it was situated, & granted the incumbent the fees. There was then no burial ground in the district, & the persons dying in it continued to be buried as before in the churchyard of the parish. Pltf. was appointed incumbent of this church in 1854, & in 1856 a burial ground for the whole parish was consecrated, the district of the new church contributing to the rates for providing it. A new rector of the parish was appointed in 1864:—*Held*: the district of St. T. was a "new parish" within 1857 Act, & pltf., on the first avoidance of the rectory, was entitled to the burial fees in respect of parishioners of St. T. buried within the parish.—*CRONSHAW v. WIGAN BURIAL BOARD* (1873), L. R. 8 Q. B. 217; 42 L. J. Q. B. 137; 28 L. T. 283, Ex. Ch.

Annotations:—Folld. Harris v. Lambeth Burial Board (1883) 47 J. P. 501. *Mentd. Haig v. Barlow, Re St. Mary, Islington, Burial Fees* (1891), Trist. 149.

241. — — — Churchyard closed.]—The ancient parish of St. Mary comprised (*inter alia*) the district parish of St. Mark, attached to the district church of which was a churchyard wherein the remains of the inhabitants of St. Mark's were

2.—MONUMENTS.

268. Power to remove gravestone—Not paid for—Supplied by cemetery company.]—A burial co. having erected a memorial stone, removed & sold same because it was not paid for:—*Held*: the proper remedy of the co. was to sue for the money, & they had no right to remove the stone.—*SIMS v. LONDON NECROPOLIS Co.* (1885), 1 T. L. R. 584, D. C.

SECT. 3.—PAYMENTS TO INCUMBENTS.

See Part V., Sect. 2, *ante*.

SECT. 4.—ALIENATION OF LAND.

269. Settled land—Specific performance.]—By settlement on marriage it was provided that pltf., tenant for life, should have power to contract for the sale of, & to convey any part of the lands in settlement, in case same should, by virtue of any powers to be contained in any Act of Parliament, be required for the purpose of any railroad, canal, or other undertaking, etc. By an Act of Parliament passed subsequently to the date of the

settlement, certain persons, an incorporated body, had power & authority given them to treat & contract for, & purchase & hold lands for the purpose of making a cemetery:—*Held*: the making of a cemetery was an undertaking authorised by an Act of Parliament, under the words of the settlement, & pltf. was entitled to a specific performance of a contract for sale by him to the co. of part of the lands in settlement.—*KENSINGTON (LORD) v. WEST LONDON CEMETERY Co.* (1838), 8 L. J. Ch. 81, L. C.

270. For the poor—Gift a charity.]—Under the powers of an Act of Parliament, assented to by the Crown, as lord of a manor, & by the commoners, the Crown granted to the vestry of R. a portion of the common for a workhouse, a cemetery, & "in trust for the employment & support of the poor of the parish":—*Held*: although this was a charity, the income might properly be applied in aid of the poor rates, & so in relief of the parish.—*A.-G. v. BLIZARD* (1855), 21 Beav. 233; 25 L. J. Ch. 171; 26 L. T. O. S. 181; 20 J. P. 3; 1 Jur. N. S. 1195; 52 E. R. 848. *Annotations*:—*Distd. A.-G. v. Bushby* (1857), 24 Beav. 299. *Consd. Re St. Botolph without Bishopsgate Parish Estates* (1887), 35 Ch. D. 142. *Refd. Webster v. Southey* (1887), 36 Ch. D. 9.

See, generally, CHARITIES.

Part X.—Position of Burial Grounds.

271. Proximity to dwelling-house—Nonconformist burial ground.]—In the Acts of Parliament in force relating to the burial of the dead certain provisions were contained requiring the consent of the owner & occupier of any dwelling-house within 100 yards of any new burial ground to be given before it was used for burials:—*Held*: the words prohibitive of opening new burial grounds being general, were not restricted by other parts of the Acts importing that they only applied to grounds established by burial boards under the Acts, & the prohibition extended to burial grounds established by special Nonconformist societies for the use of their members.—*GREENWOOD v. WADSWORTH* (1873), L. R. 16 Eq. 288; 43 L. J. Ch. 78; 29 L. T. 88; 38 J. P. 116; 21 W. R. 722.

Annotation:—*Consd. Clegg v. Metcalfe*, [1914] 1 Ch. 808.

272. — Cemetery—Actual user—Injunction.]—Deft., in 1865, obtained leave from the Home Secretary to convert a piece of land containing twenty acres into a cemetery. He could not succeed in doing so, & the land remained unaltered. In 1876 an attempt was made to get up a co. for the purpose, but the attempt failed. In the following year pltf., owner of a dwelling-house

within 100 yards of the nearest part of the land, wrote to deft. to the effect that unless deft. would give an undertaking not to use any part of the land for a cemetery, he should take legal proceedings. Deft. replied to the effect that he had no present intention of converting the land into a cemetery, that he would not give any undertaking not to do so if he found it desirable, but that if he should hereafter wish to use the property in that way, he would give pltf. two months' notice of his intention to do so; & he stated that he should not bury within 100 yards of pltf.'s house without consent. Pltf. thereupon commenced an action, & the ct. granted an interlocutory injunction restraining deft. from using, "for burial or for a cemetery," the ground in question, "or any part thereof":—*Held*: (1) the injunction must be dissolved, for there was no such threat or intention to use any part of the ground for a cemetery as to warrant the interference of the ct. by injunction, supposing such use to be unlawful; (2) an injunction in the above form could not, in any case, have been supported, for under 1855 Act, s. 9, a cemetery might come within 100 yards of a house, the only thing prohibited being actual

PART IX. SECT. 4.

1. Leasehold property — Injunction.]—A tenant for a long term of years under a lease containing covenants to keep in repair & surrender in good condition at the end of the term, will be restrained by injunction from converting the leased premises into a cemetery for the interment of dead bodies.—*CROLY v. MATHEW* (1837), 1 Craw. & D. 86.—IR.

m. S. P. HUNT v. BROWNE (1837), 1 Sau. & Sc. 178.—IR.

n. — Future burials — Waste.]—*CROGAN v. CULLEN* (1864), 16 I. Ch. R. 339.—IR.

o. For specified denomination — Specific performance.]—An owner agreed to sell a site for a burial ground

in connection with the Free Church of Scotland, if a congregation thereof could be brought together. A congregation assembled: several years afterwards the great body of the congregation abandoned their connection with the Free Church; & they, in conjunction with the vendor, assumed to exclude such of the members as continued to adhere to the Free Church:—*Held*: (1) so long as even one member remained to claim on behalf of the Free Church, the right of that body continued, notwithstanding change of opinion in the body of the members; (2) any interference with such right must be restrained; (3) specific performance of the contract must be decreed.—*A.-G. v. CHRISTIE* (1867), 13 Gr. 495.—CAN.

p. — Change of use — Reverting in grantor.]—P. conveyed land for a Presbyterian burial ground:—*Held*: even should the grantees unanimously concur in changing the use of the property such change could not be effected, but the property would revert.—*DOUGLAS v. HAWES* (1875), R. L. D. 147.—CAN.

q. Sale for cemetery purposes — Maintenance fund—Whether purchasers trustees.]—*SERSON v. WILSON* (1909), 13 O. W. R. 180.—CAN.

r. Power to sell lands not required for cemetery purposes—Cemetery Companies Act, 1887.]—*SMITH v. HUMBERVALE CEMETERY Co.* (1915), 7 O. W. N. 462; 8 O. W. N. 202; 33 O. L. R. 452.—CAN.

within that limit.—**COWLEY (LORD) v. BYAS** (1877), 5 Ch. D. 944; 37 L. T. 238; 41 J. P. 804; 26 W. R. 1, C. A.

Annotations:—**Consd. Wright v. Wallasey L. B.** (1887), 18 Q. B. D. 783; **Godden v. Hythe Burial Board**, [1906] 2 Ch. 270. **Reid. Clegg v. Metcalfe**, [1914] 1 Ch. 808.

273. — How measured.—*Held*: the word "house" in 1855 Act, s. 9, did not, for purposes of the Act, include the curtilage, & cified distance must be measured from the of the dwelling-house.—**WRIGHT v. WALLASEY LOCAL BOARD** (1887), 18 Q. B. D. 783; 56 L. J. Q. B. 259; 52 J. P. 4; 3 T. L. R. 525.

274. — Objection by vendor of land to burial board.—An action having been brought to restrain an urban district council from using land as a cemetery, except beyond a radius of 100 yards from pltf.'s dwelling-house, it was dismissed on the ground that pltf. was really the mere nominee of the owner of the house & land, who had himself granted the land to the council for the very purpose of the cemetery, & could not thus derogate from his own grant.—**TOMS v. CLACTON URBAN DISTRICT COUNCIL** (1898), 78 L. T. 712; 62 J. P. 505; 46 W. R. 629; 14 T. L. R. 474; 42 Sol. Jo. 572.

275. — Subsequently erected.—The words in 1855 Act, s. 9, "no ground not already used as or appropriated for a cemetery" mean, "used as or appropriated" at the date of the passing of the Act, & the owner, lessee, or occupier of a dwelling-house which has been erected subsequently to the acquisition of a site for a cemetery by a burial board is entitled to an injunction to restrain any ground within 100 yards of such dwelling-house from being "used for burials" without his consent in writing.—**GODDEN v. HYTHE BURIAL BOARD**, [1906] 2 Ch. 270; 75 L. J. Ch. 595; 95 L. T. 129; 70 J. P. 285; 22 T. L. R. 631; 4 L. G. R. 787, C. A.

Annotation:—**Mentd. Young v. Kingston-on-Thames, Surbiton, New Malden, & Coombe Joint Burials Committees** (1906), 76 L. J. K. B. 382.

276. Churchyard extension—Objection.—1855 Act, s. 9, does not, in the case of a consecrated extension, under Consecration of Churchyards Act, 1867 (c. 133), of a churchyard, even where such consecrated extension is within an area in which an Order in Council has been made providing that no new burial ground is to be opened without the previous approval of the Local Government Board, give the owner of a dwelling-house within 100 yards a separate individual right to object to & prohibit the user of the ground for burials without his consent in writing. *Seem*: no such separate or individual right is given, except in the case of land appropriated or used as a burial ground or as an additional burial ground under the Acts themselves.—**CLEGG v. METCALFE**, [1914] 1 Ch. 808; 83 L. J. Ch. 743; 111 L. T. 124; 78 J. P. 251; 30 T. L. R. 410; 58 Sol. Jo. 516; 12 L. G. R. 606.

277. Restraint by bye-law — Whether reasonable.—A municipal council in 1884 passed a bye-law forbidding burials "in any existing cemetery now open for burials within the distance of 100 yards from any public building, place of worship, schoolroom, dwelling-house, public pathway, street, road, or place within the borough." There was a cemetery in the borough which had been used since 1862, no part of which was more than 100 yards distant from a place of worship, etc., as mentioned in the bye-law:—*Held*: the bye-law could not be held to be *ultra vires* because it had the effect of closing the particular cemetery altogether, & of depriving applt., who had bought a portion of the cemetery in 1879 as a permanent burial place for his family, of the use & enjoyment of his property.—**SLATTERY v. NAYLOR** (1888), 13 App. Cas. 446; 57 L. J. P. C. 73; 59 L. T. 41; 36 W. R. 897; 4 T. L. R. 426, P. C.

Annotations:—**Consd. Roberts v. Richards** (1890), 54 J. P. 693; **Brownscombe v. Johnson** (1898), 78 L. T. 265; **Kruse v. Johnson**, [1898] 2 Q. B. 91.

Part XI.—Closed and Disused Burial Grounds.

SECT. 1.—CLOSING OF BURIAL GROUNDS.

SUB-SECT. 1.—POWER TO CLOSE.

278. By Order in Council—Churchyard—1853 Act, s. 5.—The Crown may, by Order in Council, under the above Act, direct the discontinuance of burials in churchyards situate in towns, out of the metropolis, though these churchyards were established under Church Building Acts.—**R. v. MANCHESTER JJ.** (1855), 5 E. & B. 702; 20 J. P. 341; 4 W. R. 98; 119 E. R. 643; *sub nom.* **R. v. MAUDE**, 25 L. J. M. C. 45; 2 Jur. N. S. 182; *sub nom.* **R. v. PRICE**, 26 L. T. O. S. 195.

SUB-SECT. 2.—EFFECT OF CLOSING ORDER.

A. Disposition of Land and Proceeds of Sale.

279. Rights of mortgagee — Future interments — Injunction.—The mtgee. of a burial ground has

notice of the purposes to which it is devoted & is bound by rights of burial, temporary or in perpetuity, granted by his mtgor., while left in possession.

In 1831 a chapel & a burial ground adjoining were mortgaged. The mtgors. remained in possession, & afterwards, in 1833, graves were sold in perpetuity to different persons, without the concurrence of the mtgees. The burial ground was afterwards closed by Order in Council, & the mtgees. thereupon began to level the ground & deface & destroy the tombstones, etc.:—*Held*: the mtgees. were bound by the rights granted, & must be restrained from doing any act which would prevent future interments in the family graves with the permission of the Secretary of State, & from removing or injuring the graves or the tombstones, & the mtgees. must replace those which had been removed.—**MORELAND v. RICHARDSON** (1857), 24 Beav. 33; 26 L. J. Ch. 690; 21

PART X.

277 l. Restraint by bye-law—Whether ultra vires.—A municipal bye-law provided that no dead body should be interred in any existing cemetery within the distance of one hundred yards from any place whatsoever within the borough:—*Held*: such bye-law was not *ultra vires*.—**BROOKS v. SELWYN** (1882), 3 N. S. W. L. R. 256.—**AUS.**

PART XI. SECT. 1, SUB-SECT. 1.

t. By bye-law — Cemetery — Cemetery Act, 1914, c. 261.—A municipal corpn. covenanted to approve & allow for ever the use for cemetery purposes of certain lands & never to attempt to prohibit interment of the dead therein. Under Cemetery Act, 1914, c. 261, the corpn. had power in perpetuity to pass bye-laws prohibiting the interment of

the dead within the municipality:—*Held*: the corpn. could not divest itself of that power & the covenant was illegal & void.—**EASTVIEW TOWN v. ROMAN CATHOLIC EPISCOPAL CORPN. OF OTTAWA** (1919), 44 O. L. R. 284; 15 O. W. N. 211; 46 D. L. R. 47.—**CAN.**

Sect. 1.—Closing of burial grounds: Sub-sect. 2, A. B. Sect. 2: Sub-sect. 1.]

J. P. 741; 3 Jur. N. S. 1189; 5 W. R. 672; 53 E. R. 269.

Annotations:—Reid. Foster v. Dodd (1866), L. R. 1 Q. B. 475. Mentd. Thomas v. Jennings (1896), 66 L. J. Q. B. 5.

280. Compulsory sale—Right to proceeds—Jurisdiction.]—By a local Act of 1792, land was directed to be purchased for an additional burial ground of a parish, & it was provided that the land when purchased was to vest in the vicar & churchwardens of the parish & their successors, for the purpose of a burying ground for the use of the parish for ever. The fees were to be received by the churchwardens, & accounted for to the trustees. In 1816, a body was constituted called the church trustees, consisting of the vicar, churchwardens, & other parishioners; & by a statute in 1821, the Act of 1792 was repealed, except that the additional burying ground purchased under the Act was to remain vested in the vicar & churchwardens & their successors, for ever, for the use of the parish. The church trustees were to fix the amount of the burial fees, which were to be received by the churchwardens, & when they amounted to £200 were to be paid over to the church trustees, who were to apply them to certain defined charitable purposes. Afterwards, by an Order in Council, the additional burial ground was closed for the purposes of burial, but the church trustees continued to receive burial fees for interments in a new cemetery which had been provided. A railway co. having taken part of the additional burial ground, the church trustees petitioned the ct., under Railway Acts, that the purchase-money might be invested to their account & the dividends paid to them:—*Held*: the ct. had no jurisdiction under Railway Acts to make the order as prayed.

Upon a second petition being presented by the A.-G. for a scheme:—*Held*: upon the two petitions, the ct. had jurisdiction, & petitioners' rights were not extinguished, but only suspended, & they were entitled to the order as prayed.—*Re* SR. PANCRAS BURIAL GROUND (1866), L. R. 3 Eq. 173; 36 L. J. Ch. 52; 15 W. R. 150.

Annotations:—Consd. Ex p. Liverpool (1870), L. R. 11 Eq. 15. Foll. Ex p. St. Martin's, Birmingham (1870), L. R. 11 Eq. 23. Distd. Westminster Corp'n. v. St. George, Hanover Square (1909), 78 L. J. Ch. 581. Reid. Campbell v. Liverpool Corp'n. (1870), L. R. 9 Eq. 579; St. Martin Orgars (1890), Trist. 145.

281. ——— Persons entitled to burial fees.]—Where a portion of a burial ground was taken up for a certain improvement:—*Held*: the income of the money produced by the sale of the land should be paid to the persons who would have been entitled to the burial fees, if it had been used for the purpose for which it was dedicated.—*Ex p. St. Andrew's, Holborn (Rector) (1866)*, cited in 40 L. J. Ch. at p. 68.

Annotation:—Foll. Ex p. Liverpool (1870), L. R. 11 Eq. 15.

282. ——— Rights of clerk & sexton.]—A burial ground provided by Act of Parliament, but of which the rector was the freeholder, was closed by Order in Council. Subsequently a portion of the land was taken for public purposes, & a sum paid into ct. under Lands Clauses Consolidation Act, 1845 (c. 18):—*Held*: inasmuch as the freehold was in the rector, & he received the burial fees, he was entitled to receive the dividends of the fund in ct. *Semle*: the parish clerk & sexton had no right to any interest in the fund, although they received certain fees for burials.—*Ex p. LIVERPOOL (RECTOR) (1870)*, L. R. 11 Eq. 15; 40 L. J. Ch. 65; 23 L. T. 354; 35 J. P. 212; 19 W. R. 47.

Annotations:—Consd. Ex p. St. Martin's, Birmingham (1870), L. R. 11 Eq. 23. Distd. Westminster Corp'n. v. St. George, Hanover Square (1909), 78 L. J. Ch. 581. Reid. St. Martin Orgars (1890), Trist. 145; St. John the Baptist, Cardiff v. St. John the Baptist, Cardiff, [1898] P. 155.

283. ——— Additional ground.]—A rector who has enjoyed the right to burial fees from a burial ground, the freehold of which is vested in trustees, is the person entitled under Lands Clauses Consolidation Act, 1845, s. 76, to the receipt of the rents & profits.

By a local Act reciting the insufficiency of an existing churchyard, the rector & churchwardens & certain other persons were constituted trustees, & empowered to enlarge the existing churchyard & to buy land for an additional burial ground, to be conveyed to the rector & churchwardens "for the use of the inhabitants of the parish." In 1849 a portion of the land purchased under the Act was taken by a railway co., & the purchase-money paid into ct. under Lands Clauses Consolidation Act, 1845. The burial ground was subsequently closed for burials:—*Held*: inasmuch as the land was intended as an addition to the churchyard, the rights of the rector therein were the same as his rights in the old churchyard, so far as they were not affected by the Act under which the land was purchased, & he was entitled to the dividends on the fund in ct. so long as it remained there.—*Ex p. St. Martin's, Birmingham (Rector) (1870)*, L. R. 11 Eq. 23; 40 L. J. Ch. 69; 23 L. T. 575; 19 W. R. 95.

Annotations:—Distd. Westminster City Council v. St. George, Hanover Square (1908), 7 L. G. R. 774. Reid. St. Martin Orgars (1890), Trist. 145.

284. ——— Basis of compensation.]—By Metropolis Improvement Act, 1863 (c. 45), the Metropolitan Board of Works were, for the purpose of making a new street, empowered to take portions of the graveyards attached to certain parish churches, which had been closed for burials. Pltf., the rector, claimed compensation under Lands Clauses Consolidation Act, 1845, incorporated with Metropolis Improvement Act, 1863, in respect of the lands so taken, of which he was the owner:—*Held*: he was entitled to be compensated for the loss which he suffered, but he was not entitled to be compensated upon the principle of treating the land as secularised, & as being of greater value than they were while in his hands, & while they were appropriated to spiritual purposes.—*STEBBING v. METROPOLITAN BOARD OF WORKS (1870)*, L. R. 6 Q. B. 37; 40 L. J. Q. B. 1; 23 L. T. 530; 35 J. P. 437; 19 W. R. 73.

Annotations:—Consd. St. Stephen, Wallbrook & Grocers Co. v. Sun Fire Office (1883), Trist. 103. Distd. Re Morgan & L. & N. W. Ry., [1896] 2 Q. B. 469. Consd. Re C. & S. L. Ry. & St. Mary Woolnoth & St. Mary Woolchurch Haw, [1903] 2 K. B. 728; Corrie v. MacDermott, [1914] A. C. 1056.

See, generally, COMPULSORY PURCHASE OF LAND & COMPENSATION.

285. Whether land reverts to grantor.]—By an Act of Will. 3, certain land belonging to the parish of L. was set apart & dedicated to the use of a burial ground, & by the sentence of consecration the corp'n. renounced all right to the land. In 1854 the ground was closed against burials by an Order in Council. In 1866 the corp'n. being authorised to take a portion of the burial ground under a local Act, served upon the rector, ordinary, & patron of the parish the usual notice to treat, & upon a reference to arbn. a sum of money was awarded for compensation. The corp'n. subsequently refused to pay, upon the ground that the fee simple of the land reverted to the corp'n. upon its being closed against burials, & the use for which it was dedicated having come

an end:—*Held*: by the Act of Parliament, followed by the sentence of consecration, the land was dedicated for ever to the use of a burial ground, & there was no reverter of the fee to the corpn., but, if necessary, the ct. would presume a conveyance of the legal estate by the corpn.—*CAMPBELL v. LIVERPOOL CORPN.* (1870), L. R. 9 Eq. 574; 21 L. T. 814; 18 W. R. 422.

Annotation:—*Reid. Ex p. Liverpool* (1870), L. R. 11 Eq. 10.

286. Reservation of grave spaces—Non-parishioner—Member of parishioner's family—Faculty.]—By an Order in Council a churchyard was closed except as to burials in reserved grave spaces allotted to members of the families of parishioners:—*Held*: faculty for the reservation of a space in the churchyard for exclusive burial could be granted to a living non-parishioner member of the family of a parishioner.—*Re SARGENT* (1890), 15 P. D. 168.

Annotation:—*Reid. De Romana v. Roberts*, [1906] P. 332.

Application to secular purposes—Street improvement—Faculty.]—*See Sect. 3, sub-sect. 2, post.*

287. Unconsecrated portion—Building leases—Transfer to borough council—Local Government Act, 1899 (c. 14).]—Land bought with ecclesiastical funds was by a private Act vested in the rector & churchwardens of St. G., for ever for a burial ground for the inhabitants of the parish. The rector & his successors were to have the burial fees. Under the direction of the vestry, the rector & churchwardens granted building leases of the unconsecrated part of the land. In 1854 the burial ground was closed by an Order in Council. As the building leases fell in & the buildings were pulled down the rector & churchwardens, under the direction of the vestry, granted fresh leases:—*Held*: (1) the land was originally Church property & did not cease to be Church property by virtue of 1857 Act, s. 24, & on the passing of London Government Act, 1899, which by s. 4 transferred the powers & duties of vestries to borough councils, but by s. 23 excepted any powers or duties relating to the affairs of the Church or any interest of a vestry in any Church property, the power & duty to direct the application of the proceeds of the leases did not pass to the W. corpn. as the borough council, but remained in the vestry under 1857 Act, s. 24; (2) the question to what purposes the proceeds of the leases ought to be applied could not be determined in this litigation.—*ST. GEORGE'S, HANOVER SQUARE (RECTOR & CHURCHWARDENS) v. WESTMINSTER CORPN.*, [1910] A. C. 225; 79 L. J. Ch. 310; 102 L. T. 290; 74 J. P. 153; 26 T. L. R. 327; *sub nom.* *WESTMINSTER CITY COUNCIL v. ST. GEORGE'S, HANOVER SQUARE (RECTOR & CHURCHWARDENS)*, 51 Sol. Jo. 325; 8 L. G. R. 337, H. L.

Annotation:—*Reid. Re Hyde Park Placo Charity* (1911), 80 L. J. Ch. 593.

B. Obligation to maintain and repair.

288. Out of poor rates—Private burial ground.]—*Held*: 1855 Act, s. 18, applied only to a burial ground belonging to a parish, & did not extend to a burial ground the property of private persons.—*R. v. ST. JOHN, WESTGATE BURIAL BOARD* (1862), 2 B. & S. 703; 31 L. J. Q. B. 205; 6 L. T. 504; 10 W. R. 606; 121 E. R. 1232, Ex. Ch. *Annotations*:—*Folld. R. v. Bishop Wearmouth Burial*

Board (1879), 5 Q. B. D. 67. *Reid. Foster v. Dodd* (1866), 7 B. & S. 140.

289. — Churchyard—Duty of churchwardens—Distinct townships.]—The churchyard of the parish of W. having become insufficient for the purposes of burial, a detached piece of land was in 1838 conveyed to the comrs. under Church Building Acts as an addition to it. The parish of W. consisted of the township of W. & five other townships, each of these six townships having separate overseers & a separate poor rate. The above piece of land, which was situate in the township of W., was used as the burial ground for the whole parish until 1854, when it was closed by Order in Council, & a burial board for the township of W. was formed:—*Held*: (1) under 1855 Act, s. 18, where a burial ground was closed by Order in Council, if it was a churchyard it must be kept in order by the churchwardens, & if a cemetery formed by a burial board, then by the burial board, & the ground in question, being a churchyard, was to be kept in order, not by the burial board, but by the churchwardens; (2) the expenses of keeping the ground in order were to be repaid to the churchwardens out of the rate for the township of W., being a place having a separate poor rate within which the ground was situate, & not out of the rates of all the townships composing the parish of which it had been the burial ground.—*R. v. BISHOP WEARMOUTH BURIAL BOARD* (1879), 5 Q. B. D. 67, C. A.

Annotation:—*Mentd. Re Nathan* (1884), 12 Q. B. D. 461.

290. — — — — —.]—A vestry passed a resolution to the effect that certain disused churchyards & burial grounds in the parish should be maintained & the walls repaired by the churchwardens, the expenses of the maintenance & repair incurred by them to be paid to them by the vestry. Subsequently the vestry sanctioned extensive alterations to the walls of a burial ground, & the senior churchwarden, acting upon such sanction, obtained tenders for the work & entered into contracts, by which he rendered himself liable for the costs of the alterations. Before the contracts were actually signed or any money paid under them by the churchwarden, he sent to the vestry a letter or precept requiring the payment of a sum of money within the amount for which he had made himself liable under the contracts:—*Held*: (1) the vestry were bound to pay to the churchwarden the amount of expenses for which he, acting under their authority, had rendered himself liable, although not actually paid by him; (2) a letter or precept written by the churchwarden, & stating the sum required, was a sufficient certificate within 1855 Act, s. 18.—*R. v. ST. MARY, ISLINGTON VESTRY* (1890), 25 Q. B. D. 523; 59 L. J. Q. B. 462; 63 L. T. 226; 54 J. P. 807; 39 W. R. 10; 6 T. L. R. 419, D. C.

SECT. 2.—BUILDING UPON DISUSED BURIAL GROUNDS.

SUB-SECT. 1.—WHAT IS A DISUSED BURIAL GROUND.

291. Unconsecrated land—No interments.]—A cemetery co., having acquired a piece of land for a cemetery, enclosed it with a wall, built a chapel upon it, & used it to some extent for burial, but the land was not consecrated. Subsequently

PART XI. SECT. 1, SUB-SECT. 2.—A.

a. Rights of relatives—Family burying ground.]—Persons having an interest in ground set apart & formerly used as a family burying ground, in which bodies of relatives were interred,

may maintain an action to restrain injury to, or interference with graves or monuments over them & have a right of way thereto.—*MAY v. BELSON* (1906), 10 O. L. R. 686; 6 O. W. R. 462.—*CAN.*

b. Application for secular purposes—Memorial—Leave of court.]—*Re CONSISTORY DUTCH REFORMED CHURCH, CAPE TOWN* (1897), 14 S. C. 5; 7 C. T. R. 4.—*S. AF.*

Sect. 2.—Building upon disused burial grounds:
Sub-sects. 1, 2, 3 & 4.]

the co., having ceased to use the land for burial, walled off a portion in which no interment had ever taken place, & sold it. The co. had power to let or sell any part of the land:—*Held*: the sold land formed part of a disused burial ground within 1884 Act, as interpreted by Open Spaces Act, 1887 (c. 32), & was subject to the prohibition against building imposed by 1884 Act.—*Re PONSFORD & NEWPORT DISTRICT SCHOOL BOARD*, [1894] 1 Ch. 454; 63 L. J. Ch. 278; 42 W. R. 358; 10 T. L. R. 207; 38 Sol. Jo. 199; 7 R. 622; *sub nom.* PONSFORD v. NEWPORT DISTRICT SCHOOL BOARD, 70 L. T. 502, C. A.

Annotations:—*Reid. Re Eccl. Comrs. & New City of London Brewery Co.'s Contract*, [1895] 1 Ch. 702; *A.-G. v. London Parochial Charities Trustees* (1896), 74 L. T. 184; *Re Bosworth & Gravesend Corpn.*, [1905] 1 K. B. 403.

292. Land illegally set apart—Contravention of Order in Council.—Where a piece of land was set apart for the purposes of interment, & part of it was used for those purposes, in contravention of an Order in Council made under 1853 Act, s. 1:—*Held*: the definition of a "burial ground" in Open Spaces Act, 1887, s. 4, which was by that Act rendered applicable to 1884 Act, included land which had been "set apart for the purposes of interment," even though it was so set apart in contravention of the Order in Council, & could never have been lawfully used for the purposes of interment, & s. 3 of the last-mentioned Act prohibited the use of any part of the land so set apart for building purposes.—*Re BOSWORTH & GRAVESEND CORPN.*, [1905] 2 K. B. 426; 74 L. J. K. B. 810; 93 L. T. 226; 69 J. P. 337; 54 W. R. 39; 21 T. L. R. 608; 3 L. G. R. 849, C. A.

293. Site of disused church—Intramural Interments.—The power to build on the site of a metropolitan church sold under a scheme made in pursuance of Union of Benefices Act, 1860 (c. 142), is not interfered with by Union of Benefices Amendment Act, 1871 (c. 90).

The site of a church where intramural burial has taken place has not been "set apart for the purposes of interment," & when so sold, is not within the prohibition against building in 1884 Act, as affected by Open Spaces Act, 1887 (c. 32), & Metropolitan Open Spaces Act, 1881 (c. 34).

1884 Act, s. 5, applies to dispositions made after the Act.—*Re ECCLESIASTICAL COMRS. & NEW CITY OF LONDON BREWERY CO.'S CONTRACT*, [1895] 1 Ch. 702; 64 L. J. Ch. 646; 72 L. T. 481; 43 W. R. 457; 11 T. L. R. 296; 13 R. 409.

Annotation:—*Consd. A.-G. v. London Parochial Charities Trustees*, [1896] 1 Ch. 541.

294. Formerly portion of site of church—Part of churchyard.—The rector & churchwardens of a church in the city of London petitioned for a faculty to sanction a bank extending certain premises over a churchyard by means of a bay window. The grant of a faculty was opposed, on the ground that the part of the churchyard to be covered by the extension was a disused burial ground, closed by an Order in Council, & that, by 1884 Act, s. 3, it was not lawful to erect any buildings thereon except for the enlargement of the church:—*Held*: on the balance of the evidence the part of the churchyard over which it was desired to build formed a portion of the western end of the church destroyed at the time of the Great Fire, which stood east & west, & it had never been set apart or used for burials, & this site, now part of a churchyard, was not a burial ground, & the faculty should issue.—*ST. EDMUND, KING & MARTYR, LONDON* (RECTOR & CHURCH-

WARDENS) v. LONDON COUNTY COUNCIL (1905), 69 J. P. Jo. 352.

SUB-SECT. 2.—SALE OR DISPOSITION UNDER STATUTORY AUTHORITY.

295. What amounts to—Land transferred by private Act—Subsequent sale.—By a private Act of Parliament passed in 1883, church lands were conveyed from the wardens of the church to trustees thereby constituted, & power was given to the trustees to sell or grant building leases. The trustees sold by auction a disused burial ground, part of these lands, describing it as "building land." The purchasers objecting to complete on the ground that 1884 Act forbade building on the land, the trustees took out a summons to enforce completion of the purchase, & contended that the private Act of 1883 constituted a sale or disposition under the authority of an Act of Parliament so as to bring this land within the exception in 1884 Act, s. 5:—*Held*: the Act of 1883 did not constitute a sale or disposition under the authority of an Act of Parliament, & the trustees had no power to sell the land as building land.—*Re ST. SAVIOUR'S RECTORY TRUSTEES & OYLER* (1886), 31 Ch. D. 412; 55 L. J. Ch. 269; 54 L. T. 9; 50 J. P. 325; 34 W. R. 224; 2 T. L. R. 239.

Annotations:—*Distd. Re Eccl. Comrs. & New City of London Brewery Co.'s Contract*, [1895] 1 Ch. 702. *Consd. A.-G. v. London Parochial Charities Trustees*, [1896] 1 Ch. 541.

296. — Sale authorised by Charity Commissioners.—A sale of a disused chapel & burial ground, although authorised by the Board of Charity Comrs. under Charitable Trusts Act, 1853 (c. 137), s. 24, is not a sale under the authority of an Act of Parliament within 1884 Act, s. 5, & the burial ground cannot by virtue of that authority be sold free from restrictions as to building.—*Re HOWARD STREET CONGREGATIONAL CHAPEL, SHEFFIELD*, [1913] 2 Ch. 690; 83 L. J. Ch. 99; 109 L. T. 706; 30 T. L. R. 16; 58 Sol. Jo. 68.

297. Sale after passing of 1884 Act—Site of disused church.—*Re ECCLESIASTICAL COMRS. & NEW CITY OF LONDON BREWERY CO.'S CONTRACT*, No. 293, *ante*.

298. — Surplus land.—In 1885 land forming part of a disused burial ground, building upon which, except for the purpose of enlarging places of worship, was prohibited by 1884 Act, s. 3, was acquired by the Comrs. of Sewers for the city of London under the power of a local Act for the purpose of street improvements. A portion of the land so acquired was afterwards resold by the comrs. as surplus land to the defts., a body of charity trustees who, with the consent of the Charity Comrs., let it for general building purposes. In an action for an injunction to restrain defts. from building upon the land:—*Held*: (1) it had been "sold under the authority of an Act of Parliament" within 1884 Act, s. 5, & was excepted from the operation of that Act; (2) s. 5 applied to a sale or disposition made after the commencement of the Act.—*A.-G. v. LONDON PAROCHIAL CHARITIES TRUSTEES*, [1896] 1 Ch. 541; 65 L. J. Ch. 242; 74 L. T. 184; 44 W. R. 395; 12 T. L. R. 168.

Annotation:—*Consd. Re Howard St. Congregational Chapel, Sheffield*, [1913] 2 Ch. 690.

SUB-SECT. 3.—WHAT IS A "BUILDING."

299. Wall for covered way.—A faculty for the erection on a disused burial ground of a

churchyard wall, one side of which would be so built as to form an arcade or covered way for the protection from the weather of frescoes proposed to be painted on the panels of that side of the wall which would be inside the churchyard, was granted, the ordinary being of opinion that the wall or structure in question was not a "building" prohibited to be erected on a disused burial ground by 1st Act, & Open Spaces Act, 1887 (c. 32).—*ST. BOTOLPH, ALDERSGATE WITHOUT (VICAR) v. ST. BOTOLPH, ALDERSGATE WITHOUT (PARISHIONERS)*, [1900] P. 69.

300. Screen to prevent acquisition of right to light.—A disused churchyard was held & administered by a borough council as an open space under Metropolitan Open Spaces Acts, 1877 (c. 35) & 1881 (c. 34), & 1884 Act. An adjoining landowner built on his land houses which overlooked the churchyard. To prevent these houses from acquiring any right of light, & to administer the ground with a view to its enjoyment by the public as an open space, the council proposed to erect a screen in the churchyard:—*Held*: a screen erected for such a purpose would not be a "building" prohibited by the Acts, & the council in erecting it would be rightly administering the Acts.—*PADDINGTON CORPN. v. A.-G.*, [1906] A. C. 1; 75 L. J. Ch. 4; 93 L. T. 673; 70 J. P. 41; 54 W. R. 317; 22 T. L. R. 55; 50 Sol. Jo. 41; 4 L. G. R. 19, H. L.; *revsq.* S. C. *sub nom.* *BOYCE v. PADDINGTON BOROUGH COUNCIL*, [1903] 2 Ch. 556, C. A.; *restg.* S. C. *sub nom.* *BOYCE v. PADDINGTON BOROUGH COUNCIL*, [1903] 1 Ch. 109. *Annotation*:—*Mentd.* *Heath's Garage v. Hodges* (1915), 14 L. G. R. 195.

SUB-SECT. 4.—PERMISSION BY FACULTY.

301. School—Consecrated ground—No interments.—A faculty may be granted for the erection of a school-house on a portion of consecrated ground in which no interments have taken place, & in which burials have been prohibited by an Order in Council issued under the authority of 1852 Act, s. 2.—*RUSSELL v. ST. BOTOLPH, BISHOPSGATE (PARISHIONERS)* (1859), 5 Jur. N. S. 300.

302. —————The Ecclesiastical Cts. have jurisdiction in their discretion to grant faculties authorising the erection on consecrated ground of the buildings of public elementary schools not provided by the local education authority in cases where it is proved that in the buildings so to be erected religious instruction will be given according to the principles of the Church of England & that interments have never taken place in the ground upon which it is proposed that the school buildings shall be erected.—*CORKE v. RAINGER & HIGGS*, [1912] P. 69; 28 T. L. R. 130.

Annotation:—*Reid.* *Sutton v. Bowden* [1913] 1 Ch. 518.

303. ——— Parish churchyard.—In special circumstances a faculty may be granted for the erection of a school on a portion of a parish churchyard closed for burials by Order in Council.—*Re BERTISON* (1874), L. R. 4 A. & E. 294.

Annotations:—*Distd.* *Re Plumstead Burial Ground*, [1895] P. 225. *Foll.* *Corke v. Rainger & Higgs*, [1912] P. 69. *Reid.* *St. Andrews, Hove v. Mawn*, [1895] P. 228, n.; *St. Nicholas, Leicester v. Langton*, [1899] P. 19; *Re Bideford, Ex p. Bideford*, [1900] P. 314. *Mentd.* *Keet v. Smith* (1875), L. R. 4 A. & E. 398.

304. ——— & parish hall—Mission services.—*Held*: the ordinary had, without infringing 1884 Act, s. 3, jurisdiction to authorise by faculty the rebuilding & extension by way of enlargement of schools & a parish hall erected on a disused burial ground within the Act, & which were used for mission services for adults & children, & which it

was intended to use when rebuilt for the same purposes supplemental to the services in the parish church, & to meet the growing wants of the parish.—*ST. JAMES THE LESS, BETHNAL GREEN (VICAR) v. ST. JAMES THE LESS, BETHNAL GREEN (PARISHIONERS)*, [1899] P. 55.

305. ——— Enlargement—Faculty refused.—*Re ST. SEPULCHRE, HOLBORN VIADUCT* (1903), 19 T. L. R. 723.

See, further, ECCLESIASTICAL LAW.

306. Workhouse chapel & buildings—Erection before application—Prohibition.—The guardians of the poor of a parish, being owners in fee of land on part of which a parish workhouse had been erected, & another part of which had been consecrated as a burial ground, prayed a faculty in the consistory ct. to authorise the erection of a chapel for the inmates of the workhouse & other buildings connected with the workhouse on a part of the consecrated ground in which no bodies had been buried. The guardians had erected the buildings in ignorance that the ground had once been consecrated for burial. No sentence had been pronounced by the consistory ct., & B., a stranger to the parish & having no interest in the matter, obtained a rule for a prohibition to prohibit proceedings in the suit:—*Held*: the rule should be discharged because (1) although a faculty ought not to be granted to apply consecrated ground to secular purposes, yet a distinction might be made as to the chapel being an ecclesiastical purpose, & it was not to be presumed that the inferior ct. would exceed its jurisdiction, & grant the faculty for both the purposes prayed; (2) in the exercise of its discretion, the ct. would not interfere at the instance of a stranger.—*R. v. TWISS* (1869), L. R. 4 Q. B. 407; 10 B. & S. 298; 38 L. J. Q. B. 228; 20 L. T. 522; 33 J. P. 516; 17 W. R. 765.

Annotations:—*Consd.* *Re Plumstead Burial Ground*, [1895] P. 225; *St. Nicholas, Leicester v. Langton*, [1899] P. 19; *Re Bideford, Ex p. Bideford*, [1900] P. 314; *Sutton v. Bowden*, [1913] 1 Ch. 518. *Reid.* *Re St. George-in-the-East* (1876), 1 P. D. 311; *Re St. Nicholas Cole Abbey, Re St. Benet Fink, Churchyard*, [1893] P. 58. *Mentd.* *Fowke v. Berington*, [1914] 2 Ch. 308.

307. Mortuary—Limitation of user.—The vicar & churchwardens of a parish church petitioned the ordinary for a grant of a faculty, authorising them to erect in a part of the parish churchyard, closed for burials under Order in Council, a mortuary, portions of which would be appropriated to a post-mortem room, to rooms for holding coroners' inquests, & living rooms for the keeper of the mortuary. The grant of the faculty was opposed by a non-resident owner of freehold property in the immediate vicinity of the site of the proposed mortuary, on the ground that the proposed appropriation & use of the churchyard would be contrary to ecclesiastical law:—*Held*: it being requisite for the health of the parish that a mortuary should be provided & the churchyard being the most suitable site for its erection, the ct. had jurisdiction to grant a faculty for the erection of a mortuary on a portion of the churchyard, with a room to be appropriated to post-mortem examinations, but the ct. ought not to sanction the erection of rooms for holding coroners' inquests or living rooms as adjunct to a mortuary erected in a churchyard.—*HANSARD v. ST. MATTHEW, BETHNAL GREEN (PARISHIONERS)* (1878), 4 P. D. 46; Trist. 74; *sub nom.* *Re ST. MATTHEW'S, BETHNAL GREEN*, 42 J. P. 408.

Annotations:—*Consd.* *St. George's, Hanover Square v. Hall* (1879), 5 P. D. 42; *Re Plumstead Burial Ground*, [1895] P. 225. *Reid.* *St. Nicholas, Leicester v. Langton*, [1899] P. 19. *Mentd.* *Batten v. Gaye* (1889), 41 Ch. D. 507.

Sect. 2.—Building upon disused burial grounds:
Sub-sects. 4 & 5. Sect. 3: Sub-sects. 1 & 2.]

308. ———.]—The rector, churchwardens, & burial board of an urban parish applied for the grant of a faculty to authorise the erection of a parochial mortuary with a post-mortem room attached, in a consecrated burial ground situate in a populous part of the parish, & closed for burials by Order in Council:—*Held*: a faculty should issue for the erection of the mortuary, but certain conditions to be specified in the faculty should be imposed with respect to the manner of using the mortuary.—*ST. GEORGE'S, HANOVER SQUARE, BURIAL BOARD v. HALL* (1879), 5 P. D. 42; Trist. 84.

Annotations:—*Reid. Re Plumstead Burial Ground*, [1895] P. 225; *St. Nicholas, Leicester v. Langton*, [1899] P. 19.

309. Underground chambers—Electric light—Term of years—Rental.]—In two cases of faculty it appeared that for the purpose of lighting two districts in the city of London with electric light, it was necessary that underground chambers should be constructed in two closed churchyards in the districts, there being no other places suitable for their construction, & that it was in the interest of the parishioners & public that electric light should be introduced in the districts:—*Held*: (1) the ct. had jurisdiction in its discretion to decree a faculty in each case authorising the construction of such a chamber in the churchyard, & the use of same as a transformer chamber for the term of twenty-one years, subject to payment of a yearly rent to the rector & churchwardens of the parish; (2) the ct. was not precluded by certain local Acts relating to the churchyard from granting the faculty prayed for.—*Re ST. NICHOLAS COLE ABBEY, Re ST. BENET FINK, CHURCHYARD*, [1893] P. 58.

Annotations:—*Consd. Re Plumstead Burial Ground*, [1895] P. 225. *Reid. St. Nicholas, Leicester v. Langton*, [1899] P. 19.

310. Wall for covered way.]—*ST. BOTOLPH, ALDERSGATE WITHOUT (VICAR) v. ST. BOTOLPH, ALDERSGATE WITHOUT (PARISHIONERS)*, No. 299, *ante*.

311. Vestry—Limitation of user.]—The ct. is not precluded by 1884 Act, s. 3, from granting a faculty for the erection on a disused burial ground of a vestry hall abutting on a church with doors leading out of it into the church. The ct. worded the faculty so as to preclude the hall from being used for secular purposes, allowing it to be used for ecclesiastical & charitable purposes.—*Re HOLY TRINITY, STEPNEY* (1902), 18 T. L. R. 789.

312. — & enlargement of existing vestry.]—The rector & churchwardens of a parish united with six other parishes in the city of London, & the churchwardens of such six parishes petitioned the ordinary for a faculty authorising a choir vestry for the choir of the parish church of the united parishes & an extension of the clergy vestry of the same church being built on a disused burial ground adjoining the church, & to which 1884 Act applied, the choir vestry & extension of the clergy vestry to be placed close alongside the church & with a door leading into it. The grant of the faculty was opposed by the London Cty. Council. It appeared in evidence that the existing accommodation for the robing of the choir was most inconvenient & unsuitable, & that there was no reasonable objection to the proposed extension of the clergy vestry, special services attended by very many clergy being held in the church, & members of the London corpn. when attending the ordinary services robing in the clergy vestry. It further appeared that it was desired by the

rector that the two vestries should be separated by a movable wooden partition, so that on occasions they might on the removal of the partition form one long room:—*Held*: (1) the ct. in its discretion would decree a faculty to issue for the erection of the choir vestry & the extension of the clergy vestry, but a movable partition between them could not be sanctioned, as the two vestries when they formed one room, upwards of 50 feet long & 26 feet wide, would give much more accommodation than would be necessary for the clergy & choir to robe in when in attendance for the services of the church; (2) what was authorised by the faculty was an "enlargement of the church" within 1884 Act, s. 3.—*ST. MARGARET'S, LOTHBURY (RECTOR, ETC.) v. LONDON COUNTY COUNCIL*, [1909] P. 310; 25 T. L. R. 734.

313. Parish hall with lavatories & kitchen.]—*LONDON COUNTY COUNCIL v. DUNDAS*, No. 315, *post*.

314. Bay window.]—*ST. EDMUND, KING & MARTYR, LONDON (RECTOR & CHURCHWARDENS) v. LONDON COUNTY COUNCIL*, No. 294, *ante*.

315. Revocation of faculty—Jurisdiction—Appeal—Infringement of 1884 Act.]—A faculty granted by the ordinary after citation & unappealed against cannot, in the absence of the consent of all the parties interested, be revoked for any cause other than fraud.

In June, 1901, on the application of the vicar & churchwardens of a parish church in the diocese of London within the metropolis, the ordinary sanctioned by faculty the erection on a portion of the churchyard of the parish, a disused burial ground within 1884 Act, in substitution for the erection on the same churchyard of a parish room over two vestries at the south end of the church sanctioned by a previous faculty, granted in Sept., 1900, of a larger hall capable of seating two hundred & forty persons, abutting on the church on its north side immediately behind the chancel, & communicating with the church by means of a door or doors, together with two vestries on the east side of the church, & lavatories & a kitchen on the sides of the hall, the hall to be used when required as a vestry & for Sunday schools & mission services & other parochial purposes. Citations to lead these faculties had been duly served, but no appearance had been entered thereto, & the decrees in pursuance of which they had been granted were not appealed against. In Mar., 1902, the London Cty. Council, the statutory authority to enforce 1884 Act within the metropolis, instituted a suit in the consistory ct. of London, & in their petition prayed that the faculty of June, 1901, should be revoked or amended in such manner that no authority should be given therein to contravene 1884 Act, s. 3. The vicar & churchwardens appeared to defend the suit, & pleaded that the ct. had no jurisdiction to rescind the faculty, but the sole question relied on & argued at the hearing was whether the faculty sought to be revoked contravened the Act. Petitioners did not ask for the revocation of the faculty on the ground of fraud, & gave no evidence either of fraud or of the ct. having been deceived by resps. or third parties. The consistory ct. of London refused to revoke the faculty as prayed, holding that the faculty had been properly granted, as the buildings the erection of which had been sanctioned by it were buildings erected for the purpose of enlarging the church within the exception contained in s. 3:—*Held*: (1) the refusal of the consistory ct. to revoke the faculty was right, as where in a faculty suit a citation has been duly

served no ecclesiastical ct. has jurisdiction in the absence of consent to revoke a faculty obtained in the suit without fraud & unappealed against; (2) the appeal must be dismissed without costs, as the point on which resps. succeeded as to the irrevocability of the faculty, though raised on the —, had not been relied on or argued in the

Semble: the faculty sought to be authorised an infringement of 1884 Act, far as it sanctioned the erection of the parish hall & the lavatories & kitchen connected with it, & was to that extent a nullity, & s. 3 did not extend to render lawful the erecting of buildings which, though under the same roof as the church & in physical communication with it, were intended to be used for ecclesiastical purposes for which the church would not be used in ordinary course, & so far as s. 3 related to churches it only permitted buildings to be erected which were in physical communication with the church & enlarged it for the main & primary purpose of religious worship. —LONDON COUNTY COUNCIL v. DUNDAS, [1904] P. 1; 19 T. L. R. 670.

Annotations:—*Fold.* *Re Grosvenor Chapel, South Audley Street* (1913), 29 T. L. R. 411. *Reid.* *Re St. Sepulchre, Holborn Viaduct* (1903), 19 T. L. R. 723; *St. Margaret, Lothbury v. L. C. C.*, [1909] P. 310.

SUB-SECT. 5.—EFFECT OF ILLEGALITY.

316. Prevention—By Injunction—Bandstand.]—Motion by the A.-G. & a vicar for an *interim* injunction to restrain defts., the vestry of the parish, from building or erecting on any part of certain disused burial grounds any stand, building, or other erection, to be used for the purposes of a bandstand, or any similar purpose:—*Held:* the vestry in building a bandstand on the burial grounds, were acting *ultra vires*, & injunction granted.—A.-G. v. ST. PANCRAS VESTRY (1893), 69 L. T. 627; 58 J. P. 22.

317. Removal—After conviction—Warehouse & offices.]—Defts. began to erect a warehouse & offices on a disused burial ground, & for the purpose of draining same dug a trench, thereby disturbing & removing human remains:—*Held:* they were guilty of an offence under 1884 Act, s. 3, & should be bound over in recognisances of £500 each to pull down the buildings & restore the ground in six months.—R. v. KENYON (1901), 65 J. P. 730.

See, also, No. 355, *post*.

Specific performance—Building contract.]—*See* BUILDING CONTRACTS, ENGINEERS & ARCHITECTS, p. 404, No. 289, *ante*.

318. — Contract for sale.]—A. agreed to sell to B. a chapel & adjoining ground in which human remains were interred. Both A. & B. knew of the interments & also that B. intended to use the lands for building. After the contract was entered into, & before completion, 1884 Act was passed. It was admitted that the land sold was a disused burial ground within the Act:—*Held:* B. was bound to complete his contract.—BOLESWORTH v. DAVIS (1886), 3 T. L. R. 214.

SECT. 3.—UTILISATION OF BURIAL GROUNDS.

SUB-SECT. 1.—OPEN SPACES.

See, generally, OPEN SPACES & RECREATION GROUNDS.

319. By faculty—Footpaths & access.]—On an application for a faculty to sanction the appropriation of a portion of a churchyard, which

had been closed for burials under an Order in Council, for the purpose of a public garden, the ct. authorised the construction of footpaths in such portion of the churchyard for the convenience of the parishioners & the erection of gates to give them access to it.—*Re* ST. GEORGE-IN-THE-EAST (1876), 1 P. D. 311; Trist. 38.

Annotations:—*Reid.* *St. John the Baptist, Cardiff v. St. John the Baptist, Cardiff*, [1898] P. 155; *St. Nicholas, Leicester v. Langton*, [1899] P. 19.

320. — Removal of tombstones—Sufficiency of notice.]—*Re* ST. GEORGE-THE-MARTYR, QUEEN SQUARE (1888), 4 T. L. R. 703.

321. — Proprietary rights—Jurisdiction of ordinary.]—*Re* CAMDEN TOWN BURIAL GROUND (1889), 5 T. L. R. 311.

322. — Destruction of vault—When dilapidated.]—Where a faculty had been decreed to issue allowing a churchyard, closed for burials & containing two private vaults, one in repair & the other out of repair, to be laid out as a public garden, subject to future order as to how such vaults were to be dealt with, the ct. made an order that there should be no interference with the vault in repair, but that the vault out of repair should be levelled with the ground & filled up. Rule of the ct. in such cases.—ST. BOTOLPH WITHOUT ALDGATE (VICAR & CHURCHWARDENS) v. ST. BOTOLPH WITHOUT ALDGATE (PARISHIONERS), [1892] P. 173; 38 Sol. Jo. 682; 8 R. 649.

323. — Conveyance by rector of legal estate not necessary—Although entitled to do so under Open Spaces (Metropolis) Act, 1881 (c. 32)—Protection of particular tomb ordered.]—*Re* MOUNT STREET, HANOVER SQUARE, BURIAL GROUND (1888), 4 T. L. R. 661; *sub nom.* ST. GEORGE'S, HANOVER SQUARE (VESTRY & CHURCHWARDENS) v. ST. GEORGE'S, HANOVER SQUARE (PARISHIONERS), Trist. 270.

See, also, Nos. 331, 333, *post*.

SUB-SECT. 2.—STREET IMPROVEMENTS.

324. By faculty—Removal of bodies.]—The vicar & churchwardens of a parish church in the city of London applied to the ct. to sanction an agreement between the vicar & the Comrs. of Sewers of the city of London to appropriate a portion of the parish churchyard closed for burials, for the widening of an adjoining street. At the hearing of the application it was proved that the proposed widening would be of great convenience to the congregation of the church, & to the public generally:—*Held:* the ct. had jurisdiction to authorise by faculty the appropriation of the portion of the churchyard required for the proposed widening of the street, so long as it should be used for the purpose, & the removal to a vault to be constructed in the churchyard of all human remains disturbed in carrying out the works authorised by the faculty.

There being no room in the churchyard for the vault directed to be constructed as above mentioned, the ct. ordered the remains disturbed to be placed in the crypts of the church. The Comrs. of Sewers & the vicar & churchwardens subsequently petitioned the ct. to authorise the remains placed in the crypts under the order of the ct., as well as certain other remains found in one of the crypts to be removed to the city of London cemetery at I. in Essex, & it appeared that such removal was expedient on sanitary grounds:—*Held:* the ct. had jurisdiction to authorise the remains to be removed as prayed, & to be reinterred in the consecrated portion of the I

Sect. 3.—Utilisation of burial grounds: Sub-sects. 2 & 3.]

cemetery.—**ST. BOTOLPH WITHOUT ALDGATE (VICAR & ONE OF THE CHURCHWARDENS) v. ST. BOTOLPH WITHOUT ALDGATE (PARISHIONERS), SEWERS COMRS. OF CITY OF LONDON, & ST. BOTOLPH WITHOUT ALDGATE (VICAR & PARISHIONERS) v. ST. BOTOLPH WITHOUT ALDGATE (PARISHIONERS),** [1892] P. 161; *subsequent proceedings*, [1892] P. 173.

Annotations:—N.F. Re Plumstead Burial Ground, [1895] P. 225. Re St. Helen's, Bishopsgate with St. Mary Outwich v. Parishioners of Same, [1892] P. 259; St. Andrew's, Hove v. Mawn, [1895] P. 228, n.; St. Nicholas, Leicester v. Langton, [1899] P. 19; Re Bideford, Ex p. Bideford, [1900] P. 314.

325. ———.]—The vicar & churchwardens of a church & local comrs. petitioned the ordinary to decree a faculty for the widening of a road abutting on the churchyard, on the ground that the road had become one of the principal thoroughfares & the proposed alteration was essential to the safety of the public passing along the road as well as for the parishioners going to & from the parish church. The churchyard had been closed for burials by an Order in Council except as regarded members of certain families buried there:—*Held*: (1) an ecclesiastical authority had a discretionary power to make such an order; (2) in the circumstances the faculty should be granted subject to the provision that the remains to be removed should be reinterred in vacant parts of the churchyard, or, if the families interested preferred it, in the parish cemetery, the families interested to be at liberty to superintend the removal of the remains & to select the site of their reinterment, & to have the same right of interment in the new graves as was reserved to them by the Order in Council.—**ST. ANDREW'S, HOVE (VICAR & CHURCHWARDENS) & HOVE COMRS. v. MAWN & ROWE** (1894), [1895] P. 228, n.

Annotations:—Re St. Nicholas, Leicester v. Langton, [1899] P. 19; Re Bideford, Ex p. Bideford, [1900] P. 314.

326. ——— Grant to individuals.]—Where it appeared that the widening of a public highway abutting on a churchyard of a parish church would be a benefit both to the congregation attending the church & to the public in general, & that in the opinion of the highway authority, a municipal corp., it was practically necessary that the widening should be effected by including therein a strip of the churchyard closed for burials by Order in Council, a faculty was granted to the incumbent & churchwardens of the church authorising the removal of human remains interred in the portion of the churchyard required for the widening & the setting back of the churchyard fence so as to throw such portion of the churchyard into the highway, on the ordinary being satisfied that an adequate consideration would be paid by the corp. in return for the rights sanctioned. The corp. had joined in petitioning for the faculty, but was omitted from the grant, the ordinary being of opinion that it was preferable that the grant should be made to individuals.—**ST. NICHOLAS, LEICESTER (VICAR) v. LANGTON**, [1899] P. 19.

Annotation:—Re Bideford, Ex p. Bideford, [1900] P. 314.

327. ——— Subject to interest of parties.]
Re ST. MARY-LE-STRAND CHURCHYARD (1901), *Times*, March 5th.

328. ——— Proviso for reversion on non-user usually inserted.]—*Re HAMPSTEAD ADDITIONAL BURIAL GROUND* (1908), *Times*, May 21st.
See, also, No. 334, *post*.

329. ——— Jurisdiction.]—The vicar & churchwardens of a parish church in the diocese of R.

petitioned the ordinary to decree a faculty to authorise a strip of consecrated ground, added to the churchyard under 1852 Act, but in which burials were prohibited by a Secretary of State's order, being taken therefrom & made part of an adjoining public highway for the purpose of widening same. In their petition they alleged (*inter alia*) that no interments had ever been made within the portion of the churchyard proposed to be dealt with by the faculty, that inconvenience was caused to persons attending the church from there being no pathway on the side of the highway adjacent to the churchyard, & that the proposed widening would enable such a pathway to be made, & would greatly conduce to the convenience of those attending the church as well as of the general public. The citation to lead the faculty was by order moved for in ct. On the hearing of the motion the Chancellor of the diocese, being of opinion that by granting the faculty prayed for he would be authorising the appropriation of consecrated ground to secular uses, thus entertaining a cause beyond the jurisdiction of the ct., refused the motion.—**RE PLUMSTEAD BURIAL GROUND**, [1895] P. 225.

Annotations:—Consd. St. Nicholas, Leicester v. Langton, [1899] P. 19. Re Bideford, Ex p. Bideford, [1900] P. 314.

330. ——— Appeal—Payment for land.]
The ordinary has jurisdiction to grant a faculty authorising a portion of a consecrated cemetery or churchyard, closed for burials by Order in Council, to be used for widening a public street. Any faculty granted for this purpose should contain exact particulars of the measurements of the portion of the cemetery or churchyard proposed to be used for the widening.

The rector & churchwardens of a parish church in the diocese of E., & the corp. of a borough in which a consecrated cemetery forming an addition to the parish churchyard was situate, petitioned the ordinary for a faculty to authorise a strip of the cemetery being used for widening an adjoining public street, & the boundary wall of the cemetery being set back, so as to form a boundary wall between the remaining portion of the cemetery & the widened street. It appeared that the street proposed to be widened was only 16 ft. wide, & too narrow for the traffic along it, & that the proposed widening would be not only for the general convenience & safety of the public, but particularly of the rector & his parishioners, to the former of whom & the churchwardens moreover, by way of consideration, a sum of money was intended to be paid by the corp. It also appeared that the strip of the cemetery proposed to be thrown into the street had been closed for interments under an Order in Council, & that the proposed alteration of the width of the street had been unanimously approved by the parish vestry. The Chancellor of the diocese refused to issue citation, being of opinion that he had no jurisdiction to grant the faculty prayed for. Petitioners appealed to the Arches Ct. of Canterbury. The Dean of Arches allowed the appeal, retained the cause, & the allegations in the petition having been verified by affidavit, decreed a faculty to issue in accordance with the prayer of petitioners.—**RE BIDEFORD PARISH, Ex p. BIDEFORD (RECTOR, ETC.)**, [1900] P. 314; 64 J. P. 743; 16 T. L. R. 540; 44 Sol. Jo. 699.

Annotations:—Re St. Corke v. Rainger & Higgs, [1912] P. 69; Sutton v. Bowden, [1913] 1 Ch. 518; Ex p. Uxbridge U. D. C. (1914), 30 T. L. R. 448.

331. ——— Discretion—No immediate necessity.]
—The power to grant a faculty for the use of a

part of a disused burial ground for widening a highway is one which must be exercised with great discretion & reserve, & where the proposal involves an extensive disturbance of graves & is reasonably obnoxious to many of the relatives of the persons buried there, & where there has been no approval by the vicar, churchwardens, & parishioners, such use ought not to be sanctioned is urgent & immediate necessity.—

U. UXBRIDGE URBAN DISTRICT COUNCIL (1914), L. R. 448.

332. — Grant of user—Acquisition of freehold.]—On an application by the rector & churchwardens & by the London Cty. Council for a faculty authorising an agreement by which the council was to acquire a strip of a disused burial ground for widening a road, the ct. declined to decide whether the council had statutory authority to acquire the freehold of consecrated land, & determined to deal with the case in its discretion under the usual procedure, which was to grant a user of the land.—*Re ST. ANNE, LIMEHOUSE (1915), 31 T. L. R. 539.*

See, also, No. 334, post.

333. — Land previously vested as open space.]—A private Act of 1898 vested in the local authority a closed burial ground in the metropolis, to be maintained by them as an open space, under & subject to Open Spaces Acts, 1877 (c. 35)—1890 (c. 15). By Metropolitan Open Spaces Act, 1881 (c. 34), s. 5, the estate acquired in any old burial ground was to be held in trust for the enjoyment of the public as an open space. That Act was repealed by Open Spaces Act, 1906 (c. 25), s. 10 of which contained similar provisions:—*Held*: there was no power by faculty to authorise the local authority to take a portion of the ground for widening the highway, as such action by the local authority would be a breach of the statutory trust.—*Ex p. ST. MARYLEBONE BOROUGH COUNCIL (1920), 36 T. L. R. 256.*

SUB-SECT. 3.—FOOTPATHS.

334. Public path—Grant of user—Reversion on non-user.]—The use of a small strip of a churchyard, which had been closed for burials, was granted by faculty, so long as it might be required for the purpose, for a public footway to be constructed outside the churchyard wall, the ct. being satisfied that the reasonable convenience of the parishioners attending the church, as well as of the public, could not be otherwise provided for.

If at any future time the ground in question were to cease to be required for this purpose, it would revert to the church.

The ct. has no power to grant the freehold or fee of consecrated ground to a local board, or to any other person, but only the use of it by faculty.—*ST. MARY ABBOTS, KENSINGTON (VICAR & CHURCHWARDENS) v. ST. MARY ABBOTS, KENSINGTON (INHABITANTS) (1873), Trist. 17.*

Annotations:—Consd. Re Plumstead Burial Ground, [1895] P. 225. Re St. Andrews, Hove v. Mawn, [1895] P. 228, n.; St. Nicholas, Leicester v. Langton, [1899] P. 19.

See, also, Nos. 328, 332, ante.

335. — Limitation of user.]—In a faculty granted for a fenced-in footpath across a closed parish churchyard for the use of the parishioners with right of way for the public, a proviso was inserted for the footpath to be closed on one day in the year, in order to show that it remained an integral portion of the churchyard with certain

limitations on its use.—*ST. JOHN THE BAPTIST, CARDIFF (VICAR) v. ST. JOHN THE BAPTIST, CARDIFF (PARISHIONERS), [1898] P. 155.*

336. — To public garden.]—*Re ST. GEORGE-IN-THE-EAST, No. 319, ante.*

337. Private path—Extension of use—Derogation of grant.]—In 1891 a faculty issued from the registry of the consistory ct. of London authorising the rector & churchwardens of a parish in the city of London, in conjunction with a co. owning premises abutting on the churchyard of the parish, a churchyard closed for burials under Order in Council, to make a private pathway inclosed on the sides by railings, across the churchyard from the co.'s premises to a public thoroughfare on the opposite side of the churchyard, provided a specified rent was paid to the rector & his successors during a term of years. The faculty recited an agreement between the rector & churchwardens & the co. whereby the former agreed to concur in granting to the co. a right of way over the pathway afterwards authorised by the faculty for the term, & on payment of the rent there mentioned, all the works to be done at the co.'s costs, & "such right of footway to be for themselves their tenants & any others authorised by them in common with the rector & churchwardens & any others authorised by the rector & churchwardens." In 1892, after the co. had done & paid for the works & whilst the term of years was still unexpired, the rector & churchwardens agreed with other owners of premises abutting on the churchyard adjacent to the co.'s premises to concur in granting to such owners a right of footway over the pathway made under the faculty of 1891, subject to the rights of the co., & also over a new footpath to be made over a piece of the churchyard to join the footpath so already made, & petitioned the consistory ct. of London for a faculty to make the new footpath & to remove a portion of the above-mentioned railings, the owners of the premises desiring the right of way over the two footpaths intervening in support of the petition. The consistory ct. decided (1) the faculty asked for must be refused, as the faculty of 1891 had granted to the co. & their assigns the enjoyment for a term of years not yet expired of the pathway made under that faculty to the exclusion of the other occupiers of premises abutting on the churchyard, & the ordinary ought not to sanction by faculty anything being done in derogation of the exclusive right so granted; (2) the operation of Ecclesiastical Leasing Acts, 1842 (c. 108) & 1858 (c. 57), did not extend to enable the incumbent of a parish, with the consent of the patron of the living & the Ecclesiastical Comrs., to grant leases of or rights over all or any portion of the churchyard of the parish. On appeal to the Arches Ct. of Canterbury:—*Held*: the construction put on that faculty by the ct. below was correct &, the grant or refusal of the faculty prayed being in the discretion of the ordinary, by whom that discretion had been properly exercised, the appellate ct. ought not to interfere. Observations by the Chancellor of the diocese as to the practice of the consistory ct. of London on the grant of faculties for the formation & use of private pathways across churchyards closed for burials, & as to the provisos to be inserted in such faculties.—*ST. GABRIEL, FENCHURCH STREET (RECTOR, ETC.) v. CITY OF LONDON REAL PROPERTY CO., [1896] P. 95.*

Annotations:—Re St. John the Baptist, Cardiff v. St. John the Baptist, Cardiff, [1898] P. 155; St. Nicholas, Leicester v. Langton, [1899] P. 19.

Part XII.—Supervision of Burial Grounds by Government Departments.

338. Order in Council—Disused burial ground—Validity—Liability of churchwardens.]—1857 Act, s. 23 applies, & the authority of the Queen in Council can be exercised, only where an existing burial ground is under the care of churchwardens, or other persons who have the charge of it, for the purpose of the burial of the dead.

From 1679 till 1844, land was held by a corp., from time to time, under long leases as a burial ground, & afterwards from year to year, till 1855. No burials took place after 1844, & in 1854 an Order in Council, under 1852 Act, s. 2, was made that burials should be discontinued. In 1857, the freeholder demised the ground for ninety-nine years to S., who entered & put some rubbish on the land; in 1859, S. demised to pltf. for fifty years, & he entered on the land. In the same year, an Order in Council was made under 1857 Act, s. 23, directed to "the person having the care of the burial ground," & served on pltf., to do certain acts. Pltf. disregarded the order, & thereupon the Secretary of State made an order, under 1859 Act, s. 1, on the churchwardens of the parish in which the ground was situate, to do the acts. The churchwardens having entered in pursuance of the order:—*Held*: the sects. did not apply, & the orders were invalid, & the churchwardens liable as trespassers.—*FOSTER v. DODD* (1867), L. R. 3 Q. B. 67; 8 B. & S. 842; 37 L. J. Q. B. 28; 17 L. T. 614; 32 J. P. 20; 16 W. R. 155, Ex. Ch.

Annotations:—*Consd.* *Lee v. Hawtrey*, [1898] P. 63. *Reid.* *Jacobson v. St. Pancras* (1880), 44 J. P. 184; *A.-G. v. London Parochial Charities Trustees* (1896), 74 L. T. 184. *Mentd.* *St. Michael Bassishaw v. St. Michael Bassishaw*, [1893] P. 233; *Re Talbot*, [1901] P. 1.

339. ——— Private ground.]—A closed private burial ground, which has never been consecrated, is not within 1857 Act, s. 23, & an Order in Council directing acts to be done to prevent it becoming or continuing dangerous or injurious to the public health, is invalid.—*JACOBSON v. ST. PANCRAS VESTRY* (1880), 44 J. P. 184.

Annotation:—*Consd.* *Lee v. Hawtrey*, [1898] P. 63.

340. ——— Faculty in aid of Order—Removal of remains from church vaults—Re-interment.]—An Order in Council was made under 1857 Act, s. 23, whereby it was ordered that the churchwardens of the parishes of St. M. & St. A., in the city of London, or such other person or persons as might have the care of the vaults under the parish church of the parishes, should adopt or cause to be adopted the following measures, viz., that all human remains found beneath the floor of the parish church should be removed & forthwith reburied in N. cemetery or some other consecrated burial ground in which interments could legally take place, the work to be carried out under the supervision & to the satisfaction of the medical officer of health for the city of London. After notice of this Order, the rector & churchwardens of the united parishes petitioned the ct. for a faculty for the removal of the remains underneath the parish church to a consecrated site in N. cemetery:—*Held*: petitioners had taken the proper course, & it was the duty of the ct. to decree a faculty directing the churchwardens to do what was required to be done by the Order in Council, with provisos inserted for the safeguard of the

fabric of the church, & for authorising the families of persons buried in the vaults to remove the remains of their relatives to any consecrated burial ground they might select.—*ST. MARY-AT-HILL WITH ST. ANDREW HUBBARD (RECTOR, ETC.) v. ST. MARY-AT-HILL WITH ST. ANDREW HUBBARD (PARISHIONERS)*, [1892] P. 394; 56 J. P. 824.

Annotation:—*Reid.* *St. Michael Bassishaw v. St. Michael Bassishaw*, [1893] P. 233.

341. ———]—The powers for preventing vaults or burial places becoming or continuing dangerous or injurious to public health which Her Majesty is empowered to exercise by Order in Council under 1857 Act, s. 23, are not inconsistent with the ct. of the ordinary possessing exclusive jurisdiction to authorise the removal & reinterment of remains buried in consecrated burial places or vaults in consecrated ground.

Where an Order in Council made under the above Act directed the churchwardens of a parish church to remove remains buried beneath the church to some other consecrated burial ground & there to rebury them, & it appeared that such removal was advisable on sanitary grounds, the ct., on the application of the rector & churchwardens of the parish church, decreed a faculty to issue giving authority for the removal & reinterment of the remains, but confining the reinterment to a place of burial to be specified in such faculty, & containing provisos as to the mode & manner in which the removal & reinterment should be carried out, & for safeguarding the interests of the relatives of persons whose remains were proved to have been buried beneath the church.—*ST. MICHAEL BASSISHAW (RECTOR, ETC.) v. ST. MICHAEL BASSISHAW (PARISHIONERS)*, [1893] P. 233; *sub nom.* *Ex p. ST. MICHAEL BASSISHAW, BASINGHALL STREET (RECTOR)*, 9 T. L. R. 369.

Annotation:—*Reid.* *Lee v. Hawtrey*, [1898] P. 63.

342. ——— Necessity for.]—The churchwardens of a parish church wholly closed for burials, who, purporting to act under an Order in Council under 1857 Act, s. 23, directing the removal & reinterment elsewhere of human remains underneath the church, do or cause to be done the acts therein directed without obtaining a faculty from the ordinary, are guilty of an offence against the laws ecclesiastical, in respect of which they may be cited to appear to answer articles to be administered to them in a criminal suit.

Orders in Council issued under 1857 Act, s. 23, & served on the churchwardens of a parish church ordered that the churchwardens or the persons having care of the vaults under the church should adopt or cause to be adopted the following measures, viz., that the whole of the human remains lying beneath the floor of the church should be removed, & reburied in a specified cemetery or in some other legal burial ground. In consequence of the service of these Orders in Council, the churchwardens, without having obtained any faculty from the ordinary, pulled down all the pews in the church, took up the flooring & monumental slabs in same, & removed certain coffins & human remains buried thereunder, for the purpose of reintering them elsewhere. Burials in the parish had been by law wholly discontinued in 1853, & since that year no burial was recorded to have taken place there:—*Held*: (1) the acts of the

PART XV.—DISINTERMENT.

churchwardens, not having been authorised by a faculty, were illegal, & the Orders in Council afforded no justification for what had been done, such orders being either wholly *ultra vires* or to be construed as merely directing an application for a faculty to carry out their terms ;

(2) on the petition of the rector of the parish church & the churchwardens, a faculty might issue authorising for sanitary reasons the removal of the remains & their reinterment in consecrated ground.—*LEE v. HAWTREY*, [1898] P. 63.

See, now, 1900 Act.

Part XIII. — Burial of Poor Persons.

343. By poor law authorities—Pauper not dying in poor house.]—*R. v. STEWART*, Nos. 10, 13, *ante*.

344. — Reimbursement — Administration.]—Administration of the effects of a pauper who died chargeable to a union, granted to the guardians of the union as creditors under Poor Law Amendment Act, 1849 (c. 103), s. 16.—*CLEAVER v. M'KENNA* (1865), 35 L. J. P. & M. 91 ; 13 L. T. 411.

345. — Citation of next-of-kin.]—The ct., upon the application of the guardians of the union in which a deceased pauper lunatic had died, made to their nominee a grant of administration in respect of the personal estate & effects of such pauper, the guardians being creditors for burial expenses, & the next-of-kin, if any, & the Queen's Proctor having failed to appear to citations calling upon them respectively to take the grant.—*In the Goods of REEVES* (1890), 55 J. P. 24.

346. — Nominee.]—The ct., upon the application of the guardians, in whose asylum deceased intestate had been, for some time prior

to her death, confined as a lunatic, made a grant to their nominee, in respect of the personal estate & effects of the deceased.—*In the Goods of LILLICRAP* (1891), 55 J. P. 825.

347. — Whether preferential creditors.]—Poor Law Amendment Act, 1849 (c. 103), s. 16, constitutes the guardians ordinary, & not preferential, creditors for the amount expended by them thereunder, & the exor. of such a pauper is entitled to retain a debt due from the pauper's estate to himself before satisfying the claim of the guardians.—*LAVER v. BOTHAM & SONS*, [1895] 1 Q. B. 59 ; 64 L. J. Q. B. 110 ; 71 L. T. 570 ; 59 J. P. 454 ; *sub nom.* *LAVER v. CHESTERFIELD UNION*, 43 W. R. 25 ; 39 Sol. Jo. 11 ; 15 R. 44, D. C.

Annotation:—Refd. Re Benson, Knaresborough Grdns. v. Benson (1918), 87 L. J. Ch. 622.

See, generally, POOR LAW.

348. Neglect of parent—Loan by poor law guardians refused—Liability for nuisance.]—*R. v. VANN*, No. 14, *ante*.

See, also, Part I., Sect. 1, sub-sect. 4 ; Sect. 2, sub-sect. 3, *ante*.

Part XIV.—Burial of Persons found drowned.

349. Justices' order—For expenses—Validity.]—A justice's order, made under Burial of Drowned Persons Act, 1808 (c. 75), s. 6, after stating that he had inquired into & ascertained on oath the costs & expenses, amounting to £1 5s., incurred by the churchwardens & overseers by reason of a dead human body having been found & brought on to the shore within their parish, directed the county treasurer to pay to them £1 5s., according to the above Act :—*Held* : the order was bad, because it did not show that the expenses in question were proper & necessary expenses incurred in or about the execution of the Act, & did not sufficiently state facts to show, or from which it could be inferred, that the justice had jurisdiction to make it.—*R. v. KENT COUNTY TREASURER* (1889), 22 Q. B. D. 603 ; 58 L. J. M. C. 71 ; 60 L. T. 426 ; 53 J. P. 279 ; 37 W. R. 619 ; 16 Cox, C. C. 583, D. C.

350. Bodies cast on shore from sea—Tidal river—Liability of county for expenses.]—A steamship was sunk by collision in the river Thames, near Woolwich, at a place below low water mark, & a number of persons were drowned. Some of the bodies were found ashore within the boundaries of Woolwich, in Kent, & were buried by the overseers. The river Thames at Woolwich & at the places where the bodies were found ashore was a navigable tidal river where great ships went :—*Held* : the ct. treasurer could not be made liable for the expenses incurred by the overseers, for the bodies were not cast on shore "from the sea" within Burial of Drowned Persons Act, 1808.—*WOOLWICH OVERSEERS v. ROBERTSON* (1881), 6 Q. B. D. 654 ; 50 L. J. M. C. 87 ; 44 L. T. 747 ; 45 J. P. 766 ; 29 W. R. 892, D. C.

351. Right to Christian burial.]—*COOPER v. DODD*, No. 117, *ante*.

Part XV.—Disinterment.

SECT. 1.—AUTHORITY.

352. Without authority—Illegal—Dissection.]—Taking up dead bodies, even though for the purpose of dissection :—*Held* : an indictable offence.—*R. v. LYNN* (1788), 2 Term Rep. 733 ; 1 Leach, 497 ; 100 E. R. 394.
Annotation:—Refd. R. v. Price (1884), 12 Q. B. D. 247.

353.

Motive.]—It is a misdemeanour at common law to remove a corpse which has been buried in ground belonging to a congregation of Protestants dissenting from the Church of England, although the act may have been done from motives of filial affection & religious duty.—*R. v. SHARPE* (1857), Dears. & B. 160 ; 26 L. J. M. C. 47 ; 28

PART XV. SECT. 1.

353 1. Without authority—Illegal—Motive.]—*ADVOCATE, H.M. v. SOUTAR* (1882), 5 Couper, 35.—*SCOT*.

Sect. 1.—Authority. Sect. 2.]

L. T. O. S. 295; 21 J. P. 86; 3 Jur. N. S. 102; 5 W. R. 318; 7 Cox, C. C. 214, C. C. R.

*Annotations:—*Consd. Williams v. Williams (1882), 20 Ch. D. 659; R. v. Price (1884), 12 Q. B. D. 247.

354. ——— Order for replacement—Contempt.]—In a suit promoted by one parishioner against another for having without lawful authority caused human bones & portions of the soil to be removed from a churchyard to a field belonging to doft., the Ct. of Arches decreed that doft. had offended against the laws ecclesiastical, & issued a monition to him to replace in the burial ground, before a certain day, the bones & earth so removed. Doft. failed to comply with the order, alleging that he was unable to do so by reason that the field, in which the bones & earth had been placed, was no longer in his occupation or possession:—*Held*: his conduct amounted to contempt of ct., & unless he obeyed the monition within six days, & certified that he had done so, the ct. would pronounce him in contempt, & signify the contempt to the Ct. of Ch.—ADLAM v. COLTHURST (1867), L. R. 2 A. & E. 30; 37 L. J. Eccl. 3; 17 L. T. 226; 31 J. P. 820.

*Annotations:—*Expld. R. v. Tristram (1899), 47 W. R. 639. Refd. Batten v. Gedy (1889), 41 Ch. D. 507; St. Michael Bassishaw v. St. Michael Bassishaw, [1893] P. 233.

355. ——— Disused burial ground.]—Doft. was indicted for unlawfully, wilfully, & indecently digging open graves in a burial ground, & taking & removing parts of the bodies of persons buried therein, & interfering with & offering indignities to the remains of the bodies. The evidence showed that doft. employed persons to excavate for building operations the burial ground attached to a Nonconformist place of worship, which had been disused as a burial ground for some time; & the jury found that, in the course of the excavations, bones that formed parts of human remains, & of the same human skeleton, were dug up, but that they were not disturbed in an improper & indecent manner:—*Held*: doft. was guilty of a misdemeanour at common law.—R. v. JACOBSON (1880), 14 Cox, C. C. 522.

356. ——— ———.]—R. v. KENYON, No. 317, *ante*.

Building on disused burial grounds generally, see Part XI., Sect. 2, *ante*.

357. Faculty—Authority exceeded—Revocation.]—In 1854 a local Act of Parliament was obtained to enable the granting of building leases of a certain portion of the cemetery belonging to the parish of A. which had not previously, it was then supposed, been used for the purposes of interment, & which was particularly described in the schedule annexed to the Act. The trustees, under the powers of the Act, contracted for the sale of the ground so described in the schedule, but the contractor, on making excavations therein, found some coffins & remains of bodies. In June, 1858, on the representation that these did not exceed twenty in number, a licence or faculty issued from the consistory ct. for the removal of such coffins & remains, in order that they might be decently & properly interred in the inclosed part of the cemetery. Subsequently, without any further authority, between four hundred & five hundred more coffins were disinterred:—*Held*: the vicar & church-

wardens, to whom the faculty had been directed, had exceeded the powers confided to them by the ordinary, & they must return the faculty into the registry, be admonished to reinter decently all the remains that had been disinterred, & to refrain from disturbing the remains of the dead which had been interred in any portion of the cemetery, & they must pay the costs of the proceedings.—ST. PANCRAZ VESTRY v. ST. MARTIN'S-IN-THE-FIELDS (VICAR & CHURCHWARDENS) (1860), 6 Jur. N. S. 510.

358. ——— Reinterment of relatives—Exclusion of vaults in church.]—Where application is made to the ct. for a faculty to authorise human remains interred in a church or disused churchyard to be removed therefrom & reinterred in consecrated ground elsewhere, the ct., if it grants the faculty, will insert in it provisions authorising members of families whose relatives are buried in such church or churchyard to remove the remains of their relatives to any particular churchyard or consecrated cemetery selected by them for the purpose of reinterment.

In a faculty authorising, on sanitary grounds, the removal of human remains interred in a parish church, provisions were, by the directions of the ct., inserted exempting from the operation of the faculty several ancient family vaults.—ST. HELEN'S, BISHOPSGATE, WITH ST. MARY OUTWICH (RECTOR, ETC.) v. PARISHIONERS OF SAME, [1892] P. 259.

359. ——— Disused churchyard.]—ST. ANDREW'S, HOVE (VICAR & CHURCHWARDENS) & HOVE COMRS. v. MAWN & ROWE, No. 325, *ante*.

— **After Order in Council—Under 1857 Act, s. 23.]**—See Nos. 340, 341, *ante*.

360. ——— Demolition & rebuilding of church—Conditions for reinterment.]—HOLY TRINITY, KINGSWAY (1909), *Times*, Aug. 6th.

361. Licence of Secretary of State.]—The Superior of St. Edmund's College, one of the Roman Catholic theological colleges in England, applied to the ct. for a faculty to authorise the removal of the remains of a former superior of the college from their place of interment in a vault in the churchyard of a parish church in the diocese of London to a vault under the chapel of the college wherein three of the predecessors of petitioner & deceased lay buried. The owner of the vault from which it was proposed to remove the remains of deceased could not be discovered, but the incumbent of the parish church in whom the freehold of the churchyard was vested & the next-of-kin of deceased consented to the proposed removal. No evidence was given that the vault under the college chapel had ever been consecrated. The ct. in its discretion granted the faculty, but, being of opinion that the vault under the college chapel was not a consecrated place of burial within 1857 Act, s. 25, directed that the faculty should issue upon condition that it was not to be acted upon until a licence approving the place of reinterment had been obtained from a Secretary of State.

The removal of remains from unconsecrated places of burial being by the above sect. placed under the control of a Secretary of State, the ct. cannot now, as it would have done before the passing of the Act, refuse to exercise whatever

355 i. ——— Disused burial ground.]—A purchaser of land in which burials have taken place may not remove the bodies or otherwise disturb or desecrate the graves.—CAPE TOWN & DISTRICT WATERWORKS CO., LTD. v. ELDERS' EXECUTORS (1890), 8 S. C. 9.—S. AF.

d. ——— Mistake of cemetery caretaker—Liability of owners.]—The caretaker of a cemetery took upon himself to disinter a body & reinter it in another place. The mistake arose through the blundering of purchasers of different plots. Defts., the owners of the cemetery, took steps before

action to restore the body to the original place of sepulture:—*Held*: defts. not liable for the misconduct of their servant, the caretaker.—MCNULTY v. NIAGARA FALLS CITY (1905), 4 O. W. R. 443; 5 O. W. R. 63.—CAN.

jurisdiction it might possess to grant a faculty for the removal of remains to unconsecrated ground, on account of the objection that the remains when removed would not be sufficiently protected from disturbance.—*Re TALBOT*, [1901] P. 1.

See, also, Nos. 363–365, 368, *post*.

SECT. 2.—PURPOSE.

362. Identification—Faculty.—Faculty to exhumate a corpse, with a view to its identity, decreed.—*Re PORE* (1851), 15 Jur. 614.

Annotation:—*Consd. R. v. Tristram*, [1898] 2 Q. B. 371.

363. ——— Licence of Secretary of State—Consecrated ground.—The jurisdiction of the ordinary over all bodies buried in consecrated ground is not affected by 1857 Act, s. 25.

The ordinary may grant a faculty for the exhumation, for the purpose of identification, of a body which has been buried in consecrated ground, & the licence of the Secretary of State is not a condition precedent to the grant, although the faculty may be inoperative until the licence has been obtained. *Semble*: a body buried in consecrated ground cannot be removed without the sanction of the ordinary.—*R. v. TRISTRAM*, [1898] 2 Q. B. 371; 67 L. J. Q. B. 857; 79 L. T. 74; 46 W. R. 653; 42 Sol. Jo. 510, D. C.; *subsequent proceedings* (1899), 80 L. T. 414, D. C.

Annotation:—*Reid. Druce v. Young*, [1899] P. 84.

364. ——— Letters of request.—The Chancellor of the diocese of London, in the exercise of his judicial discretion, may accept letters of request, signed by the President of the Probate, Divorce, & Admty. Div., requesting that in aid of the trial of an issue in a probate action a faculty may be granted authorising the opening of a vault in a consecrated burial ground in the diocese, & the opening & inspection of a coffin there buried, for the purpose of identification, & issue a faculty to give effect to such letters of request.

During the hearing of an opposed cause of faculty instituted for the purpose of obtaining a faculty for the opening of a vault in the consecrated portion of a cemetery at H., & the opening & inspection of a coffin there buried, the Chancellor, with the consent of all parties, adjourned the case to enable petitioners to apply to the President of the Probate, Divorce, & Admty. Div. to issue letters of request to the Chancellor to grant a faculty for the above-mentioned purposes in aid of justice, & of an issue in a pending probate action in which one of petitioners was pltf. On the application before the President it appeared that the probate action had been brought for the revocation of the probate of the will & codicil of a testator, a relative of petitioners, alleged to have been buried in the coffin required to be opened, & on *prima facie* evidence having been given that testator had been seen alive after the date of the grant of the probate sought to be revoked, the President ordered letters of request to issue. Some evidence to the same effect had also been given in the faculty suit previously to the issue of the letters of request, & it had been proved there that one of petitioners was registered in the books of the cemetery, a cemetery established under a private Act of Parliament, as the owner of the vault proposed to be opened. The grant of the faculty was opposed by the surviving exor. of tes-

tator & by other parties interested under the will, & on their behalf evidence was tendered to the Chancellor to show that testator had died before the date of the probate, & had been buried in the coffin proposed to be opened:—*Held*: (1) the ct. in the exercise of its discretion, would accept the letters of request, reject the evidence tendered on behalf of the opponents, & decree a faculty to issue according to the tenor of the letters of request; (2) 1857 Act, s. 25, did not require that a proviso should be inserted in the faculty that the faculty was granted subject to the licence of one of Her Majesty's principal Secretaries of State. *Semble*: the faculty might be lawfully acted upon without any such licence having been obtained.—*DRUCE v. YOUNG*, [1899] P. 84.

365. ——— Jurisdiction of ecclesiastical court—Cemetery company.—An ecclesiastical ct. has no power, in granting a faculty to disinter a body buried in consecrated ground, to cite the cemetery co. to whom the ground belongs to appear before it for the purpose of making an order against such cemetery co. that the body should be disinterred.

A faculty was granted by an ecclesiastical ct. to open a certain vault in consecrated ground & to open the lid of a coffin interred therein. In order to open the lid of the coffin it would be necessary to remove another coffin which contained a body. *Semble*: a licence of a Secretary of State, pursuant to 1857 Act, s. 25, was required for such removal in addition to the faculty.—*R. v. TRISTRAM* (1899), 80 L. T. 414; 63 J. P. 391; 47 W. R. 639; 15 T. L. R. 214; 43 Sol. Jo. 280, D. C.

366. Removal to New Zealand—Wish of deceased—Faculty granted.—*SMITH v. ROBERTS* (1877), cited in [1892] P. at p. 392.

Annotation:—*Consd. Re Dixon*, [1892] P. 386.

367. Removal to another vault—Not consecrated—Licence of Secretary of State.—*Re TALBOT*, No. 361, *ante*.

368. Removal to Roman Catholic cemetery—From Protestant cemetery—Faculty granted subject to licence of Secretary of State.—*Re SEWARD & CASELLA* (1909), *Times*, Nov. 27th.

369. Cremation—Scope of faculty.—The dead body of testator whose will contained no direction as to the mode or place of his burial, but who had expressed a wish that his wife should have the option of disposing of his remains in one of two ways, either by burial or cremation, was buried by his widow in a mausoleum in the consecrated part of a cemetery. Eighteen years afterwards the widow applied to the ct. for a faculty for the removal of the remains from the mausoleum where they had been so buried to a crematorium at W. for the purpose of being there cremated, the ashes resulting from the cremation to be then placed in an urn, & the urn & its contents deposited in the mausoleum. The ct. having directed that the exors. of the will, if living, should have notice of the application, & that evidence should be brought in as to whether the cremation could be carried out without any difficulties as to sanitation, it appeared that the exors. were dead & that the cremation could be carried out so as to be perfectly decent & harmless to health:—*Held*: the faculty must be refused.

The ct. is accustomed in proper cases to grant faculties for the removal of the remains buried in consecrated ground for the sole purpose of such remains being reinterred in other consecrated

PART XV. SECT. 2.

a. Post-mortem examination.—On a trial for murder the ct. made an order permitting exhumation of the body of deceased from its grave for the purpose of anatomical investigation

by surgeons appointed by the Crown & the prisoner.—*R. v. BEANEY* (1866), 3 W. W. & A.B. 73.—AUS.

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Sect. 2.—Purpose. Part XVI. Sects. 1, 2, 3, 4 & 5. Parts XVII. & XVIII.]

ground, & would not be justified in granting a faculty for enabling remains to be removed after burial for cremation.—*Re DIXON*, [1892] P. 386; 56 J. P. 841; 8 T. L. R. 744.

370. Obtaining papers from coffin—Faculty granted.]—*Re HALL* (1893), cited in, [1898] 2 Q. B. at p. 373.

Street improvements—Utilisation of disused burial grounds for—Faculty.]—*See Part XI., Sect. 3, subsect. 2, ante.*

Part XVI.—Registration of Burials.

SECT. 1.—BURIALS IN CHURCHYARDS.

371. Register—As evidence—Copy.]—To prove that W. of L. was dead, his will, dated in 1817, from the Prerogative Ct., was produced, & an examined copy of the register of burials of L. of 1817, containing an entry of the burial of "W. of L."; & it was stated by a niece of W. that he was dead, & that she had received a legacy of £100 under his will, but was not at the place when he died:—*Held*: to be sufficient evidence of the death of W.—*DOE d. HALL v. PENFOLD* (1838), 8 C. & P. 536, N. P.

372. ——— Extracts—Signature—Officer having custody.]—Under Evidence Act, 1851 (c. 99), s. 14, extracts from parish registers of deaths, purporting to be signed, some by the "incumbent," some by the "rector," some by the "vicar," & some by the "curate" of the parishes:—*Held*: to be receivable in evidence on a petition for the payment of money out of ct., each incumbent being an "officer to whose custody," etc. within the Act.—*Re HALL'S ESTATE* (1852), 2 De G. M. & G. 748; 9 Hare, App. 1, xvi.; 22 L. J. Ch. 177; 20 L. T. O. S. 187; 17 Jur. 29; 1 W. R. 2; 42 E. R. 1064, L. J.

Annotation:—*Consd. Re Porter's Trusts* (1856), 25 L. J. Ch. 688.

373. ——— ——— ———.]—An extract from a parish register (certificate of burial), signed by the curate of the parish, is admissible in evidence under Evidence Act, 1851, s. 14.—*Re PORTER'S TRUSTS* (1856), 25 L. J. Ch. 688; 20 J. P. 741; 2 Jur. N. S. 349; 4 W. R. 443.

374. ——— Custody—Parish clerk.]—A witness on a trial stated that he went to K. for the purpose of comparing a certificate of burial with the parish register, & was directed to the clerk's house, & there saw a person who said he was parish clerk, & who produced to him a book containing entries of burials with which he compared the certificate:—*Held*: as Parochial Registers Act, 1812 (c. 150), s. 5, directed the parish registers to be kept by the clergyman, & as no explanation was given of the book being in the possession of the clerk, it had not been produced from the proper custody, & the evidence was inadmissible.—*DOE d. ARUNDEL (LORD) v. FOWLER* (1850), 14 Q. B. 700; 19 L. J. Q. B. 151; 14 L. T. O. S. 417; 14 J. P. 114; 14 Jur. 179; 117 E. R. 270.

375. ——— Search—Charge for extracts.]—Pltf. applied to deft., a parish clerk, for liberty to search the register book of burials. He told deft. that he did not want certificates, but only to make extracts. Deft. said the charge would be the same whether he made extracts or had certificates. Pltf. searched through four years, & made twenty-five extracts, for which deft. charged him 3s. 6d. each, & he paid deft. £4 7s. 6d.:—*Held*: (1) the

charge for extracts was illegal, since the Births & Deaths Registration Act, 1836 (c. 86), s. 35, only authorised a charge for a search, & for a certified copy; (2) the payment was not voluntary, so as to preclude pltf. from recovering back the excess; (3) deft. was the proper person to be sued.—*STEELE v. WILLIAMS* (1853), 8 Exch. 625; 22 L. J. Ex. 225; 21 L. T. O. S. 106; 17 J. P. 378; 17 Jur. 464; 1 C. L. R. 258; 155 E. R. 1502.

Annotations:—*Mentd. Hooper v. Exeter Corpn.* (1887), 56 L. J. Q. B. 457; *Best v. Best & McKinley*, [1920] P. 75.

See, generally, EVIDENCE.

SECT. 2.—BURIALS IN BURIAL GROUNDS, CEMETERIES, ETC.

376. Register—As evidence—Wesleyan burial ground.]—In an action for use & occupation by the reversioner, against a person who had been tenant for years, determinable on three lives, a register of burials of a Wesleyan chapel is not admissible to prove the death of one of the *cestuis que vie*. *Semble*: a copy of an inscription on a tombstone in the burial ground of a Wesleyan chapel is also not evidence for this purpose.—*WHITTUCK v. WATERS* (1830), 4 C. & P. 375, N. P. *Annotations*:—*Reid. Re Woodward, Kenway v. Kidd* (1913), 82 L. J. Ch. 230. *Mentd. Haines v. Guthrie* (1884), 13 Q. B. D. 818.

SECT. 3.—BURIALS IN CONSECRATED GROUND WITHOUT SERVICE OF THE CHURCH OF ENGLAND.

377. Duty of rector—To register burial—Mandamus—1880 Act.]—*Mandamus* to a rector to enter in the register of burials a certificate of burial of a parishioner, who was buried after due notice without the rites of the Church. Deft. pleaded that he was not bound by statute or common law to register any one:—*Held*: Parochial Registers Act, 1812 (c. 146), s. 3, & 1880 Act, s. 10, made it the duty of deft. to register the burial.—*R. v. HALL* (1881), 45 J. P. Jo. 436.

SECT. 4.—BURIAL OF CREMATED REMAINS IN CHURCH.

378. Notice of burial should be entered in parochial burial register.]—*Re KERR*, No. 384, *post*.

SECT. 5.—DESTRUCTION, FORGERY, AND FALSIFICATION OF REGISTER.

See CRIMINAL LAW & PROCEDURE.

Part XVII.—Mortuaries.

Building on disused burial ground.]—See Nos. 307, 308, *ante*.

Part XVIII.—Cremation.

379. Legality of—Direction by will.]—Testator directed W. to burn his body, & directed his exors. to repay W. the expense of so doing. The body was buried in unconsecrated ground with the assent of the exors. Afterwards W. representing to the Under-Secretary of State that she intended to bury it in consecrated ground, obtained his licence to remove it. She caused it to be burnt in Italy, & then brought an action against the exors. for the expenses:—*Held*: a direction by will as to the disposition of testator's body could not be enforced. *Qu.*: whether it was lawful to burn a dead body. —WILLIAMS v. WILLIAMS (1882), 20 Ch. D. 659; 51 L. J. Ch. 385; 46 L. T. 275; 46 J. P. 726; 30 W. R. 438; 15 Cox, C. C. 39.

Annotations:—*Consd.* R. v. Price (1884), 12 Q. B. D. 247; *Re Dixon*, [1892] P. 386.

380. — Prevention of Inquest—Nuisance.]—To burn a dead body, instead of burying it, is not a misdemeanour, unless it is so done as to amount to a public nuisance. If an inquest ought to be held upon a dead body, it is a misdemeanour so to dispose of the body as to prevent the coroner from holding the inquest.—R. v. PRICE (1884), 12 Q. B. D. 247; 53 L. J. M. C. 51; 33 W. R. 45, n.; 15 Cox, C. C. 389.

Annotations:—*Refd.* R. v. Stephenson (1884), 13 Q. B. D. 331; *Re Dixon*, [1892] P. 386; *Re Kerr*, [1894] P. 284. *Mentd.* R. v. Byers (1907), 71 J. P. 205.

381. — —.]—It is a misdemeanour to burn a dead body, with intent thereby to prevent the holding upon such body of an intended coroner's inquest, & so to obstruct a coroner in the execution of his duty, in a case where the inquest is one which the coroner has jurisdiction to hold.—R. v. STEPHENSON (1884), 13 Q. B. D. 331; 53 L. J. M. C. 176; 52 L. T. 267; 49 J. P. 486; 33 W. R. 44; 15 Cox, C. C. 679, C. C. R.

Annotation:—*Consd.* Bastable v. Little (1906), 96 L. T. 115.

See, further, CORONERS.

382. — In private house—1902 Act, s. 8 (3).—J. was indicted in four counts under 1902 Act, s. 8 (3), for that she, with intent to conceal the commission of certain offences therein specified, procured the cremation of certain dead bodies. The bodies, which were those of children, were burnt by prisoner in a kitchen range or stove in prisoner's own house. Counsel for the defence having submitted that "cremation" in the sect. did not mean burning, but burning in a crematorium:—*Held*: there was no evidence on these counts "of procuring the cremation of any body" to go to the jury.—R. v. BYERS (1907), 71 J. P. 205.

383. Disposal of ashes—In consecrated ground—With burial service.]—*Semble*: where there has been a previous cremation in pursuance of direc-

tions left by deceased, there is no legal objection to the ashes resulting therefrom being buried in consecrated ground, accompanied with the use of the burial service.—*Re DIXON*, [1892] P. 386; 56 J. P. 841; 8 T. L. R. 714.

384. — In parish church—Closed for burials—Faculty.]—The vicar & churchwardens of a parish church, in the diocese of London, built under Church Building Act, 1818 (c. 47), & closed for burials by virtue of an Order in Council under 1853 Act, concurred in an application by the widow of a parishioner, whose dead body had been cremated, praying the consistory ct. to authorise by faculty the formation of a niche in the wall of the church & above the level of the floor, & the permanently placing therein of a sealed urn, containing the cremated ashes of such dead body. By the affidavit to lead the faculty it appeared that deceased during his life had expressed a wish that in the event of his death his remains might be cremated, & a certificate was brought in to the effect that the vestry of the parish was in favour of the remains being interred beneath the church:—*Held*: (1) the burial of the cremated ashes of a dead body in the church had not been prohibited by Church Building Act, 1818, Public Health Acts, 1848 (c. 63) & 1875 (c. 55), or by the Order in Council closing the church under 1853 Act, the provisions in those Acts as to "burial" not applying to the burial of the remains of a corpse after it had been reduced to ashes, & the ct. had jurisdiction in its discretion to grant the faculty as prayed, but must decline to do so having regard to the inconvenience which might ensue in case of alterations in the church, etc., if the urn was deposited in the church wall according to the proposal of appct.; (2) the ct. having ascertained from the Home Office that no objection on sanitary grounds was entertained by the Home Secretary to the interment of the urn containing the remains below the floor of the church, was prepared at the request of appct. to decree the issue of a faculty for the urn & its contents being so interred below the church, subject to a proper fee for the interment being paid to the incumbent of the parish. *Semble*: (1) cremated remains cannot lawfully be interred in or under a parish church except under the authority of a faculty from the ordinary; (2) notice of the burial of the remains should be entered in a parochial burial register to be kept in the church.—*Re KERR*, [1894] P. 284; 10 T. L. R. 522.

Annotation:—*Refd.* *Re Haigh with Aspull*, [1919] P. 143.

385. Disinterment of remains for purpose of cremation—Faculty refused.]—*Re DIXON*, No. 369, *ante*.

PART XVIII.

1. Disposal of ashes—In vaults of ground closed for burials.]—Land was granted by Govt. to be used as a burial ground. The Governor had under statutory powers directed that burials in the land should be discontinued:—*Held*: the ashes of cremated persons might, despite the Act, be deposited in

vaults in such ground.—*Re CONSISTORY DUTCH REFORMED CHURCH, CAPE TOWN* (1897), 14 S. C. 5; 7 C. T. R. 4. —S. AF.

g. Whether a public nuisance.]—*Held*: persons, entitled to use particular spots dedicated for the communal purpose of cremation, who use it for that purpose in a manner neither

unusual nor calculated to aggravate the inconveniences necessarily incidental to such act cannot be convicted of a public nuisance on the ground that their act caused material annoyance & discomfort to persons near the place on a particular occasion.—R. v. SAMINADHA PILLAI (1896), 1 L. R. 19 Mad. 461.—IND.

Part XIX. Taxation and Rating of Burial Grounds and Burial Fees.

386. Income tax—Cemetery company—Keeping graves in order—Lump sum payment.]—Appls. were a commercial & dividend paying co. owning & occupying two cemeteries of which they were the freeholders. They undertook in perpetuity the repair of graves & monuments, & the decoration of graves, upon payment of lump sums of money:—*Held*: in calculating the balance of profits upon which applts. were liable to be assessed to income tax under Income Tax Act, 1842, s. 60, Sched. A., No. 3, there ought to be set against the lump sums not merely the sums annually expended by applts. in the maintenance, repair, & decoration of the graves & monuments, but the capitalised value of the whole of the expenditure that applts. might be estimated to incur in discharging the obligations in perpetuity in respect of which the lump sums had been paid.—*LONDON CEMETERY CO. v. BARNES*, [1917] 2 K. B. 496; 86 L. J. K. B. 990; 15 L. G. R. 543; 7 Tax. Cas. 92; *sub nom.* *LONDON CEMETERY CO. v. INLAND REVENUE COMRS.*, 117 L. T. 151.

See, generally, INCOME TAX.

387. Poor rate—Cemetery company—Sale of exclusive rights.]—A co., incorporated by statute, had power to purchase land for the purpose of a cemetery, to make vaults & catacombs in it, & to sell, in perpetuity or for a term, the exclusive right of burial therein, subject to the rules & regulations of the co., & to payment of burial fees to them. They were bound to keep the buildings, external walls, & every part of the cemetery in repair:—*Held*: (1) the co. were liable to be rated to the relief of the poor as occupiers of the whole cemetery, though they had, in fact, sold in perpetuity the exclusive right of burial in the vaults, catacombs, etc., made by them, had ceased to exercise any act of ownership over them after the sale, & had delivered the keys to the purchasers; (2) the profits, arising from such sales, ought to be included in the ratable value of the cemetery.—*R. v. ST. MARY ABBOT'S, KENSINGTON* (1840), 12 Ad. & El. 824; 4 Per. & Dav. 327; 10 L. J. M. C. 25; 5 Jur. 170; 113 E. R. 1026; *sub nom.* *R. v. GENERAL CEMETERY CO., Arn. & H.* 105; 5 J. P. 178.

Annotations:—Folld. *R. v. Abney Park Cemetery Co.* (1873), L. R. 8 Q. B. 515. *Consd.* *Rochdale Canal Co. v. Brewster*, [1894] 2 Q. B. 852. *Distd.* *North Manchester Overseers v. Winstanley*, [1908] 1 K. B. 835. *Refd.* *R. v. St. Giles, Camberwell* (1850), 14 Q. B. 571; *L. & N. W. Ry. v. Buckmaster* (1874), L. R. 10 Q. B. 70.

388. ———.]—A co. purchased lands & laid them out as a cemetery. They received fees for interments & conveyed plots of ground to be used as graves. In one year £2,333 was received by the co. as purchase-money for such plots

of ground. Each plot was conveyed by indenture purporting to grant it in fee simple upon trust that the grantee might use it as a place of burial, subject to the regulations of the co., & subject to such trusts, in trust for the co. as part of their property. The co. were rated as the occupiers of the lands & upon the principle that the £2,333 was to be treated as part of the annual value of the occupation of the lands by the co. in that year:—*Held*: the co. were in occupation of the plots of ground which had been sold, & the principle upon which they were rated was correct.—*R. v. ABNEY PARK CEMETERY CO.* (1873), L. R. 8 Q. B. 515; 42 L. J. M. C. 124; 29 L. T. 174; 37 J. P. 822; 21 W. R. 847; *Ryde's Met. Rat. App.* (1871–85), 94; *affg. S. C. sub nom. ABNEY PARK CEMETERY CO. v. HACKNEY UNION ASSESSMENT COMMITTEE* (1871), *Ryde's Met. Rat. App.* (1871–85), 81.

Annotations:—Distd. *R. v. Curzon* (1882), 30 W. R. 521. *Consd.* *Farnham Flint, Gravel & Sand Co. v. Farnham Union*, [1901] 1 K. B. 272. *Distd.* *North Manchester Overseers v. Winstanley*, [1908] 1 K. B. 835. *Refd.* *L. & N. W. Ry. v. Buckmaster* (1874), L. R. 10 Q. B. 70; *Rochdale Canal Co. v. Brewster* (1894), 71 L. T. 243.

389. ——— Churchyard—Ratable occupation by rector.]—A parson, in whom was vested by statute the freehold of a burial ground in connection with the church, received for his own use burial fees & similar charges:—*Held*: as the beneficial occupier of the burial ground he was liable to the poor rate, & was not exempt by virtue of Poor Rate Exemption Act, 1833 (c. 30).—*WINSTANLEY v. NORTH MANCHESTER OVERSEERS*, [1910] A. C. 7; 79 L. J. Q. B. 95; 101 L. T. 616; 74 J. P. 49; 26 T. L. R. 90; 54 Sol. Jo. 80; 8 L. G. R. 75, H. L.; *affg. S. C. sub nom. NORTH MANCHESTER OVERSEERS v. WINSTANLEY*, [1908] 1 K. B. 835, C. A.

Annotations:—Consd. *Liverpool Corp'n. v. Chorley Union Assmt. Com. & Withnell Overseers*, [1913] A. C. 137. *Refd.* *Lord Advocate v. Walker Trustees*, [1912] A. C. 95. *Mentd.* *West Kent Main Sewerage Board v. Dartford Union Assmt. Com.* (1911), 104 L. T. 357; *Re Halgh with Aspall*, [1919] P. 143.

390. Improvement expenses—Burial fees.]—By a local Act it was provided that the owners & occupiers of houses, buildings, ground or land within or adjoining certain new streets, for the purpose of laying out & erecting which the Act was passed, should be liable to contribute towards certain preliminary expenses. Among the improvements contemplated & carried out under the Act, was the erection of a church & churchyard in a square, & by the deed of consecration the Rev. A. was declared the incumbent thereof, & the pew rents, vaults, & burial fees were further reserved to him by the same deed:—*Held*: these rights of A. were simply an incorporeal hereditament arising out of land, & neither he nor any mtgee. in

PART XIX.

h. Income tax—Cemetery company—Income Tax Act, 1842—Sale of right of sepulture in perpetuity.]—A cemetery co. had power to sell ground in the cemetery for burial purposes in perpetuity:—*Held*: the proceeds of sales of the right of sepulture during the year were assessable for income tax without deduction of any part thereof under the above Act.—*EDINBURGH SOUTHERN CEMETERY CO. v. INLAND REVENUE* (1889), 17 R. (Ct. of Sess.) 154.—*SCOT.*

386 i.

Keeping

in order.]—A cemetery co. received from purchasers of grave spaces, in lieu of annual payment, a lump sum for keeping the graves in order, from time to time, during each year in all time coming:—*Held*: the sums so received were assessable for income tax under the above Act as being part of the annual profits of the co.—*PAISLEY CEMETERY CO., LTD. v. REITH (SURVEYOR OF TAXES)* (1898), 63 J. P. 806; 4 Tax Cas. 1; 25 R. (Ct. of Sess.) 1080; 35 Sc. L. R. 947.—*SCOT.*

k. Tax sale—
land—Disused

paid to redeem
burial

ground.]—SAULT STE. MARIE ROMAN CATHOLIC EPISCOPAL CORPN. v. SAULT STE. MARIE TOWN (1911), 19 O. W. R. 364; 2 O. W. N. 1178.—*CAN.*

l. Lands acquired for cemetery—Unused portion let on lease—Cemeteries Act, 1882—Rating Act, 1894, s. 2.]—*TATNE v. KARORI BOROUGH COUNCIL* (1900), 19 N. Z. L. R. 72.—*N.Z.*

m. Valuation Acts—Public cemetery—Burial Grounds (Scotland) Act, 1855—Rating Exemptions (Scotland) Act, 1874.]—*EDINBURGH PARISH COUNCIL v. EDINBURGH MAGISTRATES*, [1912] S. C. 793.—*SCOT.*

possession under him could be made liable to the aforesaid preliminary expenses, on the plea that they were in the terms of the Act the "owners or occupiers of houses, buildings, ground or land within or adjoining to the new streets." *Semble*: such property being of a spiritual rather than a temporal character, would not have been liable to such impositions, even if the term "hereditaments" had been inserted in the Act.—*CHORLTON-UPON-MEDLOCK CORPN. v. WALKER* (1842), 10 M. & W. 742; 12 L. J. Ex. 88; 7 J. P. 162; 152 E. R. 671.

391. Paving rate—Cemetery company—New street.]—A cemetery co. were by statute prohibited from selling any of their consecrated land, but

were empowered to make profits by selling exclusive rights of burial. A new street was made abutting on the consecrated part of the cemetery:—*Held*: the co. were owners of land within Metropolis Management Act, 1855 (c. 120), s. 250, & were liable to contribute to the expenses of paving the new street.—*ST. GILES, CAMBERWELL VESTRY v. LONDON CEMETERY CO.*, [1894] 1 Q. B. 699; 63 L. J. M. C. 74; 70 L. T. 734; 58 J. P. 382; 42 W. R. 446; 10 T. L. R. 270; 38 Sol. Jo. 254, D. C.

Annotations:—*Refd.* *Fulham v. Minter*, [1901] 1 K. B. 501.
Mentd. *L. C. v. Wandsworth B. C.*, [1903] 1 K. B. 797.

See, generally, HIGHWAYS, STREETS, & BRIDGES;
RATES & RATING.

BUTCHERS.

See FOOD AND DRUGS ; METROPOLIS ; PUBLIC HEALTH AND LOCAL ADMINISTRATION ; TIME.

BUTTER.

See FOOD AND DRUGS.

BYE-LAWS.

See COMMONS AND RIGHTS OF COMMON ; COMPANIES ; CORPORATIONS ; EXPLOSIVES ; FISHERIES ; LOCAL GOVERNMENT ; MARKETS AND FAIRS ; METROPOLIS ; OPEN SPACES AND RECREATION GROUNDS ; PUBLIC HEALTH AND LOCAL ADMINISTRATION ; RAILWAYS AND CANALS ; SHIPPING AND NAVIGATION ; and other titles *passim*.

CABINET.

See CONSTITUTIONAL LAW.

CABLES.

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CARRIAGE BY SEA.

See SHIPPING AND NAVIGATION.

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